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EXECUTIVE PRIVILEGE: A REVIEW OF BERGER†

R. H. CLARK*

RAOUL BERGER HAS ONCE AGAIN placed within a solidly professional framework an issue of considerable public interest and debate. As was the case with impeachment,¹ Berger's scholarly study on executive privilege brings to the controversy surrounding the issue a much needed analytical construct and massing of evidence which can only result in a greater level of general understanding. Although it is not accurate to suggest that Berger is neutral on the topic, since he published a significant study as far back as 1965 attacking the concept,² his method of massing every conceivable argument and piece of evidence on both sides of the issue makes this work the most valuable treatment of executive privilege available. As was the case with his previous volumes, the framework of analysis employed by Berger stresses extensive historical study of both English and American sources. This, in turn, is combined with an effective and detailed dissection of the legal bases for presidential power and with a complete examination of the origins, growth and dimensions of executive privilege. While this reviewer disagrees with the central position that Berger asserts, namely that executive privilege is a myth, this disagreement in no way should be interpreted as seeking to deride this monument to scholarly research and analysis that Berger has produced.

One of the most surprising aspects of executive privilege is how recently the doctrine has become significant. In fact, the term itself, Berger relates, was only coined in 1958.³ The major impetus that raised the concept to a position of importance was the abusive use of the congressional investigatory power manifested during the tragic efforts to search out and expose the "Communist conspiracy" during the late 1940's and early 1950's.⁴ Particularly significant were the unrestrained uses to

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† EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH. By RAOUL BERGER. *Harvard University Press*, Cambridge, Mass. 1974. Pp. 425.

¹ See his significant study, R. BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* (1973). This reviewer's analysis of the volume can be found at Clark, Book Review, 35 OHIO ST. L.J. 92 (1974).

² Berger, *Executive Privilege v. Congressional Inquiry*, 12 U.C.L.A. L. REV. 1043, 1287 (1965).

³ R. BERGER, *EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH* 1 (1974) [hereinafter cited as BERGER]. The reviewer has, however, found the term used as early as 1955. See T. TAYLOR, *GRAND INQUEST: THE STORY OF CONGRESSIONAL INVESTIGATIONS* 97 (1955).

⁴ One of the principal perpetrators of this "exposure for exposure's sake" strategy was the House Committee on UnAmerican Activities. See generally W. GOODMAN, *THE COMMITTEE* (1968).

which the late Senator Joseph McCarthy put the investigative power in his never ending quest for publicity. President Eisenhower turned to the doctrine of executive privilege in order to safeguard the innermost workings of the executive branch from this boundless congressional probing. As a result, the doctrine became strongly entrenched as a recourse for Presidents long after the threat of McCarthyist investigations had passed. Congressional investigations emerged from this period with a permanent badge of suspicion in the eyes of the public; this legacy of distrust has been frequently exploited by Presidents seeking to justify their unwillingness to disclose requested information.⁵ Since the 1950's the doctrine, which previously had been asserted only sporadically, became notable for its frequent invocation.⁶ This trend reached its ultimate limits during the Presidency of Richard M. Nixon, where it was asserted that the President had virtually unchecked discretion to block disclosure of any information related to the executive branch which the President believed contrary to the public interest.⁷

Berger devotes an early chapter to outlining the origins and justifications for a largely unrestrained congressional power to investigate executive conduct. First, he traces English Parliamentary history which clearly establishes that a broad power to investigate existed as early as 1621. At this stage, the authority to investigate was closely tied to the power of impeachment. Close scrutiny of historical sources indicates that investigations into the Crown's conduct of war, the expenditure of public funds, execution of the laws, and investigations as an adjunct to framing legislation were firmly established. There was certainly no apparent exceptions made for foreign affairs. The central purpose of these early investigations was to insure the accountability of the executive. Berger

⁵ One book that has done much to perpetuate this distrust of congressional investigations is A. BARTH, *GOVERNMENT BY INVESTIGATION* (1955).

