

**DEBATING**

**THE**

**PRESIDENCY**

**CONFLICTING PERSPECTIVES ON THE AMERICAN EXECUTIVE**

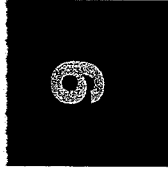
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# RESOLVED, a broad executive privilege is essential to the successful functioning of the presidency

**PRO:** Mark J. Rozell

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The framers of the Constitution created what political scientist Richard E. Neustadt has called a system of “separated institutions sharing powers”—that is, a system in which the president and Congress are distinct branches of government but share in the exercise of nearly all the powers of the federal government. A fault line runs through the framers’ plan, however. What is supposed to happen when Congress or a federal court requests information from the president that the president does not want to disclose? “Separated institutions” seems to imply that the president has the authority to decide what to turn over and what to keep within the executive branch. Indeed, that is the reasoning that sustains the constitutional doctrine of executive privilege. But “sharing powers” seems to imply something different. If the branches must participate jointly in the exercise of the powers of the federal government, then presumably Congress and the courts are entitled to see any executive document they need to exercise their share of power. Cast this way, executive privilege seems a more dubious constitutional doctrine. And the Constitution itself is silent on the matter.

Throughout most of American history, controversies about what executive information Congress and the courts are entitled to see and what the president is entitled to keep from them have been settled through the political process. Some combination of which branch cared more in a particular case and which occupied the political high ground usually determined the outcome of each dispute. But the Watergate crisis that dominated the second term of President

independence.”<sup>33</sup> The prospect of enduring the gauntlet may also discourage potential nominees from engaging in public service.

In light of this recent history, it is hard to conclude that the president has too much power in the selection of judges. If anything, one could argue that the pendulum has swung in the direction of the *Senate* exercising too much power. Both Presidents Bill Clinton and George W. Bush declared a “vacancy crisis” because they believed senators were misusing their power by obstructing the confirmation process for partisan and ideological reasons. That sounds a lot like what some of the framers sought to avoid: a process corrupted by factions and subject to intrigue.

Richard Nixon lent itself to no such solution, especially when it turned out that the president had installed a voice-activated audio-taping system in the White House that probably had recorded conversations in which Nixon and his aides either had (their critics' version) or had not (their own version) plotted criminal activities.

Not surprisingly, the Senate, the House of Representatives, and the federal district court in Washington that was trying a Watergate-related criminal case all insisted that Nixon turn over the tapes. Nixon refused to do so, invoking the doctrine of executive privilege. In 1974 the Supreme Court stepped in, ruling unanimously in the case of *United States v. Nixon* that the president must obey the district court's subpoena. "[A]bsent a claim of need to protect military, diplomatic or sensitive national security secrets," wrote Chief Justice Warren E. Burger, no presidential claim of executive privilege could prevail over "the fundamental demands of due process of law in the fair administration of criminal justice."<sup>1</sup> But that ruling did not mean the doctrine of executive privilege was invalid. Indeed, Burger continued, some form of executive privilege was "fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution." Thus, in the course of rejecting Nixon's claim of executive privilege in that particular case, the Court ruled for the first time that executive privilege had solid constitutional roots.

*United States v. Nixon* hardly settled all the disputes about executive privilege. Left unresolved were the extent of Congress's right to information that the president refused to disclose and the extent of the president's authority to use claims of national security to deny information even to the courts. Because so much about executive privilege is still uncertain, ample room for debate remains between scholars such as Mark J. Rozell, who defends the doctrine, and David Gray Adler, who opposes it.

## PRO: Mark J. Rozell

Controversies over executive privilege date back to the earliest years of the Republic. Although the phrase "executive privilege" was not a part of the nation's common language until the 1950s, almost every president has exercised some form of this presidential power.

Executive privilege is controversial because it is nowhere mentioned in the Constitution. That fact has led some observers to suggest that executive privilege does not exist and that the congressional power of inquiry is absolute. This view is mistaken. Executive privilege is an implied presidential power and is sometimes needed for the proper functioning of the executive branch. Presidents and their staffs must be able to deliberate without fear that their every utterance may be made public.

