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CONGRESSIONAL CONTROL OF AGENCY PRIVILEGE

The Constitution establishes three separate branches of government, each exercising its powers within a system of checks and balances providing controls by each branch over the others. Each branch must exercise its powers in an atmosphere of cooperation with the others, while seeking to preserve its constitutional autonomy. One area in which conflict has arisen is the assertion of executive-branch autonomy in the face of investigative actions of the legislative branch. The merits of this assertion of autonomy by the executive branch have been discussed and debated under the heading "executive privilege." Discussion of executive-branch privilege has, however, focused on assertions of privilege by the President, leaving assertions of privilege by members of the executive agencies and departments unanalyzed.

This note seeks to provide an introductory and largely historical analysis of "agency privilege:" the refusal of federal executive officials to furnish information and documents to congressional bodies absent the invocation of a claim of privilege by the President. After a brief survey of the origins of agency privilege in part I, the history and nature of the com-

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1 See generally M. FORKOSCH, CONSTITUTIONAL LAW 11-14 (2d ed. 1969).

The term "executive privilege" was first used in 1958. For a short discussion of the term's evolution, see R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 1 n.3 (1974).
3 The term was first used by Elmer Staats, Comptroller General of the United States. Staats distinguished agency privilege from executive privilege:

A far more common problem arises from a practice which might be characterized as "department" or "agency privilege" whereby executive officials refuse to furnish us particular records or documents which they do not consider appropriate for our review. Such refusals do not purport to represent assertions of executive privilege; and we are unaware of any legal authority which even arguably supports the arrogation of such discretion on the part of agency officials.

1 Hearings Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Government Operations and the Subcomm. on Separation of Powers and Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 93d Cong., 1st Sess. 116 (1973) [hereinafter cited as Joint Hearings].
Senator Edmund Muskie noted:

I see we have a new phrase in the language now, "agency privilege," and I suppose we ought to consider whether or not we need to define that in statutory language in order to control it.
Id. at 125.
peting interests of congressional investigations and autonomy of executive departments and agencies will be discussed in part II. Part III explores the constitutional basis of the claim and analyzes other justifications proffered in specific circumstances. Part IV weighs the merits of various proposals to establish a proper role for agency privilege.

I. ORIGIN OF AGENCY PRIVILEGE

The concept of agency privilege first arose when President Kennedy attempted to establish procedures for the exercise of executive-branch privilege. During the Eisenhower administration (1953-60), debate over the existence and limitations of a privilege claimed by the President on behalf of the entire executive branch had engendered criticism of the assertion of executive privilege. Although pre-1960 assertions of agency privilege have been documented in writings on executive-branch privilege, little distinction has been drawn between assertions of executive and agency privilege. During the Kennedy administration, all assertions of executive-branch privilege required presidential participation. Presidents Johnson

4 President Kennedy's definition of the procedures which qualified for executive privilege left those assertions of privilege which did not qualify in the separate agency privilege category. See note 8 infra.


President Eisenhower's letter of May 17, 1954, prohibiting all executive employees from testifying in the interest of "efficient and effective administration," was provoked by the actions of Senator McCarthy. 1 Joint Hearings, supra note 3, at 93.


6 See Kramer & Marcuse, supra note 2, at 627-68.

7 Bernard Schwartz points out that the older position using the broader concept of executive privilege was reflected in Attorney General opinions:

Not suprisingly perhaps, there has been a plethora of Attorney General *ipse dixit* which have invariably supported the claims of the executive to withhold information. Thus, in a memorandum to the President of May 17, 1954, the Attorney General asserted categorically that "our Presidents have established . . . that they and members of their Cabinets and other heads of executive departments have an undoubted privilege and discretion to keep confidential, in the public interest, papers and information which require secrecy."

1 B. SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES 145-46 (1963) [hereinafter cited as B. SCHWARTZ].

Recent writers recognize a more narrow definition of executive privilege. One commentator states, "Throughout this work 'executive privilege' refers to the direct invocation of [privilege] by the president rather than 'privilege' claimed by a host of subordinates." A. BRECKENRIDGE, THE EXECUTIVE PRIVILEGE 2 (1974).

8 President Kennedy announced his policy of executive privilege in his response to a question from Representative John Moss:

[T]his Administration has gone to great lengths to achieve full cooperation with the Congress in making available to it all appropriate documents, correspondence and information. That is the basic policy of
and Nixon also established policies with respect to executive branch privilege which incorporated the requirement of presidential assertion of the privilege. Nevertheless, during this period the number of claims of privilege which did not conform to these established procedures for ob-

this Administration, and it will continue to be so. Executive privilege can be invoked only by the President and will not be used without specific Presidential approval.

Letter from President Kennedy to Representative John Moss, March 7, 1962 (emphasis added), Hearing Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 92d Cong., 1st Sess. 34 (1971) [hereinafter cited as Senate Judiciary Committee Hearing].

President Johnson followed President Kennedy's policy:

Since assuming the Presidency, I have followed the policy laid down by President Kennedy in his letter to you of March 7, 1962, dealing with this subject. Thus, the claim of "executive privilege" will continue to be made only by the President.

Letter from President Johnson to Representative John Moss, April 2, 1965, Senate Judiciary Committee Hearing, supra note 8, at 35.

On April 7, 1969, President Nixon not only made a similar reply to a letter from Representative Moss but also issued the following procedural memorandum to all executive departments and agencies:

The policy of this Administration is to comply to the fullest extent possible with Congressional requests for information. While the Executive branch has the responsibility of withholding certain information the disclosure of which would be incompatible with the public interest, this Administration will invoke this authority only in the most compelling circumstances and after a rigorous inquiry into the actual need for its exercise. For those reasons Executive privilege will not be used without specific Presidential approval. The following procedural steps will govern the invocation of Executive privilege:

1. If the head of an Executive department or agency (hereinafter referred to as "department head") believes that compliance with a request for information from a Congressional agency addressed to his department or agency raises a substantial question as to the need for invoking Executive privilege, he should consult the Attorney General through the Office of Legal Counsel of the Department of Justice.

2. If the department head and the Attorney General agree, in accordance with the policy set forth above, that Executive privilege shall not be invoked in the circumstances, the information shall be released to the inquiring Congressional agency.

3. If the department head and the Attorney General agree that the circumstances justify the invocation of Executive privilege, or if either of them believes that the issue should be submitted to the President, the matter shall be transmitted to the Counsel to the President, who will advise the department head of the President's decision.

4. In the event of a Presidential decision to invoke Executive privilege, the department head should advise the Congressional agency that the claim of Executive privilege is being made with the specific approval of the President.

5. Pending a final determination of the matter, the department head should request the Congressional agency to hold its demand for the information in abeyance until such determination can be made. Care shall be taken to indicate that the purpose of this request is to protect the privilege pending the determination, and that the request does not constitute a claim of privilege.

taining presidential approval of the privilege increased. Documented assertions of privilege by members of the executive branch between 1964 and 1973 number as many as 160, the vast majority of which did not fall within the guidelines for claiming executive privilege then in effect. The effect was the creation of a growing number of assertions of privilege which did not fall within the scope of prior analysis of executive privilege.

II. AUTONOMY OF DEPARTMENTS AND AGENCIES AND THE CONGRESSIONAL NEED FOR INFORMATION

A. Congressional Investigatory Power

The Constitution does not specifically confer investigatory power upon Congress. The Supreme Court has, however, recognized such a power, basing its finding on the congressional lawmaking function and the necessary and proper clause, in McGrain v. Daugherty. During a Senate investigation of the Teapot Dome affair, which involved the Department of Justice, the investigating committee issued a subpoena commanding

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10 A research study by the Library of Congress based on a review of newspapers and congressional publications found three invocations of agency privilege during the Kennedy administration (1961-63), two during the Johnson administration (1963-69), and fifteen during the first term of the Nixon administration (1969-73). GOVERNMENT AND GENERAL RESEARCH DIVISION, LIBRARY OF CONGRESS, THE PRESENT LIMITS OF "EXECUTIVE PRIVILEGE," 3 Joint Hearings, supra note 3, at 222-26 [hereinafter cited as LIBRARY OF CONGRESS STUDY].

11 1 Joint Hearings, supra note 3, at 101. The larger number of reported assertions reflected here is due to the fact that this survey used committee chairmen themselves as sources, while the Library of Congress study relied on newspapers and congressional publications. The Library of Congress approach was likely to pick the majority of the assertions within the guidelines, as those would be more likely to receive publicity through presidential involvement.