⁶ The historical evolution of the doctrine of executive privilege is found in Wolkinson, *Demands of Congressional Committees for Executive Papers*, 10 FED. BAR J. 103, 223, 319 (1949) [hereinafter cited as Wolkinson], covering the period through 1948; MEMORANDUMS OF THE ATTORNEY GENERAL ON THE POWER OF THE PRESIDENT TO WITHHOLD INFORMATION FROM CONGRESS BEFORE THE SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS OF THE SENATE COMMITTEE ON THE JUDICIARY, 85th Cong., 2d Sess. 83-166 (1959), dealing with the period between 1948-1953; Kramer & Marcuse, *Executive Privilege—A Study of the Period 1953-1960*, 29 GEO. WASH. L. REV. 623, 827, 892 (1961) [hereinafter cited as Kramer & Marcuse]. Two sets of recent Senate hearings contain complete data relative to the latest invocations of executive privilege. See *Hearings on Executive Privilege: The Withholding of Information by the Executive Before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary*, 92d Cong., 1st Sess. 310-314, 543-551, 629-636 (1971) [hereinafter cited as *1971 Hearings*]; *Hearings on Executive Privilege, Secrecy in Government, Freedom of Information Before the Subcommittee on Intergovernmental Relations of the Senate Committee on Governmental Operations and the Subcommittees on Separation of Powers and Administrative Practice and Procedure of the Senate Committee of the Judiciary*, 93d Cong., 1st Sess. 219-228, 229-259 (1973) [hereinafter cited as *1973 Hearings*].

⁷ See BERGER, *supra* note 3, at 254-255. See also A. C. BRECKENRIDGE, *THE EXECUTIVE PRIVILEGE: PRESIDENTIAL CONTROL OVER INFORMATION* 143-150 (1974) [hereinafter cited as BRECKENRIDGE].

concludes that there were no executive limits placed on the power of legislative investigation, resulting in a "virtually untrammelled" power of inquiry. While some question has been raised as to the value of such precedents in defining Congress' legislative power, since the Parliament was in part a judicial as well as legislative body,⁸ C. S. Potts seemed to have resolved the issue by demonstrating that the House of Commons was "fundamentally and essentially a legislative, and not a judicial body."⁹

Berger moves on to an examination of colonial and early state materials bearing upon legislative investigation. Although there was no role for impeachment during the colonial period when governors were chosen by royal appointment, there was nevertheless no shortage of investigations into the administration of the government or general matters of legislative concern.¹⁰ When the revolution broke out and the new state constitutions were drafted, the previous colonial obstruction to impeachment was removed. Each lower house in all the new states was vested with the power of impeachment and, by inference, with the authority to investigate the conduct of government.¹¹ The Continental Congress itself provided, in creating a department of foreign affairs, that a member of Congress could have access to any papers of that office, with even secret documents being available for examination upon special leave of Congress.

Berger devotes meticulous attention to the constitutional convention and the first Congress, where impeachment was carried over in its full dimensions. Decidedly the drafters wanted to make the President and his subordinates accountable to Congress for the conduct of their offices. Free flow of information to Congress was further encouraged by the mandatory provision for the state of the union address. The first Congress, peopled with many of those who had participated in the drafting of the Constitution, specified that the treasury department should provide any information upon request of Congress without mention of any executive discretion to withhold documents. This early recognition of unhindered investigative power seems borne out by the history of such congressional investigations throughout the next century. While there are occasional refusals to provide information, the overwhelming pattern was congressional seeking and securing of all information desired.¹² The necessity for

⁸ See *Kilbourn v. Thompson*, 103 U.S. 168, 183-185 (1880). On this case, see generally Morgan, *Congressional Investigations and Judicial Review: Kilbourn v. Thompson Revisited*, 37 CALIF. L. REV. 556 (1949).

⁹ Potts, *Power of Legislative Bodies to Punish for Contempt*, 74 U. PA. L. REV. 691, 696 (1926).

¹⁰ Potts reaches similar conclusions based upon his investigations. *Id.* at 708.

