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Raoul Berger

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EXECUTIVE PRIVILEGE: A PRESIDENTIAL PILLAR  
WITHOUT CONSTITUTIONAL SUPPORT \*

THE CONSTITUTION MAKES NO MENTION of a congressional power of investigation, nor of an executive privilege to withhold information from Congress. Let me begin, therefore, with some practical considerations. Congress and the President are partners in government; Congress was designed to be the senior partner, as the vast disparity between the numerous powers conferred to the legislature and the meager few granted to the President should demonstrate.<sup>1</sup> "No one doubted," Gordon Wood states, "that the legislature was the most important part of any government."<sup>2</sup> As late as 1791, Justice James Wilson, second only to Madison as an architect of the Constitution, stated in his lectures here in Philadelphia, that the executive had been an object of "aversion and distrust," because governors had been saddled on the colonists by the Crown.<sup>3</sup> He counseled that it was time to surmount such distrust because like the assemblies, the governors were now elected by the people.<sup>4</sup>

It offends common sense to maintain that one partner may conceal information from the other in the alleged interest of the partnership. Until recent legislation called for disclosure, executive agreements, which were suspected of making large-scale military and financial commitments, were not disclosed to Congress.<sup>5</sup>

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Professor Berger is the author of *Executive Privilege: A Constitutional Myth* (1974); *War, Foreign Affairs, and Executive Secrecy*, 72 NW. U.L. REV. 309 (1978); *War-making by the President*, 121 U. PA. L. REV. 29 (1972); *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1 (1972); *The Incarnation of Executive Privilege*, 22 U.C.L.A. L. REV. 4 (1974).

1. Compare U.S. CONST. art. I with *id.* art. II.
2. G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* 162 (1969).
3. 1 THE WORKS OF JAMES WILSON 292 (R. McCloskey ed. 1967).
4. *Id.* at 292-93.
5. R. BERGER, *EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH* 140-56 (1974) [hereinafter cited as EXECUTIVE PRIVILEGE]. Legislation now requires the Secretary of State to transmit to the Congress the text of any international agreement other than a treaty, to which the United States is a party, as soon as practicable after such agreement has entered into force with respect to the United States, but in no event later than 60 days thereafter. See 1 U.S.C. § 112(b) (1976).

Arthur M. Schlesinger, Jr., suggests why new legislation was enacted: In 1962 Secretary of State Rusk and [Thailand's] Foreign Minister

Should an executive agreement for example, to come to the aid of Pakistan be concealed?

The claim of uncontrolled executive discretion to withhold information was articulated for the first time by the Eisenhower administration as a riposte to Senator Joseph McCarthy's high-handed investigation of the Army.<sup>6</sup> But the fact that power may be abused does not prove that it was not conferred. It fell to Chief Justice Burger in the *Nixon Tapes*<sup>7</sup> case to declare that the privilege for presidential communications is "inextricably rooted in the separation of powers under the Constitution."<sup>8</sup> That is a question-begging formulation. The separation of powers does not *generate* power; it only serves to *protect* granted power from encroachment. Therefore, the threshold question must be, what does the separation of powers separate? What is the content of each separate power? Regard it as a circle that has three different segments, and look at each segment of the divided powers to see what it contains.

Inquiry begins with an examination of the scope of the respective powers in English practice. The Supreme Court held in *Ex*

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expressed in a joint declaration "the firm intention of the United States to aid Thailand . . . in resisting communist aggression and subversion." While this statement may have been no more than a specification of SEATO obligations, the executive branch thereafter secretly built and used bases and consolidated the Thai commitment in ways that would still be unknown to Congress and the electorate had it not been for the indomitable curiosity of Senator Symington and his Subcommittee on Security Arrangements and Commitments Abroad. The Subcommittee also uncovered interesting transaction involving the executive branch with Ethiopia (1960), Laos (1963) and South Korea (1966).

Schlesinger, *Congress and the Making of American Foreign Policy*, 51 FOREIGN AFFAIRS 78, 100-01 (1972).

Examples of subsequently revealed secrets include a 1953 secret agreement governing nonwithdrawal of combat troops stationed in Europe, and a long range financial commitment made by the President in the form of \$435 million in promised credits and assistance in Portugal in exchange for a 25-month extension of base rights in the Azores, see EXECUTIVE PRIVILEGE, *supra* note 5, at 140-41 n.120 citing C. SULZBERGER, A LONG ROW OF CANDLES 867, 923 (1969).