Granted, the power of executive privilege is not absolute. Like other constitutionally based powers, it is subject to a balancing test. Presidents and their advisers may require confidentiality, but Congress must have access to information from the executive branch to carry out its investigative function. Therefore, any claim of executive privilege must be weighed against Congress's legitimate need for information to carry out its own constitutional role. Yet the power of inquiry is also not absolute, whether it is wielded by Congress or by prosecutors.

Not all presidents have exercised executive privilege judiciously. Some have used it to cover up embarrassing or politically inconvenient information, or even outright wrongdoing. As it is with all other grants of authority, the power to do good things is also the power to do bad things. The only way to avoid the latter is to strip away the authority altogether and thereby eliminate the ability to do the former. Eliminating executive privilege would hamper the ability of presidents to discharge their constitutional duties effectively and to protect the public interest.

## THE NEED FOR CANDID ADVICE

The constitutional duties of presidents require that they be able to consult with advisers without fear that the advice will be made public. If officers of the executive branch believe their confidential advice could be disclosed, the quality of that advice could be seriously damaged. Advisers cannot be completely honest and frank in their discussions if they know that their every word might be disclosed to partisan opponents or to the public. In *United States v. Nixon* (1974), the Supreme Court recognized that the need for candid exchanges is an important basis for executive privilege:

The valid need for protection of communications between high government officials and those who advise and assist them in the performance of their manifold duties . . . is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision-making process. . . . The confidentiality of presidential communications . . . has constitutional underpinnings. . . . The privilege is fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution.<sup>1</sup>

In 1979 the Court reiterated its support of executive privilege based on the need for a candid exchange of opinions among advisers. "Documents shielded by executive privilege," the Court explained, "remain privileged even after the decision to which they pertain may have been effected, since disclosure at any time could inhibit the free flow of advice, including analysis, reports and expression of opinions."<sup>2</sup>

Although Congress needs access to information from the executive branch to carry out its oversight and investigative duties, it does not follow that Congress must have full access to the details of every executive branch communication. Congressional inquiry, like executive privilege, has limits. That is not to suggest that presidents can claim the need for candid advice to restrict any and all information. The president must demonstrate a need for secrecy in order to trump Congress's power of inquiry.

### LIMITS ON CONGRESSIONAL INQUIRY

Congress's power of inquiry, though broad, is not unlimited.<sup>3</sup> A distinction must be drawn between sources of information generally and those necessary to Congress's ability to perform its legislative and investigative functions.<sup>4</sup> There is a strong presumption of validity to a congressional request for information relevant to these investigative functions. The presumption weakens in the case of a congressional "fishing expedition"—a broad, sweeping quest for any and all executive branch information that might be of interest to Congress for one reason or another. Indeed, Congress itself has recognized that there are limits on its power of inquiry. For example, in 1879 the House Judiciary Committee issued a report stating that neither the legislative nor the executive branch had compulsory power over the records of the other. Congress gave the executive branch the statutory authority to withhold information when it enacted the "sources and methods proviso" of the 1947 National Security Act, the implementation provision of the 1949 CIA Act, and the 1966 Freedom of Information Act.

Nevertheless, critics of executive privilege argue that Congress has an absolute, unlimited power to compel disclosure of all executive branch infor-

mation. Rep. John Dingell, D-Mich., for example, said that members of Congress "have the power under the law to receive each and every item in the hands of the government."<sup>5</sup> But this expansive view of congressional inquiry is as wrong as the belief that the president has the unlimited power to withhold all information from Congress. The legitimacy of the congressional power of inquiry does not confer an absolute and unlimited right to all information. The debates at the 1787 Constitutional Convention and at the subsequent ratifying conventions provide little evidence that the framers intended to confer such authority on Congress. There are inherent constitutional limits on the powers of the respective governmental branches. The common standard for legislative inquiry is whether the requested information is vital to the Congress's law-making and oversight functions.