¹¹ See the significant research undertaken by Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 HARV. L. REV. 153, 167-168 (1926). Landis states that prior to 1880, no state decision curtailed or even limited state legislative investigative power.

¹² This is clearly the conclusion of Landis after an exhaustive study that covered the

Congress to have unlimited access to information essential for the making of new laws, for the evaluation of existing statutes, for the appropriation of funds, and for the insurance of administrative and executive accountability, was almost universally recognized.¹³

If there seems to be such widespread recognition of the legitimacy of and necessity for congressional investigations, why then has there evolved something called "executive privilege"? The answer lies in the nature of the separation of powers structure created by the Constitution.¹⁴ As Breckenridge has asserted: "The executive power resides in *the* president and is not subordinate to the legislative power vested in Congress."¹⁵ In short, Congress cannot utilize its power to investigate in such a fashion as will diminish the President's abilities to discharge his own constitutional obligations. The acceptance of this proposition demands a demonstration that the President has certain exclusive constitutional powers which will not tolerate legislative interference. The usual powers said to belong in this category are the "executive power," the power as commander-in-chief, and the exclusive executive power over foreign relations. Berger devotes individual chapters to each of these powers with the purpose of showing that far from being the exclusive preserve of the Presidency, they in fact involve a sharing of power with Congress. As a result, Congress then has every justification in seeking information relative to their discharge. In addition to this, it seems evident to this reviewer that Berger also has the unstated goal of seeking to cut the modern presidency down to size by refuting three of the major legal supports instrumental in the evolution of today's potent presidential office.

In dealing with each of these three elements of presidential power, Berger's methodology is identical. Relying upon exhaustive analysis of historical materials, he seeks to demonstrate that the constitutional dimensions of each executive power have been expanded beyond the original intent of the framers. Consequently, the "executive power"

period through 1924. See also Stamps, *The Power of Congress to Inquire and Punish for Contempt*, 4 BAYLOR L. REV. 29, 39-40 (1951).

¹³ See generally E. EBERLING, CONGRESSIONAL INVESTIGATIONS (1928) [hereinafter cited as EBERLING]; M. DIMOCK, CONGRESSIONAL INVESTIGATING COMMITTEES (1929); M. N. MCGEARY, THE DEVELOPMENT OF CONGRESSIONAL INVESTIGATIVE POWER (1940) [hereinafter cited as MCGEARY]; Galloway, *The Investigative Function of Congress*, 21 AMER. POL. SCI. REV. 47, 49-50 (1927). Interestingly enough, Eberling still asserts that the President is justified in resisting any demand for information he considers incompatible with the public interest, EBERLING, *supra*, at 282, while McGeary considers the issue to be "an open question," MCGEARY, *supra*, at 103-04.

¹⁴ For effective analysis of the separation of powers concept see R. SCIGLIANO, THE SUPREME COURT AND THE PRESIDENCY 1-22 (1971); A. VANDERBILT, THE DOCTRINE OF THE SEPARATION OF POWERS AND ITS PRESENT-DAY SIGNIFICANCE (1963); Sharp, *The Classical American Doctrine of "The Separation of Powers,"* 2 CHI. L. REV. 385 (1935).

¹⁵ BRECKENRIDGE, *supra* note 7, at 24 (1974). See also Younger, *Congressional Investigations and Executive Secrecy: A Study in the Separation of Powers*, 20 U. PITT. L. REV. 755, 771 (1959).

clause¹⁶ is not a grant of ill-defined presidential authority meant to expand over time, but rather it is limited to the precise elements (commander-in-chief, veto, power to negotiate treaties, etc.) specified in section 2 of Article II. Berger asserts that the framers were so terrified of unbridled executive power that they certainly would not have inserted such a blank check into an otherwise precise delineation of executive power. There simply are no inherent presidential powers.