12 See 1 B. SCHWARTZ, supra note 7, at 121. In McGrain v. Daugherty, 273 U.S. 135, 161 (1927), the Court stated:

[T]here is no provision expressly investing either house with power to make investigations and exact testimony to the end that it may exercise its legislative function advisedly and effectively.


14 Id.

15 273 U.S. 135 (1927). The Court stated:

We are of the opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function. . . . [T]he provisions are not of doubtful meaning, but, as was held by this Court in the cases we have reviewed, are intended to be effectively exercised, and therefore to carry with them such auxiliary powers as are necessary and appropriate to that end.

16 Although the McGrain case did not directly concern the subpoena of a member of a department or agency, the Court responded to a lower-court statement that the Senate was in actuality putting the Attorney General on trial by stating that the investigation was within the power to legislate.

[T]he functions of the Department of Justice, the powers and duties of the Attorney General and the duties of his assistants, are all subject to regulation by congressional legislation, and . . . the department is
the appearance of Mally S. Daugherty, brother of the United States Attorney General and an Ohio banker, to give testimony and to bring with him certain bank records. Rather than appear, Daugherty secured a writ of habeas corpus on the ground that the Senate had exceeded its powers. The Court vacated the writ in an opinion recognizing the broad scope of the congressional power of inquiry. The Court regarded investigative power as a necessary attribute of the power to legislate, and refused to place any clearly defined limits upon congressional power to investigate departments and agencies.

The necessity for the factfinding role of Congress has expanded apace with the increasing size of the executive bureaucracy. In the first two-thirds of the nation's history, congressional investigations proceeded on a sporadic basis. The House of Representatives conducted its first investigation in 1827, and the Senate initiated its first investigation in 1859. When Congress felt the need to investigate, special committees were formed. The committees were not designed to provide continuous information, since the congressional actions creating them gave only a specific delegation of

273 U.S. 135, 178 (1927). Watkins v. United States, 354 U.S. 178 (1957) (invoking the reversal of a conviction of an individual for refusal to answer a congressional committee question where the subject of the inquiry was not made known), does not alter the Court's position on this point.

In Watkins... the high Court declared that congressional investigatory authority did not include the power "to expose for the sake of exposure." It should, nevertheless, be emphasized that this limitation has no application to inquiries into the operation of the executive. In such inquiries, there is not the same danger of exposure for exposure's sake that may exist in a case like Watkins, which concerned only the investigation of a private individual.

1 B. Schwartz, supra note 7, at 129. The Watkins opinion, in fact, starts with the following "basic premises:"

The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad... It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.


18 Id. at 174.

19 Raoul Berger has stated:

If I have not misread history, the power of legislative inquiry into executive conduct at the time of the Constitution was virtually unlimited; and on the whole it has served the democratic process well.

Berger, supra note 2, at 1319-20. In the executive privilege area, in contrast, different conclusions have been drawn from the lack of clear constitutional limits. In Kramer & Marcuse, supra note 2, at 904-05, the authors argue that the founding fathers sought to prevent a despotic legislature through creation of an equally strong executive.

20 In the first 120 years of the nation, about one-third of the federal peacetime agencies were formed. In the next thirty years, between 1900 and 1930, the number doubled. With the New Deal, agencies were created at a more accelerated rate.


investigatory power and a limited existence. But in this same period of our history, only about one-third of our present executive agencies were formed. As the expansion of the executive branch accelerated in the early part of this century, the greater number of informational sources as well as the increase in the mass and complexity of available data pressured Congress to develop more efficient methods of gathering information. The Legislative Reorganization Act of 1946 gave significant impetus to the information-seeking role of Congress through the grant of subpoena powers to standing committees of Congress. The Act also improved the flow of information between Congress and the General Accounting Office (GAO), which was established in 1921 as an investigative arm of Congress, and directed that the GAO perform an expenditure analysis of each executive agency. Later legislation continued to refine the GAO's role.

The lawmaking power is not the only constitutional support for the congressional information-gathering role. The President has a constitutional duty to provide information to Congress concerning the state of the union. Article I, section 3 of the Constitution provides that the President is directed "from time to time to give to the Congress information of the

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23 Id.
24 See note 20 supra.
25 The Joint Committee formed to investigate proposed changes in the organization of Congress echoed the need in its report:

Public affairs are now handled by a host of administrative agencies headed by nonelected officials with only casual oversight by Congress.

... Under these conditions ... the time is ripe for Congress to reconsider its role in the American scheme of government and to modernize its organization and procedures.


27 The Senate gave all fifteen standing committees subpoena powers and a scope of inquiry limited only by the jurisdiction of the committee. Legislative Reorganization Act § 134(a), 60 Stat. 831-32 (1946). In the House of Representatives only the Committee on Un-American Activities was given subpoena power by the Act. Legislative Reorganization Act § 121(b), 60 Stat. 828-29 (1946). The rules of the House of Representatives have expanded a committee's authorized subpoena power, however, and the House has been very willing to authorize specific inquiries. Maslow, supra note 22, at 839-40. In Kilbourn v. Thompson, 103 U.S. 168, 190 (1880), the Supreme Court likened the scope of authority of the congressional subpoena power to that of the judiciary. See Note, Executive Privilege and the Congress: Perspectives and Recommendations, 23 DEPAUL L. REV. 692, 699 (1974), for a historical development of congressional subpoena power.

28 Budget and Accounting Act, 42 Stat. 20 (1921).
29 Id. Prior to this time, Congress had relied on language in statutes and on internal checks within the executive branch, supplemented occasionally by congressional investigations of matters which attracted national attention. The General Accounting Office investigates all matters relating to the receipt and expenditure of public funds. R. BROWN, THE GAO, UNTAPPED SOURCE OF CONGRESSIONAL POWER 10-11 (1970).


32 U.S. CONST. art. II, § 3.
state of the union.” The extent of this duty is much debated, but it is difficult to conclude from a literal reading of the Constitution that an annual speech meets the duty imposed by the clause. The annual state of the union message is more a creature of tradition than of constitutional law.

Arguably, the state of the union clause gives Congress the right to know everything about executive departments and agencies. Support for this position is available from the British parliamentary system, under which

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33 Some have argued that the President determines the scope of this duty:
   Today there is no subject on which the President may not appropriately communicate to Congress, in as precise terms as he chooses, his conception of its duty. Conversely, the President is not obligated by this clause to impart information which, in his judgment, should in the public interest be withheld.


Bernard Schwartz has commented that, “The duty to communicate to Congress is one whose fulfillment is wholly discretionary with the President.” 1 B. Schwartz, supra note 7, at 27.

Raoul Berger, on the other hand, believes that the duty may be much more expansive:

   It is more reasonable to read the “state of the nation” phrase as imposing a duty to furnish information which the Grand Inquest was historically authorized to require.

Berger, supra note 2, at 1077. The term “Grand Inquest” refers to investigations by the British Parliament, the scope of which Berger asserts are determinative of the scope of congressional investigative power. Id. at 1069. As to the broad scope of the Grand Inquest, see id. at 1056-58.

34 As Raoul Berger states, “A good reason for a restrictive reading of the phrase is yet to be proffered, and it is contrary to common sense.” Berger, supra note 2, at 1077.

35 Bernard Schwartz places emphasis upon what the clause has meant “in practice” as opposed to what it says “on its face.”

   Presidential messages to the Congress have been of two kinds. There is, first of all, the annual message upon the State of the Union and the budget message... In these messages it has become customary for the legislative program desired by the Chief Executive to be outlined. In addition, there are special messages, focused upon particular subjects, which are normally intended to secure specified congressional action.

2 B. Schwartz, supra note 7, at 27. Raoul Berger argues that the clause “has too mechanically been associated with annual Presidential messages,” citing Justice Story as an advocate for a more literal reading of the clause. Berger, supra note 2, at 1077.

36 During the 49th Congress, Senator Edmunds, Chairman of the Senate Judiciary Committee, in a congressional debate on the subject of relations between the Senate and the executive departments, stated that the state of the union refers to the universal power of knowledge and information of the two Houses of Congress in respect to every operation of the Government of the United States and every one of its officers, foreign and domestic.