### THE OTHER BRANCHES AND CONFIDENTIALITY

Executive privilege can also be defended on the basis of accepted practices of secrecy in the other branches of government. In the legislative branch, members of Congress receive candid, confidential advice from committee staff and legislative assistants.<sup>6</sup> Meanwhile, congressional committees meet on occasion in closed session to mark up legislation. Congress is not obligated to disclose information to another branch. A court subpoena will not be honored except by a vote of the legislative chamber concerned. Members of Congress enjoy a constitutional form of privilege that absolves them from having to account for certain official behavior, particularly speech, anywhere but in Congress. But as with the executive, this protection does not extend into the realm of criminal conduct.

Secrecy is found as well in the judicial branch. It is difficult to imagine more secretive deliberations than those that take place in Supreme Court conferences. Court observer David M. O'Brien refers to secrecy as one of the "basic institutional norms" of the Supreme Court. "Isolation from the Capitol and the close proximity of the justices' chambers within the Court promote secrecy, to a degree that is remarkable. . . . The norm of secrecy conditions the employment of the justices' staff and has become more important as the number of employees increases."<sup>7</sup> Members of the judiciary claim immunity from having to respond to congressional subpoenas. The norm of judicial privilege also protects judges from having to testify about their professional conduct.

It is thus inconceivable that secrecy, so common to the legislative and judicial branches, would be uniquely excluded from the executive.<sup>8</sup> Indeed, the executive branch regularly engages in activities that are secret in nature. George C. Calhoun explains that the executive branch "presents . . . matters to grand juries; assembles confidential investigative files in criminal matters; compiles

files containing personal information involving such things as census, tax, and veterans information; and health, education and welfare benefits to name a few. All of these activities must, of necessity, generate a considerable amount of confidential information. And personnel in the executive branch . . . necessarily prepare many more confidential memoranda. Finally, they produce a considerable amount of classified information as a result of the activities of the intelligence community.<sup>9</sup>

Legislative, judicial, and executive branch secrecy serves a common purpose: to arrive at policy decisions more prudent than those that would be made through an open process. And in each case, the end result is subject to scrutiny. Indeed, accountability is built into secretive decision-making processes, because elected public officials must justify the end result at some point.

### GIVING EXECUTIVE PRIVILEGE ITS DUE

The dilemma of executive privilege is how to permit governmental secrecy while maintaining accountability. On the surface, the dilemma is a difficult one to resolve: how can democratically elected leaders be held accountable when they are able to deliberate in secret or to make secretive decisions?

The post-Watergate period witnessed a breakdown in the proper exercise of executive privilege. Because of former president Richard Nixon's abuses, Presidents Gerald R. Ford and Jimmy Carter avoided using executive privilege. Ford and Carter still sought to preserve presidential secrecy, but they relied on other constitutional and statutory means to achieve that goal. President Ronald Reagan tried to restore executive privilege as a presidential prerogative, but he ultimately failed when congressional committees threatened administration officials with contempt citations and adopted other retaliatory actions to compel disclosure. President George Bush, like Ford and Carter before him, avoided executive privilege whenever possible and used other strategies to preserve secrecy. President Bill Clinton exercised executive privilege more often than all of the other post-Watergate presidents combined, but often improperly, such as in the investigation into his sexual relationship with White House intern Monica Lewinsky. President George W. Bush has exercised the privilege more sparingly than his predecessor, but he also has exercised this power in some questionable circumstances, such as his attempt to deny Congress access to decades-old Justice Department documents.<sup>10</sup>

Thus in the post-Watergate era either presidents have avoided uttering the words "executive privilege" and have protected secrecy through other sources of authority (Ford, Carter, G. Bush), or they have tried to restore executive privilege and failed (Reagan, Clinton, G. W. Bush). Clinton's aggressive use of executive privilege in the Lewinsky scandal served to revive the national debate

over this presidential power—a debate that continued into the Bush years. It is therefore an appropriate time to discuss how to restore a sense of balance to the executive privilege debate.