6. EXECUTIVE PRIVILEGE, *supra* note 5, at 234. In a directive to the Secretary of Defense, President Eisenhower instructed him to tell all Department of Defense employees that they were not to testify before the Senate Committee on Government Operations regarding any communications of the executive branch and were not to produce any documents relating to such conversations. 100 CONG. REC. 6621 (1954).

7. *United States v. Nixon*, 418 U.S. 683 (1974). The *Nixon* case involved President Nixon's assertion of absolute executive privilege in support of a motion to quash a third-party subpoena *duces tecum* issued by the United States District Court for the District of Columbia, directing President Nixon to produce certain tape recordings and documents relating to his conversations with aides and advisors during his term as President. *Id.* at 686, 703.

8. *Id.* at 708.

*Parte Grossman*,<sup>9</sup> that the Constitution must be interpreted "by reference to the common law and to British institutions as they were when the instrument was framed and adopted."<sup>10</sup> Applying that canon to congressional investigations (patently Congress was modeled on the bicameral Parliament), the Court held in *McGrain v. Daugherty*,<sup>11</sup> a case arising out of the Teapot Dome scandal, that

the power of inquiry . . . was regarded and employed as a necessary and appropriate attribute of the power to legislate . . . . Thus . . . the constitutional provisions which commit the legislative function to the two houses are intended to include this attribute to the end that the function may be effectively exercised.<sup>12</sup>

Thus, we have an established investigative power, found by the Supreme Court to exist at English law before the adoption of the Constitution, and held to be an inherent "attribute" of Congress.

To ascertain the scope of Parliament's power, I examined its practice from 1621 to about 1750, and found a virtually unbroken, plenary practice of inquiry into executive conduct across the board.<sup>13</sup> Parliament commonly inquired into the conduct of war,<sup>14</sup> expenditures of public money<sup>15</sup> and — to lay a foundation for legislation — how the laws were executed.<sup>16</sup> Before Parliament repealed or revised a law, it wanted to know how the law had been working. To find out, it interrogated the executive branch. With one explicable exception, to which I shall return, I found no executive resistance to demands for information during this whole period. In that exceptional instance, William Pitt, the great Chancellor, summarizing the prior practice, declared: "We are called the Grand Inquest of the Nation, and as such it is our Duty to inquire into every Step of publick Management, either Abroad or at Home, in

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9. 267 U.S. 87 (1925) (upholding the power of the President to grant pardons, even for contempt of court offenses).

10. *Id.* at 108-09.

11. 273 U.S. 135 (1927) (Senate can compel a private individual to appear before it or one of its committees for the purpose of giving testimony in regard to an investigation ordered for a legitimate purpose).

12. *Id.* at 175.

13. EXECUTIVE PRIVILEGE, *supra* note 5, at 15-31.

14. For several examples of Parliament's frequent probes into perceived misconduct of the army in wartime, see EXECUTIVE PRIVILEGE, *supra* note 5, at 18; 3 H. HALLAM, THE CONSTITUTIONAL HISTORY OF ENGLAND 143 (London 1884).

15. See EXECUTIVE PRIVILEGE, *supra* note 5, at 19.

16. *Id.* at 19-20.

order to see that nothing has been done amiss . . . .”<sup>17</sup> Nothing was excepted — domestic and foreign relations both were inquired into by the Grand Inquest of the Nation. Thus, English practice prior to the adoption of the Constitution discloses an untrammelled legislative power of investigation. By the logic of *McGrain*,<sup>18</sup> the fact that the British executive did *not* claim the right to withhold information from Parliament demonstrates that such a privilege was *not* an attribute of the executive, and this was understood by the Founders.

The Founders were familiar with the English practice and intended to adopt it. There is time only to tick off a number of proofs: (1) Montesquieu, oracle of the Founders on the separation of powers, stated that the legislature “has a right and ought to have the means of examining in what manner its laws have been executed.”<sup>19</sup> (2) James Wilson exalted the Commons as the Grand Inquest of the Nation because it had “checked the progress of arbitrary power . . . . The proudest ministers . . . have appeared at the bar of the house, to give an account of their conduct . . . .”<sup>20</sup> In the Pennsylvania Ratification Convention, where he led the fight for adoption of the Constitution, James Wilson stated: “The executive is better to be trusted when it has no screen . . . [the President cannot] hide either his negligence or inattention . . . not a *single privilege* is annexed to his character . . . .”<sup>21</sup> (3) References to the House as Grand Inquest of the Nation appear in the several conventions.<sup>22</sup> Not one voice was raised to urge curtailment of the inquisitorial power in the interest of the President. That in itself is an extraordinary fact. Had there been any inkling that it was intended to have the President rise above the traditional practice, somebody would have said so. Such a suggestion was never raised. Everybody took for granted that the executive would be subject to inquiry by the Congress. (4) The Treasury Act of 1789<sup>23</sup> made the executive’s duty to supply information explicit. It provided in express terms that the Secretary of the Treasury