Relative to the commander-in-chief clause, Berger concludes that the President is merely to direct troops in response to congressional policy, with the only exception being the ability to repel sudden and immediate attacks upon the United States itself. The powers granted to Congress in terms of declaring war, raising and governing armies, and appropriating money all indicate shared responsibility. Hence, Berger concludes that Lincoln's creation of the "war power," by merging the commander-in-chief clause with the requirement that the President "take care that the laws be faithfully executed," was illegitimate.

Finally, in reference to presidential power in foreign relations, it is asserted that the President was not meant to be the "exclusive organ" of the nation. The executive was only to negotiate agreements which required ultimate Senate approval.¹⁷ The President's authority was not designed to be monopolistic, thus the entire evolution of executive agreements is, aside from those implementing express policy from Congress, constitutionally incorrect.

It is at this point that Berger's attack upon executive privilege begins to falter. Has Berger adequately explained the growth of presidential power by demonstrating that the office has evolved over several centuries and grown in response to the demands placed upon it? In answering, consideration must be given to whether Berger's interpretation of the available historical materials is as "air-tight" as he would lead us to believe.

Berger's basic premise is that such intense suspicion of executive power existed after the revolution that the Presidency was meant to be carefully hedged in, relative to its powers, with no potential for expansion beyond the express components found in the Constitution. Strangely, Berger seems to have forgotten some of his own previous historical analysis. In 1969, he wrote that "in 1787 there was widespread fear of oppression by a remote federal government, centered largely in dread of 'legislative despotism.'"¹⁸ In that earlier book, Berger correctly related how the activities of the tyrannical state legislatures (particularly in

¹⁶ "The executive power shall be vested in a President of the United States of America," U.S. CONST. art. II, § 1.

¹⁷ Berger meticulously analyzes and rejects the reasoning in the key decision of *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). In addition, his analysis of the executive agreement doctrine contributes a valuable perspective to the sparse literature on this topic. BERGER, *supra* note 3, at 140-62.

¹⁸ R. BERGER, *CONGRESS V. THE SUPREME COURT* 8 (1969).

reference to their populist attacks upon property rights) had made the framers determined to keep congressional power within precise limits, and one device designed to accomplish this was a strong President.¹⁹

Pertaining to the executive power clause, there is considerable disagreement. Charles Warren, while agreeing in part with Berger that the authority was to be limited to the specific powers stated in section 2, goes beyond Berger's position by adding "or as might be implied from each such specific power."²⁰ Another definitive work on the creation of the Presidency concludes that it cannot be definitely settled as to whether the intent was to expressly hold the Presidency to those powers stated in the original draft of the clause.²¹ But the final version which emerged from a committee on style dominated by pro-executive power advocate Gouverneur Morris, was clearly unlike the legislative and judicial articles in simply vesting the "executive power" without any specification of its components. This was probably deliberately done in the hope of encouraging the future growth of executive power.²² The definitive Library of Congress annotated Constitution further supports the expansive concept of Presidential power.²³ This interpretation of the clause also seems consistent with the manner of draftsmanship used throughout the Constitution: "a general proposition followed by an incomplete enumeration of particulars, or things which, arguably, are particulars, included within the antecedent general expression."²⁴ But what many writers find most significant is the long line of definitive Supreme Court decisions which have so augmented Presidential powers.²⁵

¹⁹ *Id.* at 11. The abuses of state legislative power are effectively discussed in J. FISKE, *THE CRITICAL PERIOD IN AMERICAN HISTORY* 200-220 (1902).

²⁰ C. WARREN, *THE MAKING OF THE CONSTITUTION* 526 (1967).

²¹ C. THATCH, *THE CREATION OF THE PRESIDENCY* 117-118 (1922).

²² *Id.* at 138. It is surprising that Berger makes no reference to Thatch's significant volume in his bibliography.

²³ The difficulty of a complete enumeration of all the cases of executive authority, would naturally dictate the use of general terms, and would render it improbable that a specification of certain particulars was designed as a substitute for those terms, when antecedently used. The different mode of expression employed in the constitution, in regard to the two powers, the legislative and the executive, serves to confirm this inference. *THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION* 427 (N. Small ed. 1964).