First, it needs to be recognized that executive privilege is a legitimate constitutional power—not a "constitutional myth." Consequently, presidents should not be devising schemes for achieving the ends of executive privilege while avoiding any mention of this principle. Furthermore, Congress (and the courts) must recognize that the executive branch—like the legislative and judicial branches—has a legitimate need to deliberate in secret and that every assertion of executive privilege is not a devious attempt to conceal wrongdoing.

Second, executive privilege is not an unlimited, unfettered presidential power. It should be exercised rarely and only for the most compelling reasons. Congress has the right—and often the duty—to challenge presidential assertions of executive privilege.

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

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

Congress possesses many other means by which it can compel presidential compliance with requests for information. One of those is the control Congress maintains over the government's purse strings, which means that it holds formidable power over the executive branch. In addition, Congress often relies on the subpoena power and the contempt of Congress charge to compel release of withheld information. It is not merely the exercise of these powers that matters, but the threat that Congress may resort to such powers. Congress has successfully elicited information from the executive branch using both powers. During the Reagan years, for example, in several executive privilege disputes Congress prevailed and received all the information it had requested from the administration—but only after it subpoenaed documents and threatened to hold certain administration officials in contempt. The Reagan White House simply decided it was not worth the political cost to continue such battles with Congress. In these cases, the system worked as it is supposed to. Had the information in dispute been critical to national security or preserving White House candor, certainly Reagan would have taken a stronger stand to protect the documents.

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

In the vast majority of cases—and history verifies this point—it can be expected that the president will comply with requests for information rather than withstand retaliation from Congress. Presidential history is replete with examples of chief executives who tried to invoke privilege or threatened to do so, only to back down in the face of congressional challenges. If members of Congress believe that the executive privilege power is too formidable, the answer resides not in crippling presidential authority, but in exercising to full effect the vast array of powers already at Congress's disposal.

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## CON: David Gray Adler

**E**xecutive privilege—the claim that a president has the right to withhold information from Congress and the courts—has become a principal tool

in the promotion of executive secrecy and deception. Executive secrecy represents a continual threat to the values and principles of the Republic. Some of the nation's darkest moments have stemmed from a presidential penchant for secrecy: the quagmire of Vietnam, the suppression of the *Pentagon Papers*, Watergate, the Iran-contra scandal, and President George W. Bush's obscuration over the rationale for the invasion of Iraq.

The pernicious effects of executive secrecy have not deterred advocates of executive privilege from asserting its central importance to the president's performance of his constitutional responsibilities, particularly in matters of national security and foreign affairs. Yet advocates of executive privilege have been unable to document instances in which resort to executive privilege has served the interests of the nation. Nor have they been able to document any national disasters that have resulted from executive transmission of information to Congress.

Defenders of executive privilege have urged legal justifications as well, yet there is no mention of executive privilege in the Constitution. Like Topsy in *Uncle Tom's Cabin*, executive privilege “never was born. It just grewed like cabbage and corn.” Even if, for the sake of argument, one were to concede the occasional utility of a claim of executive privilege, that would not establish its constitutionality. As Chief Justice John Marshall wrote in *McCulloch v. Maryland*, “The peculiar circumstances of the moment may render a measure more or less wise, but cannot render it more or less constitutional.”<sup>1</sup>

There are a good many reasons to doubt both the constitutionality and the utility of executive privilege. When the concept of a constitutionally based executive privilege was created by the judiciary in *United States v. Nixon* (1974), it was said to be grounded in the separation of powers.<sup>2</sup> Proponents of executive privilege have also sought its justification in historical precedents. In truth, both of these efforts to establish the legality of executive privilege rest on flimsy scaffolding. Moreover, whatever the legality of executive privilege it is not essential to the success of the presidency and, in fact, poses serious harms to the political system.

## CONSTITUTIONAL CONSIDERATIONS

Questions of presidential authority properly begin with constitutional analysis. Where in the Constitution—in its express provisions or implied derivations—is provision made for executive privilege? Moreover, which of the president's constitutional assignments require resort to claims of executive privilege?