37 Raoul Berger testified:

   [In a random sampling of parliamentary debates at different periods stretching from 1621 to 1742, I found legislative oversight of administration across the board: Inquiries to lay a foundation for legislation, into corruption, the conduct of war, execution of the laws, disbursement of appropriations, in short, into every aspect of executive conduct.
the Grand Inquest provided Parliament with an unbridled power to investigate every aspect of executive management, foreign or domestic.\textsuperscript{38} Early colonial practice reflected a preference that the colonial legislatures be given significant investigatory powers.\textsuperscript{39} The Continental Congress, when creating the Department of Foreign Affairs, provided that members of Congress would have access to all information, including classified documents.\textsuperscript{40}

In summary, there are evidently no limits on congressional investigative power, provided that Congress is acting pursuant to a constitutional function.

\textbf{B. Autonomy of Executive Departments and Agencies}

The expansion of the Executive, which gave impetus to congressional expansion of its investigative role, came largely in the form of new federal agencies. Executive departments cannot trace their origins directly to the Constitution.\textsuperscript{41} The departments and agencies are creatures of legislative enactment. Created as tools necessary and proper for the enforcement of laws enacted by Congress, they exist only at the pleasure of Congress.\textsuperscript{42} Congress can do more, though, than create or abolish these agencies; it can apply controls through its annual appropriations, nurturing or stifling agency operations in varying degrees.\textsuperscript{43}

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\textsuperscript{38} See Berger, supra note 2, at 1056-58. McGrain v. Daugherty, 273 U.S. 135 (1927), has been regarded as precedent for turning to Parliamentary history to determine the scope of congressional investigative power. 1 Joint Hearings, supra note 3, at 237. See Berger, supra note 2, at 1066.

\textsuperscript{39} See Berger, supra note 2, at 1058-59.

\textsuperscript{41} Even departments existing under the Articles of Confederation were not established by the Constitution, and in its first session Congress created by statute the Department of Foreign Affairs (now Department of State), Act of July 27, 1789, ch. 4, 1 Stat. 28, the Department of War, Act of Aug. 7, 1789, ch. 7, 1 Stat. 49, and the Treasury Department, Act of Sept. 2, 1789, ch. 12, 1 Stat. 65. Departments are only mentioned incidentally in the Constitution, as if their existence were presumed.

C. SWISHER, AMERICAN CONSTITUTIONAL DEVELOPMENT 51 (2d ed. 1954).

\textsuperscript{42} Berger, supra note 2, at 1100.

\textsuperscript{43} Kramer and Marcuse argue that the power of Congress to create and abolish executive agencies is not a power to supervise and control them. Kramer & Marcuse, supra note 2, at 827. Others, however, point to the significance of the appropriations power. Berger, supra note 2, at 1112, cites the language of 5 U.S.C. § 105(a) (1958)
The history of the federal government in large part reflects the growth of federal agencies. Federal agencies now perform significant quasi-executive, quasi-judicial, and quasi-legislative functions. Agency enabling legislation has frequently been broad and sweeping, and an expansive interpretation of congressional grants of power has frequently stood without challenge. These features are due, in part, to the widely varied structures of these agencies, which make categorization and generalization as to their powers difficult. The solution to many problems has often been the creation of a new agency. When new problems call for congressional attention, old ones, with their agencies, may recede from congressional view. Although federal agencies are thought to be checked by congressional control through enabling legislation and appropriations, executive supervision, and judicial review of legislation and action, they are, in fact, to a large extent self-supervising.

Executive departments and agencies are entities of statutory rather than constitutional creation, yet, on the basis of executive autonomy, they assert a privilege against Congress, their creator. The authority for such assertions must be analyzed in the setting not only of statutory autonomy but also

(Now codified at 5 U.S.C. § 2954 (1970)) in support of this proposition:

Every executive department and independent establishment of the Government shall, upon request of the Committee on expenditures . . . of the House . . . or upon request of the Committee on expenditures of the Senate . . . furnish any information requested of it relating to any matter within the jurisdiction of said Committee.

44 [Note 20 supra.]
45 I K. Davis, Administrative Law Treatise § 1.02 (1958). The Supreme Court, referring to the role of administrative bodies, has stated:

They have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories as much as the concept of a fourth dimension unsettles our three-dimensional thinking.

Courts have differed in assigning a place to these seemingly necessary bodies in our constitutional system. Administrative agencies have been called quasi-legislative, quasi-executive or quasi-judicial, as the occasion required, in order to validate their functions within the separation-of-powers scheme of the Constitution.

47 Discussing the exercise of the power of selective enforcement by agencies, Davis points out that courts acquiesce in the assumption . . . of the enormous power of selective enforcement, which is (a) not only unguided by statutory standards but often exercised in direct violation of clearly expressed legislative intent, (b) typically unguided even by administrative standards, (c) typically unprotected by procedural safeguards, (d) typically exercised by subordinate officers with little or no supervision, and (e) typically immune to judicial review even when denial of equal justice can readily be shown.

Id. § 2.07.
50 See 1 K. Davis, Administrative Law Treatise § 1.09, at 68-69 (1958).
51 Despite this fact, very few agencies are granted independent status in their enabling legislation. Id. § 1.07 at 51.
autonomy acquired through separation of powers by the placement of departments and agencies in the executive branch.

III. THE AUTHORITY UNDERLYING THE ASSERTION OF AGENCY PRIVILEGE

A. Constitutional Basis

Separation of powers is at least as basic to the framework of the Constitution as is congressional power to make laws and conduct investigations. Yet even those who advocate the existence of executive or agency privilege have failed in their search for a direct constitutional foundation. Instead, proponents of an extensive privilege argue that nothing in the Constitution or in the few judicial opinions dealing with the question denies the existence of executive or agency privilege. Even though the Constitution does not expressly recognize a power of the President to withhold information, it likewise does not expressly recognize congressional power to investigate, and, therefore, the latter power has not been shown superior to the former. The fact that Congress has on occasion not contested the assertion of privilege also has been cited as tacit recognition by Congress that the privilege exists. This proposition is not conceded by the opponents of privilege, however. Finally, it is argued that the power of Congress to create and abolish executive agencies is not the power to supervise and control; Congress has the power of vigilance, not surveillance. The effective opposing argument is that while Congress should not be involved in the enforcement of laws, there is no reason to limit inquiry after enforcement action has taken place. To grant Congress the right to abolish agencies without the right to inspect to see whether abolition of the whole agency is necessary is to force blind action which is likely to exceed what is necessary to correct the problem.

52 Kramer & Marcuse, supra note 2, at 899-903.
53 Id. at 899-900.
54 Id. at 899-903.
55 Id. In the opinion of then-Attorney General Kleindienst [s]uch historical practices of one branch of our Government, especially when acceded by another[,] yield Burkeian rules of constitutional prescription of the highest vitality.
56 Raoul Berger argues that congressional acquiescence does not create privilege. 1 Joint Hearings, supra note 3, at 248. In support of his position, Berger cites Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). One of the arguments presented in Youngstown in support of the President's action in directing the Secretary of Commerce to take possession of many of the nation's steel mills was that other Presidents had in the past taken possession of private businesses without congressional authority in order to settle labor disputes. The Court's answer was that even if that were true it would not have caused any diminution of the exclusive constitutional authority of Congress. 343 U.S. at 588-89.
57 Kramer & Marcuse, supra note 2, at 827.
58 Berger, supra note 2, at 1098-1101.
59 Id. at 1100-01.
Many of the justifications asserted for agency privilege parallel those claimed for executive privilege: classification of information,\textsuperscript{60} preservation of national security,\textsuperscript{61} protection of intelligence sources,\textsuperscript{62} encouragement of the free exchange of frank opinions,\textsuperscript{63} or involvement of a presidential communication.\textsuperscript{64} The similarity of the assertions to those commonly ad-

\textsuperscript{60} For example, the Defense Department refused to provide a top-secret "Comustat Plan 1/64" between the United States and Thailand to the Senate Foreign Relations Committee on this ground. N.Y. Times, Aug. 9, 1969, at 1, col. 7.

The problem of classified information has become a major area of concern. 1 Joint Hearings, supra note 3, at 262-64. For an analysis of the Executive's ability to classify information under Exec. Order No. 11652, as amended, Exec. Order No. 11714, 3 C.F.R. 339 (1974), 50 U.S.C. § 401 Note (Supp. III, 1973) (directive detailing classification and downgrading procedures) and proposed remedies to deal with excess classification, both as to level of classification and quantity of material, see 1 Joint Hearings, supra note 3, at 287-93.