²⁴ W. W. CROSSKEY, *I POLITICS AND THE CONSTITUTION* 379 (1953) [hereinafter cited as *CROSSKEY*]. This writer is indebted to C. H. PRITCHETT, *THE AMERICAN CONSTITUTION* 334 (2d ed. 1968) [hereinafter cited as *PRITCHETT*], for suggesting the above reference by Crosskey.

²⁵ See generally G. SCHUBERT, *THE PRESIDENCY IN THE COURTS* (1957); E. S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* (4th ed. 1957) [hereinafter cited as *CORWIN*]. Relative to military leadership see C. ROSSITER, *THE SUPREME COURT AND THE COMMANDER IN CHIEF* (1951). On foreign policy, consult L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 37-65 (1972). The major exception to this tendency of broad augmentation of presidential powers is found in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). But this unique decision does not refute the correctness of the general expansive reading of executive power. "What the decision did hold was that the inherent power of seizure which the President might otherwise have possessed had been eliminated in this situation when Congress decided not to include seizure authority in the Taft-Hartley Act." *PRITCHETT* at 341. See also on the case A. WESTIN, *THE ANATOMY OF A CONSTITUTIONAL LAW CASE* (1958).

Even if Berger's interpretation of constitutional history were correct, would this settle the issue? The answer seems to hinge upon one's theory of constitutional construction. "I am," Berger related in Senate testimony, "an adherent of the historical meaning of constitutional terms . . . I prefer to see the intention of the Founding Fathers."²⁶ That is, what the framers intended to mean by certain terms should forever determine their subsequent content. This philosophy of historical intent was significantly employed in the massive 1952 study published by W. W. Crosskey.²⁷ His 1200 pages of analysis were devoted to demonstrating the correct meanings to be applied to basic constitutional terms ("commerce," "in pursuance thereof," "executive power") in light of their meanings in 1787. Crosskey argued that much subsequent interpretation had gone astray because of ignorance of what key constitutional phrases meant to the drafters.

Berger seems to be of the same school. Yet such a theory ignores the reality of constitutional language and intent. While it is perfectly correct to maintain such a position for certain provisions of the document, Berger's own massive research into impeachment well demonstrating this, other clauses of the Constitution are of a different nature. It has been argued that there is a "two-clause" theory of interpretation. "A two-clause theory states that there are two distinct groups of constitutional clauses, one immutable and not subject to judicial construction, the other subject to change over time through judicial interpretation."²⁸ While there is no definitive theory of how one can distinguish one type of clause from another, it seems logical that in applying either the "textual approach" (looking at the language of the text itself) or the "open-ended intent" theory (did the framers themselves want a provision to develop and expand), such a clause as "the executive power" clause certainly does not suggest the fastening of a precise and permanent meaning. One need only recall Chief Justice Marshall's famous injunction prescribing the necessity for broad construction²⁹ to add further doubt to the legitimacy of Berger's theory of constrained interpretation. The Supreme Court has persistently chosen to follow an approach requiring a broad construction when interpreting Presidential power.³⁰

²⁶ 1971 *Hearings*, *supra* note 6, at 301.

²⁷ See CROSSKEY, *supra* note 24, at 3-14. Surprisingly enough, Crosskey, using the same method of analysis, comes to the conclusion opposite of Berger's. The President has "possession of general executive authority." CROSSKEY, *supra* note 24, at 379. As does Corwin, Crosskey points to the power granted by the first Congress to the President in 1789 providing the authority for removal of executive officials (which was not expressly granted) as indicating the correctness of this interpretation. See CORWIN, *supra* note 25, at 16-17; PRITCHETT, *supra* note 24, at 334.

²⁸ C. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* 162 (1969).

²⁹ "... a constitution intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819).

³⁰ This of course does not mean that history is of no value in constitutional construction.