The framers of the Constitution made no provision for executive privilege, which is not surprising because of the framers' deep-seated fear of executive

power. As the historian Charles Warren has pointed out, "Fear of a return of Executive authority like that exercised by the Royal Governors or by the King had been ever present in the states from the beginning of the Revolution."<sup>3</sup> The founders assumed, as James Iredell stated at the North Carolina ratification convention, that "nothing is more fallible than human judgment."<sup>4</sup> And so it was a cardinal principle of republicanism that the conjoined wisdom of the many was superior to the judgment of one. Accordingly, the founders embraced the doctrine of checks and balances as a check on executive unilateralism. In foreign affairs, too, the founders insisted on a structure of shared powers. For, as even Alexander Hamilton agreed, "The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a President of the United States."<sup>5</sup>

The framers showed no sympathy for the notion of executive privilege. Speaking at the Pennsylvania ratifying convention, James Wilson, the delegate from Pennsylvania who was second in importance only to James Madison of Virginia as an architect of the Constitution, defended the Constitutional Convention's decision to establish a single presidency rather than a plural presidency. "Executive power," he explained, "is better to be trusted when it has no screen." Wilson noted the visibility and accountability of the president: "he cannot act improperly, and hide either his negligence or inattention," and although he possesses sufficient power, "not a *single privilege* is annexed to his character; far from being above the laws, he is amenable to them in his private character as a citizen, and in his public character by impeachment."<sup>6</sup> The president was to be bound by the strictures of the Constitution, made amenable to the laws and the judicial process, and barred from hiding his activities. The framers' understanding, as Madison put it, that the executive power should be "confined and defined" affords no ground for the view that executive privilege was regarded as an attribute of executive power that might be advanced to conceal the president's "negligence or inattention."<sup>7</sup>

The delegates' refusal to grant the president the authority to conceal information from Congress reflected more than just a generalized distrust of executive power. That decision also reflected the framers' belief that Congress, like the British Parliament, would need on occasion to pursue investigations as a prelude to impeachment. Wilson was one of many delegates to trumpet the role of the House of Commons as the "Grand Inquest of the Nation," which, he declared, has "checked the progress of arbitrary power. . . . The proudest ministers of the proudest monarchs . . . have appeared at the bar of the house to give an account of their conduct."<sup>8</sup> In addition, the framers acted out of a belief

that the powers vested in Congress—including its general oversight authority to supervise the enforcement of its laws and the implementation of its appropriations, as well as its broad informing function—required legislative access to information possessed by the executive.

The lone provision of the Constitution that addresses secrecy vests in Congress, not the president, the authority to conceal information from the public. Article I, Section 5, requires both houses of Congress to keep and publish journals, except "such parts as may in their judgment require secrecy." This provision proved divisive in the Constitutional Convention and in the state ratifying conventions. Wilson was one of those who objected. "The people," he insisted, "have a right to know what their Agents are doing or have done, and it should not lie in the option of the Legislature to conceal their proceedings." The framers preferred publicity over secrecy, and they understood that information and knowledge were critical to the preservation of liberty and the enterprise of self-governance.<sup>9</sup>

In summary, neither the Constitutional Convention debates—in which the idea of executive privilege was never discussed—nor the text of the Constitution supports the notion that the founders intended to bestow upon the president the power to conceal information from Congress. Nor at the time of the framing was there either an inherent or implied executive power to conceal information from legislative inquiry. The framers knew how to grant power, confer immunities, and create exceptions to power, but there is no evidence to support the contention that they ascribed to the president an implied power to undercut the investigatory power of Congress.<sup>10</sup>

In *United States v. Nixon*, the Supreme Court ignored the text and the architecture of the Constitution in creating the doctrine of a constitutionally based executive privilege. The Court, in an opinion written by Chief Justice Warren E. Burger, held that "a presumptive privilege for confidential communications . . . is fundamental to the operation of government and inextricably rooted in the separation of powers" and that "to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based."<sup>11</sup> The Court's employment of a mere *ipse dixit* served to elevate executive privilege to the constitutional level for the first time. Before that ruling, executive privilege had been known only as an "evidentiary" or "presumptive" privilege—that is, one similar to the lawyer-client or doctor-patient relationship that must yield to the showing of a greater public need.