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17. *Id.* at 29.

18. 273 U.S. at 161.

19. 1 C. DE S. MONTESQUIEU, *THE SPIRIT OF THE LAWS* 231 (5th ed. London 1773), quoted in *EXECUTIVE PRIVILEGE*, *supra* note 5, at 4.

20. 2 *THE WORKS OF JAMES WILSON* 731 (R. McCloskey ed. 1967).

21. 2 J. ELLIOTT, *DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 480 (2d ed. 1836), quoted in *EXECUTIVE PRIVILEGE*, *supra* note 5, at 49 (emphasis in original).

22. See *EXECUTIVE PRIVILEGE*, *supra* note 5, at 35-36.

23. Act of Sept. 2, 1789, ch. 12, § 2, 1 Stat. 65 (current version at 31 U.S.C. § 1001 (1976)).

should supply information to Congress.<sup>24</sup> This was an authoritative construction by the First Congress, which is one of the most valued sources of constitutional construction. (5) Attorney General Caleb Cushing held in 1854 that, “[b]y express provision of the law, it is made the duty of the Secretary of the Treasury to communicate information to either House of Congress when desired; and it is practically and by legal implication the same with other secretaries . . . .”<sup>25</sup>

The thorniest area is that of confidential communications. President Eisenhower expanded the confidential communications theory into an umbrella over the entire executive branch, claiming that communications between employees of the executive branch must be shielded in order that these employees may be completely candid in advising with each other.<sup>26</sup> I wish I had time to comment on the folly of this pronouncement, although one can understand it in the heated atmosphere of Senator McCarthy’s inquiry into the Army. It was not long before extraordinary claims for secrecy blossomed in the wake of this candid interchange doctrine.

Testifying before a Senate subcommittee in 1973, Attorney General Richard Kleindienst asserted that the President is em-

24. Act of Sept. 2, 1789, ch. 12, § 2, 1 Stat. 65, 66 (current version at 31 U.S.C. § 1002 (1976)). The Act imposed upon the Secretary of the Treasury the duty “to make report, and give information [to Congress], . . . respecting all matters referred to him by the Senate or House of Representatives, or which shall appertain to his office, . . . .” *Id.*

25. 6 Op. Att’y Gen. 326, 333 (1854).

26. 100 CONG. REC. 6621 (1954). The statement was part of President Eisenhower’s directive to the Secretary of Defense regarding the appearance of Department of Defense employees before the Senate Committee on Government Operations. See note 5 *supra*. After President Eisenhower had invoked the “candid interchange” doctrine, the withholding of information by government administrators multiplied. EXECUTIVE PRIVILEGE, *supra* note 5, at 236. Two examples of the practice include the Department of Agriculture’s withholding of “‘initialed file copies of an amendment’ because ‘they related solely to its internal operations,’ . . . [and its refusal] to submit a [1957] Farm Population Estimate which had been withdrawn from distribution and destroyed.” *Id.*, quoting Kramer & Marcuse, *Executive Privilege — A Study of the Period 1953-1960* (pts. 1-2), 29 GEO. WASH. L. REV. 623, 658-59; 827, 877 (1961).

Historian Arthur M. Schlesinger, Jr., summed up the impact of the “candid-interchange” doctrine as follows:

The Eisenhower directive ushered in the greatest orgy of executive denial in American history. From June 1955 to June 1960 there were at least 44 instances when officials in the executive branch refused information to Congress on the basis of the Eisenhower directive — more cases in those five years than in the first century of American history . . . . What had been for a century and a half sporadic executive practice employed in very unusual circumstances was now in a brief decade hypostatized into sacred constitutional principle.