History thus provides enlightenment. Indeed, the Court frequently says that it

One of the most persistent arguments put forward by those supporting executive privilege is past precedent.³¹ The most frequently cited source of such precedents is found in a 1957 memorandum prepared by then Deputy Attorney General William P. Rogers.³² Berger devotes one chapter to an effort to repudiate the precedent value of some of these instances. Berger discusses only a handful of these purported precedents, preferring to concentrate his analysis on the incidents occurring before the Civil War. In so doing he is really attempting to discredit the two key propositions announced at the beginning of the Rogers memo. Those propositions are: first, that a persistent line of precedents exists over 150 years, demonstrating the widespread acceptance of the practice; and second, that the courts have uniformly upheld such power on the part of the President and his subordinates.³³ While Berger and others have demonstrated that both of these propositions are palpably incorrect,³⁴ it is, nevertheless, beyond doubt that consistently throughout American history Presidents have asserted the power and have been successful in their assertion. This has resulted for a number of reasons: in almost every case Congress has gotten what it asked for; Congress has avoided any court test (until the recent Watergate committee) seeking to force the Executive to produce certain documents, and Congress' ample powers over appropriations, confirmation of appointments, and so forth, have generally been effectively utilized to compel action on the part of recalcitrant executives. Nonetheless, Congress' unwillingness to initiate a court test of its power, and its preference for seeking a "political" solution, have promoted the successful assertion of executive privilege.

Berger employs several techniques in examining the precedents which he discusses. The primary tactic is to demonstrate, through his superb skills of historical analysis, that key precedents have turned on facts other than those cited by the supporters of executive privilege (e.g., the

reads the provisions of the Constitution "in the light of" history. The image of light suggests most clearly how history should be used. It is neither prologue on the one hand, nor director of the drama on the other; rather, history is a spotlight, always available to illumine, but not to blind. History does not provide the answers to the problems of today; it merely helps to frame the questions.

Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. CHI. L. REV. 502, 552-553 (1964). See also Wyzanski, *History and Law*, 26 U. CHI. L. REV. 237 (1959).

³¹ See generally sources cited in note 6, *supra*. For an example of this argument see Note, *The Power of the Executive to Withhold Information from Congressional Investigating Committees*, 43 GEO. L.J. 643, 646-653 (1955).

³² MEMORANDUMS OF THE ATTORNEY GENERAL ON THE POWER OF THE PRESIDENT TO WITHHOLD INFORMATION FROM CONGRESS BEFORE THE SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS OF THE SENATE COMMITTEE ON THE JUDICIARY, 85th Cong., 2d Sess. 942 (1958) [hereinafter cited as ROGER'S MEMO]. See also Rogers, *Constitutional Law: The Papers of the Executive Branch*, 44 A.B.A.J. 941 (1958); Wolkinson, *supra* note 6. But see response by Schwartz, *A Reply to Mr. Rogers: The Papers of the Executive Branch*, 45 A.B.A.J. 467 (1959).

³³ ROGER'S MEMO, *supra* note 32, at 942.

³⁴ See 1971 Hearings, *supra* note 6, at 247; Schwartz, *Executive Privilege and Congressional Investigatory Power*, 47 CALIF. L. REV. 3, 27-32 (1959).

investigation of General St. Clair and the Burr conspiracy trial).³⁵ His secondary technique, which is less valuable, is simply to argue that while such a claim of executive privilege was in fact made, it was constitutionally invalid. Berger would have been better advised to have just conceded that such episodes had taken place in the past, and then to have explained how Congress was reluctant to invoke judicial power and how it sought instead to achieve an acceptable political solution to the problem. It is also equally evident from the historical record that when Presidents have successfully asserted the power, Congress has seldom stated its acquiescence in the legitimacy of the practice. In fact, until 1904, Congress itself often granted the very dispensations that are now cited as evidence of the inherent executive power to withhold information.³⁶

There is no ambiguity, however, pertaining to the asserted court precedents upholding executive privilege relating to congressional requests for information. None exist. Berger effectively discusses this in a chapter on "Executive Privilege Compared with Evidentiary Privilege." Courts have recognized the authority of the executive to withhold secret information (usually of military value) from private litigants in civil suits. The definitive case is *United States v. Reynolds*,³⁷ which involved a suit brought by wives of civilian employees killed during the crash of a military aircraft. The widows wanted certain documentary reports pertaining to the crash, but the military argued that to comply with this request would entail the disclosure of military secrets. The Supreme Court sustained the government position, holding that the Federal Tort Claims Act did not waive normal executive control over privileged documents. Further, it was not necessary for the government to disclose such material to trial judges for *in camera* inspection, as long as the trial judge had reasonable cause to believe that injurious disclosure would result from making such information available. This situation is wholly different from congressional requests for executive information.