\textsuperscript{61} For example, Secretary of Defense Melvin Laird replied to a request for a copy of the "Pentagon Papers" by Senator Fulbright by noting that it would be contrary to the national interest to supply it. R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 282-85 (1974). Legislation that would limit the exercise of privilege to direct, personal, and confidential relationships involving matters of national security and other public policy decisions has been urged. 1 Joint Hearings, supra note 3, at 134.

\textsuperscript{62} For example, then-Attorney General Robert Jackson refused to turn over to a House committee the FBI reports and names of confidential informants it had requested. In summarizing Jackson's reasoning, Raoul Berger states:

Attorney General Jackson reasoned that disclosure would (1) prejudice law enforcement; (2) be a breach of faith with confidential informants and thereby impair future efficiency; and (3) interfere with the president's duty to "take care that the laws are faithfully executed." R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 212 (1974) (footnote omitted).

\textsuperscript{63} For example, the Secretary of the Air Force refused to provide to the Comptroller General a report by the Inspector General on the basis that it was necessary to conceal identities to preserve the relationships established by the Inspector General for obtaining information. Berger, supra note 2, at 1113. During the "Pentagon Papers" controversy Secretary of Defense Laird asserted that the papers contained "a variety of internal advice and comments central to the decision-making process." Letter from Secretary Laird to Senator Fulbright, Dec. 20, 1969, Senate Judiciary Committee Hearing, supra note 8, at 37. See Comment, Executive Privilege and the Congress: Perspectives and Recommendations, 23 DePaul L. REV. 692, 728-29 (1974), analyzing the need for secrecy with respect to presidential communications.

\textsuperscript{64} Secretary of Defense Laird's refusal to turn over the "Pentagon Papers" was based in part upon the fact that they included "NSC [National Security Council] papers and other Presidential communications." Letter from Secretary Laird to Senator Fulbright, Dec. 20, 1969, Senate Judiciary Committee Hearing, supra note 8, at 37.

Another Secretary of Defense, Clark Clifford, has stated that:

The protection of confidential communications between a President and one of his advisers has classically been considered to be in the national interest because it insures the full and candid expression of views which assists the President in discharging his responsibilities.

1 Joint Hearings, supra note 3, at 55.

\textsuperscript{65} For example, President Eisenhower's letter of May 17, 1954, to Secretary of Defense Charles Wilson, directing him to tell his subordinates not to testify during the Army-McCarthy Hearings, served to encourage subordinates in the executive branch to use the cloak of executive privilege. Thirty-four such instances occurred during the remainder of the Eisenhower administration. The executive bureaucracy
vanced in conjunction with claims of executive privilege reflects in part the common heritage of the concepts. But those persons defending an assertion of agency privilege on such grounds are not merely operating under the mistaken belief that they are properly asserting executive privilege, they also assert a privilege based on the Constitution which does not depend on an act of the President for its existence. In some cases, however, these assertions of agency privilege are being made with the hope that the agency can remain under the umbrella of executive privilege without following presidential-approval procedures.

In December 1969, the Department of Defense refused to provide a copy of the “Pentagon Papers” to the Senate Foreign Relations Committee. Secretary of Defense Melvin Laird, in his letter of refusal to Senator J. William Fulbright, stated: “It would clearly be contrary to the national interest to disseminate it more widely.” That contention was apparently based upon the Secretary’s own interpretation of the national interest and did not utilize the executive privilege procedures established by President Nixon. The Laird letter not only advanced the national interest as a basis for agency privilege but also based a claim of privilege on the arguments that the document contained sensitive National Security Council papers and presidential communications, that many of the papers included internal advice central to the decisionmaking process, and that many of the contributors received an express guarantee of confidentiality. Secretary Laird’s position remained unchanged after Senator Fulbright pointed out that executive privilege had not been invoked.

In February 1963, General Maxwell D. Taylor refused to discuss the Bay of Pigs invasion while testifying before the House Subcommittee on Defense Appropriations. His stated reason was that it would result in a

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66 See Senate Judiciary Committee Hearing, supra note 8, at 38. Six months later, however, Secretary Laird reaffirmed his refusal of the request. Letter from Secretary Melvin Laird to Senator J. William Fulbright, July 21, 1970. Id. at 39.


68 See note 66 supra.

69 Letter from Secretary Melvin Laird to Senator J. William Fulbright, Dec. 20, 1969, Senate Judiciary Committee Hearing, supra note 8, at 38.

70 See note 66 supra.

71 See note 69 supra.

72 Letter from Secretary Melvin Laird to Senator J. William Fulbright, July 21, 1970, Senate Judiciary Committee Hearing, supra note 8, at 39. This letter specifically mentioned only the national interest justification without commenting on the executive privilege issue. See note 66 and accompanying text supra.

“highly controversial, divisive public discussion among branches of our Government . . . .” General Taylor could point to presidential authority for his refusal, since President Kennedy had directed General Taylor and the other members of the board of inquiry into the invasion attempt to refrain from disclosing their findings to anyone but him. However, General Taylor did not seek specific presidential approval for his refusal to testify on the matter before the House committee, and therefore did not comply with the procedure for invoking executive privilege established by the Kennedy administration. Then-Representative Gerald Ford characterized General Taylor’s “divisive discussions” justification as less a matter of national security than of preventing administration embarrassment, pointing out that the gag on board members had been violated by Attorney General Robert Kennedy, who granted interviews to a newspaper reporter and a news magazine.

In September 1968, the Under Secretary of the Treasury, Joseph W. Barr, refused to testify during hearings before the Senate Judiciary Committee on the nomination of Abe Fortas as Chief Justice of the Supreme Court. The focus of the hearings had temporarily strayed, and the committee was seeking information concerning legislation on the subject of Secret Service protection of presidential candidates. Mr. Barr declined the invitation to testify on the ground that in the course of work on this legislation he had discussed the subject matter directly with President Johnson. This assertion of privilege was not, however, invoked by

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75 Id.  
76 The Library of Congress in its study classified this incident as one of three refusals by executive departments and agencies to provide information which were not in conformity with established procedures for the exercise of executive privilege during the Kennedy administration (1961-63). Library of Congress Study, supra note 10, at 224-25.  
77 See note 8 supra.  
80 Although the subject matter was arguably within the ambit of Congress’ general power to legislate, it was far from clear that the subject matter was within the scope of the committee hearings on the confirmation of a Chief Justice. Samuel J. Archibald, of the Washington Freedom of Information Center, referred to this scope problem in a letter to Senator James Eastland on Sept. 17, 1968:  
Regardless of the absurdity of some of the issues discussed at the hearings on the nomination of Associate Justice Abe Fortas, the principle of Congressional access to Executive Branch information is too important to let stand the informal claim of “executive privilege.”  
114 Cong. Rec. 27519 (1968). Mr. Barr did not assert as a basis for refusal that the committee had exceeded its scope of inquiry. See note 81 infra.  
81 Mr. Barr’s letter stated in part:  
In the development of this legislation, I participated in meetings with representatives of the White House and discussed the matter directly with the President.  
Based on long-standing precedents, it would be improper for me under these circumstances to give testimony before a congressional committee concerning such meetings and discussions.  
President Johnson, as required by executive privilege procedures during the Johnson administration. Mr. Barr may well have been relying upon the Eisenhower letter of May 17, 1954, which became the basis of many claims of privilege by members of the executive department long after the motive which inspired the letter had passed. It is possible that such assertions as those discussed above are supported by secret presidential orders directing the exercise of executive privilege, but no evidence of such written orders has emerged. Such directives might exist where the request by Congress has attracted widespread national attention.

Many reasons given for assertion of agency privilege are largely procedural: primary responsibility for release in another agency or department; the tentative nature of a planning document; or a custom not to release such information. Many of the procedural reasons for the assertion of privilege may actually reflect tactics to prevent the dissemination of infor-

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82 As stated by Senator Robert Griffin in inserting the matter into the Congressional Record, President Johnson, like President Kennedy, had established the policy that information would not be withheld from Congress unless the President himself invoked executive privilege. 114 CONG. REC. 27518 (1968). See note 9 supra.


84 The Library of Congress study on the limits of executive privilege implies that a secret order by President Nixon directing invocation of executive privilege would have been sufficient to have brought the fifteen assertions of agency privilege in his first term into compliance with his directives with respect to executive privilege. LIBRARY OF CONGRESS STUDY, supra note 10, at 226.

85 Herman Marcuse has stated that none of the agency privilege cases cited in the Library of Congress report as occurring during the Nixon administration passed through his office, the Office of Legal Counsel in the Department of Justice, as required by President Nixon's executive privilege procedures. Id. at 227. See note 9 supra.