A. Schlesinger, Jr., *THE IMPERIAL PRESIDENCY 15859* (1973).

powered to forbid federal employees from testifying before Congress under *any* circumstances and to block congressional demands for *any* document within the executive branch, "even when called upon to impeach the President."<sup>27</sup> How can Congress operate if it is cut off from the two-and-one-half million members of the bureaucracy which it created, which it funds, and to which it delegates enforcement of the laws?

Communications between the President and his aides stand on a higher level; what the President says to his Secretary of State or Secretary of the Treasury in the secrecy of his cabinet is not comparable to consultations between clerks. But even communications of this higher level are not insulated from inquiry, as the *Nixon Tapes*<sup>28</sup> case taught. Although Chief Justice Burger held that "the importance of this confidentiality is too plain to require further discussion,"<sup>29</sup> the Watergate scandal and the firestorm that swept the nation after the "Saturday Night Massacre"<sup>30</sup> made the withholding of the Nixon tapes unthinkable. So Chief Justice Burger grudgingly made a breach in the separation of powers: the privilege "cannot prevail," he said, "over the fundamental demands of due process of law in the fair administration of criminal justice."<sup>31</sup>

At the time, I prophesied that this "principle" would burgeon by analogy, that the public interest in the criminal prosecution of a White House aide hardly rose to its interest in the "full disclosure of all the facts" before Congress when it is engaged in inquiry into a Teapot Dome Scandal, or in the impeachment of the President,<sup>32</sup> or in weighing a missile limitation agreement with

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27. 1 *Executive Privilege; Secrecy in Government; Freedom of Information: Hearings on S. 858, S. Con. Res. 30, S.J. Res. 72, S. 1106, S. 1142, S. 1520, S. 1923, and S. 2073 Before the Subcomm. on Intergovernmental Relations*, 93d Cong., 1st Sess. 18, 39 (1973) (statement of Richard G. Kleindienst). In discussing the extension of executive privilege, Attorney General Kleindienst quoted President Nixon's statement that, "under the doctrine of separation of powers, the manner in which the President personally exercises his assigned executive powers is not subject to questioning by another branch of government." *Id.* at 25.

28. *United States v. Nixon*, 418 U.S. 683 (1974). The Court emphasized that "neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances." *Id.* at 706.

29. *Id.* at 705.

30. The abrupt firing of special Watergate prosecutor Archibald Cox on Saturday, Oct. 20, 1973, is referred to as the Saturday Night Massacre. See *THE WHITE HOUSE TRANSCRIPTS* 866 (G. Gold ed. 1974).

31. 418 U.S. at 713. See notes 7-8 and accompanying text *supra*.

32. See Berger, *The Incarnation of Executive Privilege*, 22 U.C.L.A. L. REV. 4, 8-9 (1974).

Russia. My prophecy was speedily fulfilled in the second *Nixon* case,<sup>33</sup> when President Nixon once more invoked executive privilege for confidential papers to shield some forty-two million pages of documents that had poured into the White House from every quarter of the government during his administration.

Although Chief Justice Burger, dissenting, stuck to his guns and insisted that a breach in Presidential confidentiality was warranted only when "the conduct of criminal proceedings would be impaired,"<sup>34</sup> the Court, no longer constrained to furnish Nixon with a "definitive" decision (remember, President Nixon had said he would only obey a *definitive* decision, which is why the whole Court joined in the decision in the first case), held in the second *Nixon* case<sup>35</sup> that, "the claims of Presidential privilege clearly must yield to the important congressional purposes of preserving the materials and maintaining access to them for lawful governmental and historical purposes."<sup>36</sup> Protection of the public right to information, upon which the second *Nixon* case was largely pitched, is not nearly as important as the right of Congress to inquire into executive misconduct, to ascertain the facts, for example, behind unauthorized entry into another Vietnam war. Thus, no sooner had the claim of executive privilege received Chief Justice Burger's imprimatur than it was rendered virtually meaningless.

The Court's decision in the second *Nixon* case<sup>37</sup> was in accord with English precedent. As a prelude to the impeachment of the Earl of Oxford and other high ministers in 1714, Parliament examined Thomas Harley, the brother of Oxford, and Matthew Prior, both envoys to France, interrogating them as to their instructions by the Ministers to negotiate a secret treaty behind the back of the Dutch allies.<sup>38</sup> Disclosure of such a scheme was disgraceful, for the resulting Treaty of Utrecht, as William Pitt later

33. *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425 (1977). In the second *Nixon* case, former President Richard Nixon challenged the validity of the Presidential Recordings and Materials Preservation Act, which directed the Administrator of General Services to take custody of Nixon's presidential materials and have them screened by government archivists to eliminate personal matter and to preserve those having historical value, making them available for use in judicial proceedings. *Id.* at 429.