Another of the purported precedents is *Environmental Protection Agency v. Mink*,³⁸ wherein the Supreme Court upheld the refusal of the government to disclose documents relating to underground nuclear testing. Not only does this case again involve private litigants (albeit Mink was a

³⁵ Berger has continued to defend his interpretation of the Burr trial. See his decimation of Rhodes, *What Really Happened to the Jefferson Subpoenas?* 60 A.B.A.J. 52 (1974), in Berger, *The President, Congress and the Courts*, 83 YALE L.J. 1111, 1111-1122 (1974).

³⁶ See 1971 Hearings, *supra* note 6, at 247.

³⁷ 345 U.S. 1 (1952). The recent cases on the Nixon tapes involve questions of the courts as agents in the criminal justice process and not private litigants. These will be discussed *infra*.

³⁸ 410 U.S. 73 (1973). This case is cited in BRECKINRIDGE, *supra* note 7, at 96, as recognizing executive privilege. This is based on the use of the term "executive privilege" by several of the Justices. However, this was done only to demonstrate that no issue of executive privilege was involved in the case. See 410 U.S. at 94 (Stewart, J., concurring).

member of Congress), but the decision of the Court also turned on provisions of the Freedom of Information Act and not on any general considerations of executive privilege. It is beyond dispute that the courts have limited *judicial* access to certain executive information, particularly under the doctrines of military and foreign policy secrecy, informers, and confidential information.³⁹ However, the cases limiting judicial access should not be read as precedent for limiting congressional access. There is a great contrast between the judiciary's and the Congress' need for information.

Having thoroughly examined the legal and historical justifications suggested by supporters of executive privilege, Berger rounds out his analysis with a discussion of the "practical arguments" made in support of the concept. Primary among the arguments is the "candid interchange doctrine," which asserts that unless a President can guarantee the privacy of his intra-executive branch communications, he will not receive from his subordinates the candid types of advice and arguments which are essential for effective policymaking. Berger's response is to point out that this practice was not considered necessary until President Eisenhower first asserted this position in 1954.⁴⁰ Furthermore, Berger argues that it would often be difficult for Congress to attach responsibility for decisions if it were not able to follow the flow of policymaking, including the inputs of candid recommendations from executive advisors. That such stripping away of confidentiality may result in embarrassment is incidental. Ought not presidential advisors be responsible for their exercises of judgment? Interestingly enough, this "housekeeping" privilege has attracted influential support from Dorsen and Shattuck in an article otherwise extremely critical of executive privilege.⁴¹ Basing their position on the need to encourage candid interchange of opinion within the executive branch, they would nonetheless still require executive officials to testify as to what decisions were actually made, if not the recommendations and considerations that shaped that decision. The American Civil Liberties Union has even produced a series of guidelines to suggest how such delicate situations ought to be managed.⁴² These proposals are certainly deserving of serious evaluation.

Another slate of practical arguments has been suggested by Bishop in an influential 1957 article discussed by Berger.⁴³ A very important consideration is whether Congress could be a safe repository of secret information. This is a position asserted frequently by executive privilege supporters seeking to identify the concept of executive disclosure to

³⁹ See generally Hardin, *Executive Privilege in the Federal Courts*, 71 YALE L.J. 879 (1962); Carrow, *Governmental Nondisclosure in Judicial Proceedings*, 107 U. PA. L. REV. 166 (1958).

⁴⁰ See notes 4-5, *supra*, and accompanying text.