86 With respect to the "Pentagon Papers" confrontation, the matter was not one of great national awareness until the documents became available to the public, well after Senator Fulbright had requested that the study be provided to his committee. R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 282-85 (1974). The publicity, contributing to the likelihood that the President was aware of the situation, makes plausible the possibility of a tacit understanding between the President and the officials involved. See LIBRARY OF CONGRESS STUDY, supra note 10, at 226.

87 Department of Defense officials refused to permit the General Accounting Office field staff in Greece to have access to information which the staff considered necessary to its audit until the request was cleared at the Washington level. Senate Judiciary Committee Hearing, supra note 8, at 314.

88 This was the reason for the refusal by the Department of Defense to provide the requested Five-Year Plan for the Military Assistance Program to Congress in June, 1969. Letter from Senator J. William Fulbright to Secretary Melvin Laird, Senate Judiciary Committee Hearing, supra note 8, at 40.

89 The refusal of the Department of Defense to provide to Congress monthly statistical reports on military operations in Southeast Asia was supported by Deputy Secretary of Defense David Packard with the fact that, on the basis of custom, tradition, usage and precedent, the Legislative and Executive Branches have come to accept and recognize that there are certain matters which, for varying reasons, are not normally discussed outside the Executive Branch. Letter from Deputy Secretary David Packard to Senator Stuart Symington, June 11, 1970, Senate Judiciary Committee Hearing, supra note 8, at 47.
The General Accounting Office (GAO), which serves as the investigative arm of Congress in monitoring agency efficiency, frequently experiences assertions of agency privilege. The Internal Revenue Service (IRS) has consistently refused to turn over to the GAO information concerning the operation of the Economic Stabilization Program. The position of the IRS has been that the matter involves the administration of the internal revenue laws and is, therefore, beyond the scope of the GAO’s audit responsibility. The IRS would permit the complete audit to be carried out only with a “memorandum of understanding,” which the GAO felt would restrict its independence and limit its access to necessary records. The GAO has also been restricted by the Federal Deposit Insurance Corporation (FDIC) in its audit of that agency. The FDIC has allowed access only to those administrative or housekeeping records which pertain to its financial transactions, and has limited the inspection of records concerning the banks which it insures.

The GAO efforts to obtain information have on the whole been successful because of its practice of developing a cooperative relationship with the departments and agencies it audits. But Comptroller General Elmer B. Staats has testified that assertions of agency privilege against the GAO and substantial procedural delays are increasing.

Some of the reasons advanced in asserting agency privilege appear to be of great substance: the matter is still under adjudication, an individual

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90 The Library of Congress study on the limits of executive privilege concluded that the top-level policy makers apparently are happy to use the bureaucracy's tactics of delay and obfuscation to prevent Congress from getting at information which might embarrass [sic] their agency or their administration.

Library of Congress Study, supra note 10, at 228.

91 Joint Hearings, supra note 3, at 122. Comptroller General Elmer Staats testified that:

The Departments of Defense, State, and Treasury have employed delaying tactics in preventing our access to necessary records. Information and records have been withheld on the basis that they were internal working documents or that they disclosed tentative planning data. The most serious interference has resulted from restraints placed upon agency officials which require them with more and more frequency to refer to higher authority for clearance before making records available to our staff.

Id. at 119.

92 Id. at 122.

93 Id. at 123.

94 The General Accounting Office is required by section 17 of the Federal Deposit Insurance Act, 12 U.S.C. § 1827 (1971), to conduct annual audits of the FDIC.

95 1 Joint Hearings, supra note 3, at 123.

96 1 Joint Hearings, supra note 3, at 114-16.

97 In one case, for example, the Department of Defense feared that various Army documents delivered by the Justice Department to a Senate subcommittee would be prejudicial to the Government's interest in a case then on remand for trial. Letter from J. Fred Buzhardt, General Counsel of the Department of Defense, to Lawrence Baskir, Chief Counsel and Staff Director, Senate Subcommittee on Constitutional Rights, June 9, 1971, Senate Judiciary Committee Hearing, supra note 8, at 398.
was promised confidentiality; the agency believes that the request is beyond the scope of committee inquiry; or fear of harm to individuals through exposure of raw files.

Occasionally, no reasons are offered. During the Kent State investigation, Attorney General Richard Kleindienst refused to provide Senator Edward Kennedy's Subcommittee on Administrative Practice and Procedure with information concerning the Kent State disturbances. Even though similar information had been provided to the Scranton Commission, established by President Nixon to investigate the incident in its general review of civil disturbances, Senator Kennedy recalled Kleindienst stating: "I am not taking executive privilege. I am just not going to make the material available." This is perhaps the clearest statement of a claim of agency privilege distinct from that of executive privilege yet made. At least two explanations for the Attorney General's position may be advanced. It is possible that he did not want public disclosure of matters subject to future litigation. Others have suggested that the statement represented merely an active attempt to suppress the dissemination of information on the incident.

Even the more substantive reasons for asserting agency privilege must not be confused with the authority to make the assertions. Conceding the validity of a particular rationale, the question of authority to make the assertion in the first instance remains. Recent Presidents, having restricted the exercise of executive privilege to themselves, have not indicated any

98 Secretary of Defense Laird asserted guarantees of confidentiality as a basis for the refusal to provide Senator Fulbright with a copy of the "Pentagon Papers." Laird stated: "Many of the contributions of this document were provided on the basis of an expressed guarantee of confidentiality." Letter from Secretary Melvin Laird to Senator J. William Fulbright, Dec. 20, 1969, Senate Judiciary Committee Hearing, supra note 8, at 38.

99 John Dean asserted that information concerning presidential flights "has traditionally been considered personal to the President and thus not the proper subject of Congressional inquiry." Letter from John W. Dean III, Counsel to the President, to Elmer B. Staats, Comptroller General of the United States, Nov. 20, 1972, 3 Joint Hearings, supra note 3, at 203.

100 In one case, for example, the Department of Defense sought to prevent publication in a committee report of references to certain public figures contained in investigative files. Letter from J. Fred Buzhardt, General Counsel of the Department of Defense, to Mr. Lawrence W. Baskir, Chief Counsel and Staff Director, Subcommittee on Constitutional Rights, June 9, 1971, Senate Judiciary Committee Hearing, supra note 8, at 398.

101 1 Joint Hearings, supra note 3, at 470.

102 2 Joint Hearings, supra note 3, at 19.

103 Id. Senator Kennedy implied that one of the purposes of the request was that the parents of the students killed at Kent State might have access to the material. As late as May 1972, the administration stated that the substance of the Kent State matter was still under consideration even though Attorney General-designate Kleindienst had said earlier in 1972 that the Kent State file was closed. P. Davies, The Truth About Kent State 195 (1973).

104 Peter Davies' account of private attempts to force the Justice Department to convene a grand jury clearly implies a purposeful suppression of the case. It was not until May 10, 1973, after the indictment of former Attorney General John Mitchell on charges of perjury and obstruction of justice, that the Justice Department admitted it had for some time possessed evidence upon which it could have sought the indictments of one to six guardsmen. Id. at 203.
desire to have department and agency officials make that determination. Nor has the judiciary been a source of authority upon which agency and department heads may rely. The Supreme Court has been favorably disposed toward congressional power to investigate, particularly when counterbalanced against the claims of department and agency officials.

In general, these assertions of agency privilege do not cite any express constitutional, judicial, or executive authority in support of the right of refusal to provide information. Beyond the fact that the assertions were not made pursuant to presidential authority, it is clear in several instances that the officials involved were aware at the time or were subsequently made aware of the existing procedures for claiming executive privilege and still did not comply with those procedures. The similarity of many of the justifications given for assertions of agency privilege to those asserted for executive privilege leads to the suspicion that many executive officials were attempting to shelter themselves beneath the executive privilege umbrella without complying with executive privilege procedures. The reasons for this phenomenon have not been clearly identified. These instances may, in fact, have involved undisclosed presidential authorization to exercise executive privilege. Executive officials may be hesitant to disturb a busy President for written authorization, but since they would be pursuing a specific presidential directive when they sought his authorization, this hesitancy is unwarranted. Executive officials may find it embarrassing not only to disclose the information to Congress but also to reveal it to their superiors, but many of these assertions received sufficient notoriety to make it likely that the President was aware of them.