The Court's effort to ground executive privilege in the separation of powers is unpersuasive. Separation of powers does not create or grant power; rather, it constitutes a rough division of authority that serves to preserve the Constitution's enumeration of powers against acts of usurpation. The Court's claim that executive privilege is "inextricably rooted in the separation of

powers" would have astonished Chief Justice Marshall, who faced the question of a presidential privilege to withhold information from the courts in 1807 in the treason trial of Aaron Burr.<sup>12</sup> Burr had requested from President Thomas Jefferson a letter written to him by Gen. James Wilkinson. Jefferson's attorney, George Hay, offered to submit the letter to Marshall, "excepting such parts thereof as are, in my opinion, not material for the purposes of justice, for the defense of the accused, or pertinent to the issue. . . . The accuracy of this opinion, I am willing to refer to the judgment of the Court, by submitting the original letter for its inspection."<sup>13</sup> When Jefferson submitted the letter, with certain deletions, he did not assert a right to withhold information from the court; indeed, he made no challenge to the authority of the court to demand from the president materials relevant to the trial.

Marshall said nothing at all about an executive privilege "rooted" in the separation of powers. The chief justice approached the question of a presidential power to withhold information as an evidentiary privilege, not as a constitutional power. To acknowledge a constitutionally based privilege would acknowledge the president's authority to draw the line and determine issues of disclosure. But Marshall made it clear that he, not the president, would determine the measure of a president's authority to withhold material from the Court.

No historical materials, English or American, would have given the framers an understanding of executive power that included the authority to conceal information from a legislative inquiry. The framers largely drew their understanding of separation of powers from Baron de Montesquieu, who found no grounds in separation of powers for an executive to resist a legislative inquiry. The legislature, Montesquieu wrote, "has a right, and ought to have the means, of examining in what manner its laws have been executed." That right is an attribute of the English system, unlike others, he noted, in which government officers give "no account of their administration."<sup>14</sup> In short, for the framers the separation of powers did not imply an executive right to withhold information from the legislature. On the contrary, it entailed a strong belief that the legislature had a right to demand from the executive the information it deemed relevant to its inquiries.

The effort to ground executive privilege in the original understanding of separation of powers fails to withstand historical scrutiny. The case for executive privilege fares no better when early precedents are considered.

## PRECEDENTS

Political scientist Mark J. Rozell has contended that "President George Washington's actions established precedents for the exercise of what is now known as executive privilege."<sup>15</sup> This contention rests on the slender reed of

Washington's response to a House investigation in 1792 into the disastrous military campaign of Gen. Arthur St. Clair against the Indians. The House had appointed a committee to investigate the "causes of the failure" of the campaign and had vested in it the authority to call for persons and papers to assist its investigation. For his part, Washington recognized the authority of Congress to conduct an inquiry into the conduct of an executive officer, which reflected the historic practice of parliamentary inquiries into executive actions. As president, he cooperated completely.

The assertion that Washington claimed executive privilege is drawn not so much from anything he said or did, but rests, rather, on an excerpt from Secretary of State Jefferson's notes of a cabinet meeting. Jefferson wrote that the cabinet had agreed that the "house was an inquest, and therefore might institute inquiries," but determined that the president had discretion to refuse papers, "the disclosure of which would injure the public."<sup>16</sup> There is no reason to doubt the accuracy of Jefferson's notes, but little precedential value can be gleaned from this episode. First, Washington complied with the committee's demand and supplied all materials and documents relevant to the failed expedition. He offered no separation of powers objection. Second, there is no evidence that Jefferson's notes were presented to Congress or filed with the government. In short, they formed no part of the official record; there was no assertion to Congress of an executive privilege and no statement or declaration of an executive power to withhold information from Congress. Finally, the incident's precedential value is vitiated by the fact that neither Washington nor Jefferson ever invoked the St. Clair "precedent" in subsequent episodes that allegedly involved their respective claims to executive privilege.