34. *Id.* at 515 (Burger, C.J., dissenting).

35. Justices Stewart, Marshall, and Stevens joined Justice Brennan's opinion for the Court. Justices White, Powell and Blackmun concurred in part. Chief Justice Burger and Justice Rehnquist each wrote dissenting opinions.

36. 433 U.S. at 454.

37. 433 U.S. 425 (1977). See notes 33-36 and accompanying text *supra*.

38. EXECUTIVE PRIVILEGE, *supra* note 5, at 256.

said, left an indelible stain on the honor of England.<sup>39</sup> Nevertheless, nobody breathed a claim to executive privilege. A reflection of this English precedent is found in the Jay Treaty incident. The House requested President Washington to furnish the instructions which had been given to the Minister who had negotiated the Jay Treaty, justifying the request, apparently, because "it was necessary to implement the treaty with appropriations."<sup>40</sup> Washington refused the papers to the House on the ground that the treaty power was exclusively vested in the President and Senate, leaving the House without jurisdiction in the premises.<sup>41</sup> Washington made certain, however, that "all the papers affecting the negotiation[s] . . . were laid before the Senate"<sup>42</sup> — evidence that he did not conceive that even his own communications were sacrosanct. This was a treaty that excited vastly more vitriolic comment than did the recent Panama Canal Treaties<sup>43</sup> or the termination of full diplomatic recognition of Taiwan.

The issue of executive privilege is but one facet of the relationship between the President and Congress. Decisions to claim the privilege originate in the bureaucracy, and, as Professor Wade of Cambridge observed, bureaucrats have an "occupational love of secrecy," and possess the "instinct of hiding as much as possible from the public gaze,"<sup>44</sup> as the post-McCarthy record teaches.<sup>45</sup>

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39. *Id.*

40. *Id.* at 171, citing Mem. Att'y Gen., *The Power of the President to Withhold Information from the Congress*, Senate Subcomm. on Const. Rights 5 (85th Cong., 2d Sess. 1958).

41. Washington further stated:

The nature of foreign negotiations requires caution; and their success must often depend 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 . . . . 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.

5 ANNALS OF CONG. 760 (1796).

42. 5 ANNALS OF CONG. 760-61 (1796). President Washington further asserted: "I have no disposition to withhold any information which the duty of my station will permit, or the public good shall require to be disclosed." *Id.* at 760.

For a detailed discussion of the Jay Treaty incident, see EXECUTIVE PRIVILEGE, *supra* note 5, at 171-79.

43. For a commentary favoring limitation of the President's role in treaty-making and critical of the exclusion of the House from the disposition of the Panama Canal, see Berger, *Must The House Consent To Cession Of The Panama Canal?*, 64 CORNELL L. REV. 275 (1979).

44. EXECUTIVE PRIVILEGE, *supra* note 5, at 214, citing H. WADE, ADMINIS-TRATIVE LAW 18 (2d ed., Oxford, 1967).

45. EXECUTIVE PRIVILEGE, *supra* note 5, at 236-51.

The claim of executive privilege is part of the unrelenting executive drive for ever more power. We need, therefore, to recall Justice Brandeis' reminder that it was the deep-seated conviction of the English and American people that they "must look to representative assemblies for the protection of their liberties."<sup>46</sup> Legislative assemblies cannot function in the dark.

I am by no means suggesting to you that I regard the Congress as a collection of latter-day saints. But Congress *is* a great public town meeting where national issues can be debated and sentiment can be gauged.<sup>47</sup> It is better to have government thus operate in the open than behind a shroud of secrecy, a shroud that produces Haldemans and what Attorney General Mitchell called a "chamber of White House horrors."

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46. *Myers v. United States*, 272 U.S. 52, 294-95 (1926) (Brandeis, J., dissenting).

47. We must act quickly to abandon the role of mere spectators to a cockfight between Congress and the President, and to realize that we all have an immediate interest in ensuring that Congress be fully informed not only in order to carry out its own functions but in the process enlighten the electorate so that it can make informed judgments.

Berger, *Executive Privilege: A Reply to Professor Sofaer*, 75 COLUM. L. REV. 602, 620 (1975).