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105 See notes 8, 9 supra.
106 Bernard Schwartz concludes that even the “exposure for exposure’s sake” limitation with respect to the congressional investigation of private individuals is not a limitation with respect to inquiries into the Executive. Citing McGrain v. Daugherty, 273 U.S. 135 (1927), and Watkins v. United States, 354 U.S. 178 (1957), Schwartz analyzes the judicial emphasis given to the congressional investigative power to support his assertion that “[w]here a congressional investigation is one into the operation of a government agency, the scope of inquiry cannot be restricted.” 1 B. SCHWARTZ, supra note 7, at 128-29. See note 16 supra.
109 See notes 66, 72 supra.
110 See notes 60-64 and accompanying text supra.
111 See note 68 and accompanying text supra.
112 See notes 84-86 supra.
113 This hesitation may have been reflected in Senator Fulbright’s attempt to obtain the Department of Defense’s Five-Year Plan for the Military Assistance Program. Senator Fulbright’s first inquiry brought a reply that the matter was receiving careful consideration. His second inquiry elicited no response. His third inquiry, mentioning a vote by the Committee on Foreign Relations to invoke statutory authority to suspend funding of the Military Assistance Program, elicited a written assertion of executive privilege by the President. Senate Judiciary Committee Hearing, supra note 8, at 44-46.
The most plausible reason seems to be that executive officials were given authority under many pre-1960 administrations to exercise executive privilege and felt that this authority thereafter became permanently fixed.  

Despite reasons suggested by the above-discussed examples, agency privilege can claim no greater constitutional authority than that possessed by executive privilege and, upon analysis, much less. Even defenders of agency privilege recognize the possibility of delegation by the President to department and agency heads of the power to exercise the privilege, implying a lack of power in those positions at present. The arguments which are claimed to give at least indirect constitutional support to executive privilege are based on the principle of separation of powers. The powers of the federal government are allocated to its three branches; the power in the executive branch is established in the Presidency. Therefore, assuming a power of privilege in the executive branch, it is a power of privilege in the President and not a power of other members of the Executive unless so delegated by the President. When the President does not delegate this power, but instead clearly directs that any claim of justification to withhold information from Congress must be personally exercised by the President, other members of the Executive lack any power to with-

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115 The directive issued by President Eisenhower on May 17, 1954, which sought to restrict members of the executive branch from testifying before a subcommittee of the Senate Committee on Government Operations was used extensively by subordinates in the Executive as a claim of authority to withhold information from Congress. A. Breckenridge, The Executive Privilege 58 (1974). As the Library of Congress research staff concluded, "That cloak [of executive privilege] no longer exists, but the bureaucracy that used it is little changed." Library of Congress Study, supra note 10, at 228.

116 The "privilege" involved both in executive privilege and agency privilege is one asserted in the executive branch. The Constitution vests the powers of the Executive in the President. U.S. Const. art. II, § 1. Therefore, the power of privilege in the President would, if a constitutional power, be the maximum power of privilege in the executive branch. Any privilege claim by another member of the Executive could not be greater than that of the President, and, since recent Presidents have asserted that privilege may only be claimed by the President, other members of the Executive who assert a privilege are necessarily basing it upon something less than constitutional authority.

117 Kramer & Marcuse, supra note 2, at 911.


119 Justice Holmes argued that any power not clearly lodged in one of the three branches fell to the legislature to determine how it should be exercised. Springer v. Philippine Islands, 277 U.S. 189, 211 (1928) (dissenting opinion).

120 U.S. Const. art. II, § 1.

121 The issue of whether an act by a subordinate sufficed to constitute an act of the President arose in Environmental Protection Agency v. Mink, 410 U.S. 73, 82 (1973), a case involving the classified documents exemption of the Freedom of Information Act, 5 U.S.C. § 552 (1970). The legislative history of the exemption indicated that the President was to determine if the exempted matter should be kept secret. The material involved had in fact been classified by subordinates, but the Court found that the President, rather than reserving his power to himself, had delegated the power to his subordinates through Executive Order 10501, which had been the basis upon which the subordinates classified the documents. Absent the delegation of power, the Court stated, the act of the subordinate would not have been sufficient. 410 U.S. at 82.
hold information which the Constitution vests in the executive branch.\(^{122}\)

It is clear, therefore, that agency and department heads cannot rely upon the Constitution to support a general claim of agency privilege, although the possibility still exists that individual claims may find specific support in statutory authority.

**B. Statutory Authority**

In some instances, an individual assertion of agency privilege is claimed on the authority of a statute. The incidence of such support, however, is low.

John W. Dean III, while serving as White House counsel to President Nixon, withheld information from the GAO concerning presidential flights and passengers.\(^{123}\) The reason given was that the information was personal to the President and that adequate information was available to the GAO through alternative sources, in this case the financial reports of the Committee to Re-elect the President.\(^{124}\) Attorney General Kleindienst, in response to an inquiry concerning the matter, specifically stated that Mr. Dean did not invoke executive privilege.\(^{125}\) He asserted that Mr. Dean was instead pursuing statutory authority\(^{126}\) for the claim that the President's travel expenses are discretionary and accounted for only on his request\(^{127}\). The statutory authority was not mentioned in Mr. Dean's letter refusing to provide the information, and it is not clear whether the statute is in fact sufficient justification. Comptroller General Elmer Staats, in testimony concerning this incident, stated that such information had been made available on request of Congress by previous administrations to determine if proper reimbursement had been made for political use of government aircraft.\(^{128}\)

A statute which authorized department heads to maintain custody and control of the documents in their possession\(^{129}\) was amended in 1958\(^{130}\) to prevent its use to facilitate the withholding of information.\(^{131}\) Congress

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\(^{122}\) The President's subordinates may claim a privilege separate in origin from his, but they may properly assert such a privilege only under a regulation, statute, or order, not under the Constitution. A. BRECKENRIDGE, THE EXECUTIVE PRIVILEGE 2 (1974). See W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW: CASES AND COMMENTS § 24.31 (1960); E. GRIFFITH, CONGRESS: ITS CONTEMPORARY ROLE 2 (2d ed. 1956).

\(^{123}\) Letter from John W. Dean III to Elmer B. Staats, Nov. 20, 1972, 3 Joint Hearings, supra note 3, at 203. See 1 id. at 126.

\(^{124}\) 1 Joint Hearings, supra note 3, at 126.


\(^{126}\) 3 U.S.C. § 103 (1975), which provides:

There may be expended for or on account of the traveling expenses of the President of the United States such sum as Congress may from time to time appropriate, not exceeding $40,000 per annum, such sum when appropriated to be expended in the discretion of the President and accounted for on his certificate solely.

\(^{127}\) See note 125 supra.

\(^{128}\) 1 Joint Hearings, supra note 3, at 126.


\(^{130}\) 72 Stat. 547 (1958).

\(^{131}\) Berger, supra note 2, at 1308-09.
specified in the Freedom of Information Act\(^{132}\) that, merely because certain
categories of information may be withheld from the public, the Act created
no authority for withholding information from Congress.\(^{133}\) The analysis
of specific claims of agency privilege reveals that the rationale proffered
seldom has a statutory basis.

\section*{C. Delegated Authority}

Some future President might decide to delegate to subordinates the
privilege to withhold information.\(^{134}\) Nevertheless, the distinctions drawn
as to agency privilege would be relevant to assertions of privilege by those
members of the Executive to whom the power was not delegated. It is
likely, however, that Congress would be less willing to acquiesce to the
exercise of delegated executive privilege by agencies.\(^{135}\) In any case, agen-
cies (and perhaps Presidents) are unwilling to rest claims of privilege upon
express delegation in many cases.\(^{136}\)

\section*{IV. LEGISLATING THE PROPER BOUNDS OF
AGENCY PRIVILEGE}

The foregoing analysis of the authority underlying the assertion of
agency privilege and the occasions of its use has revealed that there may
exist some limited statutory authority justifying some rather specific and
narrow claims of privilege.\(^{137}\)

Members of Congress have expressed concern about the continued
assertion of privilege in the form of various legislative proposals which
seek a statutory definition of executive privilege rather than leaving its

\footnotesize
\begin{itemize}
\item \(^{133}\) See note 139 and accompanying text infra.
\item \(^{134}\) This, in a sense, is what President Eisenhower did in 1954. See note 5 supra. See also A. Breckenridge, The Executive Privilege 58 (1974), discussing the effect of Eisenhower's actions in 1954.
\item \(^{135}\) In 1962, political peace was at least temporarily established as to the exercise of executive privilege through the President's willingness to restrict its exercise to himself alone.
\item In a carefully staged scenario in 1962 stemming from a dispute over whether or not a Senate subcommittee was entitled to know the names of Defense Department officials who had censored speeches of Generals and Admirals, Secretary of Defense McNamara appeared before the subcommittee and read a letter to him from President Kennedy direct-
ing him (McNamara) not to testify about certain matters. . . . Senator Stennis, the Chairman of the subcommittee, obviously prepared for the event, "read from prepared notes and annotated transcripts of court de-
cisions and Congressional hearings to justify his ruling" to accept the
President's plea. Subsequent events indicate the precedent has been set.
If the President himself indicates in writing that he does not want his
subordinates to testify, the congressional committee will usually let the
matter drop there.
\item E. Corwin, The Constitution and What It Means Today 145 (rev. ed. H. Chase
\item \(^{136}\) See part III A supra.
\item \(^{137}\) See part III B supra.
\end{itemize}
definition to presidential order. The byproduct of these proposals would be to make illegal any exercise of privilege beyond that clearly delineated.