The early years of the Republic reflect widespread understanding of Congress's right to demand information relevant to the exercise of its constitutional powers and responsibilities. President Washington freely supplied information to Congress pursuant to investigations of the St. Clair disaster and accusations of impropriety brought against Secretary of the Treasury Alexander Hamilton.<sup>17</sup> He refused demands from the House for information relative to the Jay Treaty, but not for reasons of executive privilege. Rather, he withheld the requested materials on grounds that the House has no part of the treaty power.<sup>18</sup> During Washington's tenure, the question was not executive concealment from Congress, but disclosure to the public. As a consequence, as political scientist Daniel N. Hoffman has shown, information was supplied to Congress, "some on a public and some on a confidential basis."<sup>19</sup> On some occasions, Congress disclosed information to the public; on others, Congress persuaded the executive to disclose information to the public. It was able to do so because Article I, Section 5, of the Constitution grants to Congress the exclusive authority to withhold information from the citizenry. At all events,

what emerged from this early period was not a record of constitutionally based claims to executive privilege, but rather an institutional practice of comity between the president and Congress.<sup>20</sup>

## EXECUTIVE PRIVILEGE AND A SUCCESSFUL PRESIDENCY

In *United States v. Nixon*, the Court declared that executive privilege is "constitutionally based" if it "relates to the effective discharge of a President's powers." This test begs the question: which of the president's constitutional powers requires resort to concealment of information from Congress in the pursuit of a successful presidency? None. The primary purpose animating the invention of the presidency was to create an executive to enforce the laws and policies of Congress.<sup>21</sup> And although the "Imperial Presidency" has soared beyond the constitutional design, it remains true that the constitutional powers and roles assigned to the president do not require the use of executive privilege.<sup>22</sup> The president's constitutional duty to faithfully execute the laws requires no resort to executive privilege; indeed, it was President Nixon's resort to executive privilege that obscured his failure to faithfully enforce the laws. Moreover, the exercise of the pardon and veto powers are subject to close scrutiny and demand accountability and explanation—hardly criteria for concealment. The appointment power—a shared power, it bears reminding—cannot be carried out unless the president and the Senate cooperate, a dynamic that precludes the claim of executive privilege. In none of these areas do presidents need executive privilege to successfully carry out their constitutional duties.

The argument for executive privilege in foreign policy and national security, a favorite among extollers of a strong presidency, shatters upon close analysis. The argument assumes that executive unilateralism in foreign affairs and war making is constitutionally based. It is not. The constitutional governance of American foreign policy reflects the framers' commitment to collective decision making and their fear of executive unilateralism. As a consequence, the Constitution grants to Congress the lion's share of the nation's foreign policy powers; the president's powers pale in comparison, and they require no resort to an executive privilege.<sup>23</sup> The president is commander in chief of the nation's armed forces, but in this role the president is accountable to Congress and thus possesses no authority to withhold information from it. The president is assigned the duty of receiving ambassadors from other countries, but the framers viewed the performance of this duty as a routine, administrative function, exercised in most other countries by a ceremonial head of state. The lack of discretionary or policy-making authority in this duty precludes any presidential need to conceal information from Congress.<sup>24</sup> Finally,

in partnership with the Senate the president appoints ambassadors and makes treaties. Because neither power can be effectuated without the consent of both parties, the claim of privilege would defy not only the text and structure of the Constitution, but also the values, policy concerns, and logic that undergird the partnership.