The Freedom of Information Act\textsuperscript{138} limits the extent to which departments and agencies may withhold information from the public. Prior to 1975, the Act provided that none of its provisions could be a basis for withholding information from Congress.\textsuperscript{139} In 1975, amendments were proposed calling for an affirmative congressional right to information.\textsuperscript{140} The proposed amendments recognized no authority to withhold information

\textsuperscript{139} Subsection (c) of the statute reads:
This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

5 U.S.C. § 552 (c) (1970). In Soucie v. David, 448 F.2d 1067, 1071-72 n.9 (D.C. Cir. 1971), the court stated that the power of Congress to compel disclosure of agency records to the public is no greater than its power to compel disclosure to Congress itself.

\textsuperscript{140} S. 1142, 93d Cong., 1st Sess. (1973); H.R. 5425, 93d Cong., 1st Sess. (1973). The relevant portions of S. 1142 read:

Section 552 (c) of title 5, United States Code, is amended to read as follows:

"(c) (1) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section.

"(2) (A) Notwithstanding subsection (b), any agency shall furnish any information or records to Congress or any committee of Congress promptly upon written request to the head of such agency by the Speaker of the House of Representatives, the President of the Senate, or the chairman of any such committee, as the case may be.

"(B) For purposes of this paragraph, the term 'committee of Congress' means any committee of the Senate or House of Representatives or any subcommittee of any such committee or any joint committee of Congress or any subcommittee of any such committee or any joint committee of Congress or any subcommittee of any such joint committee.'"

Section 552 of title 5, United States Code, is amended by adding at the end thereof the following new subsection:

"(d) Each agency shall, on or before March 1 of each calendar year, submit a report to the Committee on Government Operations of the House of Representatives and the Committee on Government Operations of the Senate which shall include—

"(1) the number of requests for records made to such agency under subsection (a);

"(2) the number of determinations made by such agency not to comply with any such request, and the reasons for each such determination;

"(3) the number of appeals made by persons under subsection (a) (5) (B);

"(4) the number of days taken by such agency to make any determination regarding any request for records and regarding any appeal;

"(5) the number of complaints made under subsection (a) (3);

"(6) a copy of any rule made by such agency regarding this section; and

"(7) such other information as will indicate efforts to administer fully this section;

during the preceding calendar year."

See 1 Joint Hearings, supra note 3, at 507-09.
in either the President or other members of the executive branch.\textsuperscript{141} As finally enacted, however, the section remained unchanged.\textsuperscript{142}

Senator J. William Fulbright introduced a bill which would have forbidden the assertion of privilege before a congressional committee without a signed claim of privilege by the President.\textsuperscript{143} This, in substance, was an attempt to define a scope of executive privilege coextensive with that asserted by recent Presidents, with the additional requirement that the approval be in writing.\textsuperscript{144} The bill provided that the requesting committee could evaluate the assertion and, if the President denied information to the committee, submit the request to Congress for resolution.\textsuperscript{145} By implication, it gave legal recognition by the Congress to certain claims of privilege.\textsuperscript{146} If constitutional authority exists for a privilege, Congress cannot limit that authority by statute.\textsuperscript{147} The privilege would not be a privilege at all if subject to congressional approval,\textsuperscript{148} but the basic struc-

\textsuperscript{141} This provision was attacked as unconstitutional by the Department of Justice, alleging a violation of separation of powers. 1 Joint Hearings, supra note 3, at 514.


\textsuperscript{143} S. 858, 93d Cong., 1st Sess. (1973).

\textsuperscript{144} Section 306(b) of the Fulbright bill provided:

\begin{quote}
In no case shall an employee of the executive branch appearing before the Congress, any joint committee of the Congress, any committee of either House of the Congress, or any subcommittee of any such committee, in response to a summons or request, assert executive privilege unless the employee presents, at the time executive privilege is asserted in response to any testimony or document sought, a statement signed personally by the President requiring that the employee assert executive privilege as to the testimony or document sought.
\end{quote}

S. 858, 93d Cong., 1st Sess. § 306(b) (1973). Presidents Kennedy, Johnson, and Nixon also required specific approval by the President for the assertion of executive privilege, but not necessarily a signed statement. See notes 8, 9 supra.

\textsuperscript{145} Section 306(c) of the Fulbright bill provided:

\begin{quote}
When such an employee presents such statement, it shall then be a question of fact for the committee to decide (including, in the case of the assertion of such privilege before a subcommittee, for the committee of such subcommittee to decide) whether the assertion of executive privilege is well taken. If not well taken, the employee shall be ordered to provide the testimony or document sought. When any such committee, unholds [sic] or denies the assertion of executive privilege, it shall within ten days file with its House of Congress (or, in the case of a joint committee, with each House of Congress) a resolution, together with a report and record of its proceedings bearing on such assertion of executive privilege, and shall take such action as such House or Houses deems proper on disposition of any such resolution.
\end{quote}

S. 858, 93d Cong., 1st Sess. § 306(c) (1973).

\textsuperscript{146} 1 Joint Hearings, supra note 3, at 250.

\textsuperscript{147} Attorney General Kleindienst, speaking from a position claiming such constitutional authority, testified: "The clause [quoted note 144 supra] would point toward congressional supremacy inconsistent with the separation-of-powers system and doctrine." 1 Joint Hearings, supra note 3, at 26.

\textsuperscript{148} Attorney General Kleindienst further testified:

\begin{quote}
We also have serious difficulties with that aspect of the proposed legislation which would purport to make it a question of fact for the committee to decide whether an assertion of privilege is well taken. We deal here, as often in the constitutional field, with a fact/law interface, and not with a simple question of fact.
\end{quote}

1 Joint Hearings, supra note 3, at 26.
ture of the bill implied a presumptive executive privilege. The bill suffered from other definitional and procedural problems, although its significance now is primarily historical.

Senator Adlai E. Stevenson III has suggested that legislation be drafted which would define when executive privilege may be properly invoked and also establish the congressional right to obtain information in the broadest terms and refuse to give any person a blanket exemption from testifying. This proposal, like the Fulbright bill, would require the President to certify a claim of the right to withhold and to provide his reasons for withholding information; the proposal would also limit executive privilege by statute and make exercises of agency privilege illegal. The Stevenson proposal, like that of Senator Fulbright, would be unacceptable to those who refuse to acknowledge that any privilege exists. Unlike the Fulbright bill, which left the resolution of any conflict to the discretion of Congress, the Stevenson proposal includes detailed procedures to resolve the conflict, proposing appointment of a special prosecutor who might seek court resolution of a dispute.

In its recommendation that conflicts be resolved by the courts, the Stevenson proposal is similar to a bill sponsored by Senator Edward M. Kennedy, which proposed the conferral of exclusive original jurisdiction

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149 The bill has been criticized for its tendency to sanctify a right to executive privilege, its failure to define limits for the exercise of the privilege, and its lack of procedures to resolve impasses. Note, Executive Privilege and the Congress: Perspectives and Recommendations, 23 DePaul L. Rev. 692, 731-34 (1974).

150 The bill was never enacted and its sponsor is no longer a member of the Senate.

151 Senator Stevenson criticized Senator Fulbright's bill for failing to define the proper role of executive privilege and set out his proposed definition:

I therefore would suggest that direct communications between the President and anyone in the executive branch should be protected—if the matters in discussion legitimately relate to aspects of public policy.

. . . What about other communications within the executive branch?

. . . First of all, a sine qua non to the invocation of executive privilege should be that the information is protected from disclosure under other acts such as the Freedom of Information Act or the Budget and Accounting Act. Then, where the information is so protected, the President himself should certify the right to withhold information in these cases.

1 Joint Hearings, supra note 3, at 95.

152 Senator Stevenson suggested a preamble broadly asserting congressional power to obtain information:

Congress should be wary of giving away any of its legitimate constitutional power. The present bills on this subject do not make sufficiently clear Congress' broad power; they tend to sanctify a right to executive privilege, without stating clearly and forthrightly Congress' concomitant right to obtain information.

1 Joint Hearings, supra note 3, at 94.

153 Id. at 94-95. See note 151 supra.

154 1 Joint Hearings, supra note 3, at 250. See note 146 and accompanying text supra.

155 See note 145 supra.

156 1 Joint Hearings, supra note 3, at 96.
on the District Court of the District of Columbia to adjudicate conflicts over claims of agency privilege which reached an impasse between Congress and members of the Executive.\textsuperscript{157} Such proposals could force an eventual Supreme Court determination of whether agency privilege has any constitutional basis.\textsuperscript{158} The Supreme Court may wish to avoid a decision on an issue when the controversy is politically charged.\textsuperscript{159} Such circumstances create a danger that the Court might be disobeyed. Thus, leaving the resolution of the issue to the political process avoids the constitutional crisis which might otherwise ensue.\textsuperscript{160} It has been pointed out that there is greater controversy over congressional access to the information of departments and agencies when different parties control the two branches.\textsuperscript{161} To the extent that an assertion of agency privilege does not rest upon a presidential claim of executive privilege, there is less likelihood that the question is so politically charged that the Court will fear that its decision will be unenforceable.\textsuperscript{162} Thus, matters of agency privilege may stand a greater chance of judicial resolution than matters of executive privilege.

Proposals for the resolution of privilege conflicts in the courts have been attacked by former Senator Sam J. Ervin, Jr., who feels that the Supreme Court has already recognized Congress' power to investigate.\textsuperscript{163} He has pointed out that such a time-consuming process would work to the advantage of the departments and agencies. In many instances delay would be defeat for Congress, since the information would not be available when needed.\textsuperscript{164} Ervin argues that, since Congress already has the power to

\textsuperscript{157} S. 2073, 93d Cong., 1st Sess. (1973).
\textsuperscript{158} This result is all the more likely after the litigation over the Nixon tapes. United States v. Nixon, 418 U.S. 683 (1974), has been interpreted as rejecting the argument that there is no constitutional basis at all for executive privilege. Westin, \textit{The Case for America}, in \textit{United States v. Nixon} (L. Friedman ed. 1974). This may thrust the federal courts into a greater role in deciding executive-legislative conflicts, a role which the courts have avoided in the past. In Alan Westin's words: What it will mean in practice . . . is that from now on, the federal courts have been given the role of arbitrating both the general definitions and the document-by-document review of those presidential communications that may become central to criminal proceedings. \textit{Id.} at xxi.
\textsuperscript{159} Justice Brandeis has outlined the techniques used by the Court to avoid constitutional issues. \textit{Ashwander v. TVA}, 297 U.S. 288, 346-48 (1936) (concurring opinion).
\textsuperscript{161} \textit{Library of Congress Study, supra} note 10, at 227. The report also points out, however, that instances of assertion of agency privilege are not uncommon when both branches are controlled by the same party. \textit{Id.}
\textsuperscript{162} Although United States v. Nixon, 418 U.S. 683 (1974), might be characterized as politically charged, Alan Westin contends that public opinion was solidly against the President, making the decision very predictable. Westin, \textit{The Case for America}, in \textit{United States v. Nixon} xii-xiv (L. Friedman ed. 1974).
\textsuperscript{163} \textit{Joint Hearings, supra} note 3, at 99-100.
\textsuperscript{164} \textit{Id.} at 99. Ervin's illustration is the Watergate investigation.
obtain information, it should issue a warrant for the arrest of a recalcitrant and send out the Sergeant at Arms to bring him before the bar of the parent body. The concept does have some historical support, but the Sergeant at Arms might well find himself outmatched by a recalcitrant executive branch.

The prospects for legislative action depend in part on the authority underlying agency privilege. If United States v. Nixon has recognized some constitutional basis for executive privilege claims in certain areas, Congress cannot exert its will to undercut that privilege; the source of the authority determines the strength of the privilege. By implication, it is only the President, and not Congress, who can limit claims of executive privilege to those made on the strength of his specific authorization. However, United States v. Nixon speaks only of privileges of the President, not executive branch privilege. The conclusion is still valid, therefore, that agency privilege as here defined has no constitutional basis and consequently is subject to the will of Congress. To the extent that the Fulbright and Stevenson proposals and the proposed amendment to the Freedom of Information Act would limit executive branch privilege to presidential exercise thereof, there would appear to be no conflict with United States v. Nixon. The Fulbright bill, by refusing to define the scope of executive branch privilege and merely requiring a presidential assertion, comes closest to avoiding conflict.

Leaving aside the question of constitutional power, Senator Ervin's argument that Congress has all the power it needs raises the question of whether any legislation is necessary. The Fulbright bill leaves to Congress the determination of appropriate action, but this gives Congress nothing

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165 Id. Bishop, The Executive Right of Privacy: An Unresolved Constitutional Question, 66 Yale L.J. 477, 484 (1957) provides a general analysis of the use of the Sergeant at Arms.


167 Senator Altai Stevenson III testified concerning his reservations as to its use: Some, including Senator Ervin and Senator Kennedy, have suggested that Congress resort to its own remedies—the contempt power; that Congress send the Sergeant at Arms out to place the individual in custody, arraign him, and try him—or have the courts try him—for Contempt of Congress. This has never been done. And I would suggest that these remedies are unnecessarily contentious and perhaps at best futile.

1 Joint Hearings, supra note 3, at 96.

168 Congress can legislate with respect to common law and statutory privileges but cannot regulate constitutional privileges. Comment, Executive Privileges: What Are the Limits?, 54 Ore. L. Rev. 81, 83 (1975).


170 See note 158 supra.

171 Comment, Executive Privileges: What Are the Limits?, 54 Ore. L. Rev. 81, 83 (1975).


173 See note 122 and accompanying text supra.

174 See note 145 supra.
that it does not already have. If Congress has the right to restrict assertions of agency privilege, it has it without additional legislation.

Agency privilege is more a political than a constitutional problem. As a political problem, it is best left to the political process. Where departments and agencies lack authority for their assertions, Congress must be willing to pursue the matter until a presidential privilege claim is provoked in an attempt to bring about the production of testimony and documents desired. Where departments and agencies assert statutory authority for their privilege, Congress has the power to legislate with respect to that statute. Congress has too willingly created an executive bureaucracy without providing the means to monitor its efficiency and to determine whether executive agencies fulfill their intended purposes. Annual budgetary review has not been performed with a diligence sufficient to provide significant control. Congress needs, more than additional legislation, development of a coordinated approach to information-gathering by the GAO and congressional committees which will enable it to assert its positions effectively while maintaining responsible control over its individual members and committees with respect to the information sought and its disclosure. Agency privilege has filled a vacuum of power left by Congress and must be met by finding in Congress a countervailing power.

V. CONCLUSION

An express constitutional basis for agency privilege does not exist. The concept has long been insulated from analysis of the precise privilege and authority involved in the assertion by confusion of agency privilege with executive privilege. Absent a presidential claim of privilege encompassing assertions of agency privilege, Congress may act effectively to control its use. But the executive departments and agencies are largely creatures of Congress and will continue to assert the power of privilege until Congress finds the will to check its creations. By segregating asser-

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181 For an analysis of the development of bureaucratic power, see A. De Grazia, Republic in Crisis 109-44 (1965).
182 See note 122 and accompanying text supra.
184 Congress therefore can control assertions of privilege as long as they have at most a statutory basis. See notes 131, 168 and accompanying text supra.
185 See note 181 supra.
tions of privilege which fall into the agency privilege category, Congress may be able to develop effective procedures to deal with them even though the conflict over executive privilege remains unresolved. The area is one in which careful attention to definition and procedure may reduce conflict and prevent attempts to withhold documents and testimony under an ill-defined umbrella of privilege. No new statutes are necessary to create the distinction in the minds of department and agency officials; all that is needed is an awareness that Congress recognizes that distinction and will act upon it.

—Mark A. Luscombe