Nothing in the creation of the commander in chief clause justifies presidential concealment of information from Congress. The war clause vests in Congress the sole and exclusive authority to initiate military hostilities, large or small, on behalf of the American people.<sup>25</sup> In his role as commander in chief, the president conducts war, as Hamilton explained at the Constitutional Convention, "once war is authorized or begun."<sup>26</sup> In the capacity of "first General or Admiral," the president conducts the military campaign, but the president remains accountable to congressional supervision. As Madison explained, Congress has the sole authority to determine whether "a war ought to be commenced, continued or concluded."<sup>27</sup> As a consequence, Congress is entitled to complete information about the status of military activities, a need that prohibits resort to executive concealments. At bottom, no theory of executive privilege can be adduced to subvert the express grant of the war power to Congress.<sup>28</sup>

It is folly as well to assert a presidential privilege to conceal information from the Senate in matters relevant to treaty making, because the Constitution conceives the treaty power as the joint province of the president and the Senate.<sup>29</sup> Under the Constitution, treaties require the advice and consent of the Senate, an arrangement that urges consultation and cooperation and renders concealment unwise and ineffacious. In *Federalist* No. 64, John Jay of New York conveyed his understanding that negotiations with those who desired to "rely on the secrecy of the President" might arise, but he emphasized that such secrecy applied to "those preparatory and auxiliary measures which are not otherwise important in a national view, than as they tend to facilitate the attainment of the objects of the negotiations."<sup>30</sup> The president may "initiate" the negotiations, which require secrecy, but the framers anticipated that the Senate would, consistent with the meaning of "advise," participate equally with the president throughout the negotiation of treaties.<sup>31</sup>

In summary, the constitutional design for foreign affairs provides no basis for the assertion of a presidential power to withhold information from Congress. Rather, the Constitution reflects the understanding that Congress possesses in the realm of foreign policy the same interests, powers, and responsibilities that it has in domestic matters: an informing function, an interest in knowing how its laws and policies have been executed, a responsibility to determine that its appropriations have been effectuated, as well as a general oversight function and the power of inquiry, as prelude to impeachment.

**CONCLUSION**

Little or no evidence exists to suggest that resort to executive privilege has served the national interest. Of course, the president's interests may differ from the nation's. In that event, executive concealment may be a viable option, as it was for Richard Nixon, but it is unlikely to be worthy of emulation and likely to inflict harm on the Republic. Mark Rozell has suggested that the competitive political process will provide a sufficient safeguard against the abuse of executive privilege. That is doubtful. American history has richly affirmed the framers' understanding that the integrity of government officials will not afford a sufficient bulwark against the abuse of power. That is why the founders wrote a constitution, and it is safe to say that trust in government officials was not an animating force behind the Constitutional Convention. Convention delegates did not fail to address the issue of secrecy; rather, they chose not to clothe the president with authority to withhold information from Congress. Nothing in law or history suggested to them the wisdom of an executive power to conceal information from Congress. Nothing since—either in law or in history—has offered persuasive evidence that the framers were mistaken.

**RESOLVED, a president's cabinet members should have a larger role in the formation of public policy**

**PRO:** Andrew Rudalevige

**CON:** Matthew J. Dickinson

The term *cabinet* reveals the nation's British roots. Advisers to the king were designated the "Cabinet Council" as far back as the 1620s. What began in Great Britain as an advisory institution evolved in the late eighteenth and nineteenth centuries into the modern British cabinet, a collective body that fuses legislative and executive powers and personnel. Each member of the cabinet is also a member of Parliament. Selected by the prime minister, the cabinet is accountable to Parliament for its policies. Each cabinet member takes individual responsibility for the acts of his or her department and shares a collective responsibility with the other cabinet members for government actions of great importance. That, at least, is the theory of "cabinet government."

Americans adopted the British terminology of the *cabinet*, but by separating the executive from the legislature (specifically by forbidding members of Congress to hold executive office simultaneously) the framers ensured that the United States would not follow the British model of cabinet government. What the American cabinet did resemble was the older British model of advisory councils. Every colonial government and nearly all of the new state constitutions adopted after the American Revolution included provisions for a council to advise the governor. Under most of these early constitutions, the governor could not act without first receiving advice from the council. In Virginia, for example, the executive council, which was selected by the legislature, was required to keep a written and signed record of its advice, which the legislature could ask to see whenever it wished. The framers of the U.S. Constitution