⁴¹ Dorsen & Shattuck, *Executive Privilege, the Congress and the Courts*, 35 OHIO ST. L.J. 1, 29-33 (1974).

⁴² *Id.* at 30-33.

⁴³ Bishop, *The Executive's Right of Privacy: An Unresolved Constitutional Question*, 66 YALE L.J. 477 (1957).

Congress with the concept of automatic public disclosure.⁴⁴ This position serves as a strategy to avoid having to deal candidly with the primary issue of congressional disclosure. The fact that congressional committees have persistently involved themselves in overseeing military affairs, the CIA, and other confidential matters, without any more leaks resulting than those originating in executive agencies, largely refutes this argument.⁴⁵ Another contention, which is less easy to dismiss, involves keeping the information derogatory of individual reputations within the privacy of executive files. In the late 1940's a mammoth flare-up developed from demands for raw FBI files, which resulted in a claim of executive privilege.⁴⁶ Again, this issue is one of confidence in congressional rectitude, but in all fairness it should also be recognized that since considerations of national security are not involved here, members of Congress would probably feel less restrained in leaking information. After all, "exposure for exposure's sake" has frequently been an unstated goal of congressional investigations. To these, and other less significant practical arguments, Berger responds by stating that the President was meant to function in open view within a "goldfish bowl" environment. This is a proposition to which some parameters must be attached in order for it to be meaningful.

Berger calls for authoritative judicial resolution of the executive privilege issue in the concluding sections of the volume. Although the Supreme Court's action in the recent case of *United States v. Nixon*⁴⁷ indicates the courts will entertain suits on at least some executive privilege questions, it must be emphasized that the *Nixon* situation involved considerations of the needs of the judicial branch engaged in a criminal trial. There are still vital, unanswered questions pertaining to jurisdiction in situations where a suit would involve a congressional committee seeking such information.⁴⁸ Berger's discussion of these issues is well worth serious examination.

The first likely obstacle is the doctrine of case and controversy. Does

⁴⁴ 1971 *Hearings*, *supra* note 6, at 243.

⁴⁵ See *Gravel v. United States*, 408 U.S. 606 (1972). The decision indicates that severe criminal penalties may attach to members of Congress who release classified information.

⁴⁶ Collins, *The Power of Congressional Committees of Investigation to Obtain Information from the Executive Branch: The Argument for the Legislative Branch*, 39 *Geo. L.J.* 563, 577 (1951).

⁴⁷ U.S., 94 S. Ct. 3090 (1974). For a complete discussion of the case and its ramifications, see generally *Symposium: United States v. Nixon*, 22 *U.C.L.A. L. Rev.* 4 (1974). Prior to the *Nixon* opinion, the controlling decision was *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973). Berger has analyzed both the majority and dissenting opinions in the latter case in the "Epilogue" chapter of his book. See BERGER, *supra* note 3, at 348-72.

⁴⁸ See *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 366 F. Supp. 51 (1973), (Judge Sirica's opinion refusing jurisdiction in the case involving the Senate Watergate Committee's efforts to enforce their subpoena against President Nixon.) Additional problems may result if a committee seeks information also involved in a prominent criminal trial. See *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 370 F. Supp. 521 (1974).

a suit between two branches of the federal government really involve sufficient conflict of interest to justify resolution of the dispute by the courts? Berger argues that it is the nature of the dispute, not who brings it, that should be determinative, whether the dispute exists between branches of the government or merely within a single branch.⁴⁹ This position is certainly in accordance with the need to have a mechanism available to resolve inter-branch conflicts according to law. Even an opponent of general judicial review such as Judge Learned Hand clearly stated his belief that the courts were required to intervene in suits wherein issues of the boundaries of power between branches were involved.⁵⁰ Obviously such considerations also relate to standing, a second possible obstacle, for who has a better argument for standing than a Congress which is trying to protect its constitutional prerogatives?

In his previous volume on impeachment, Berger indicated he had concluded that the doctrine of political questions was in a period of flux, and that the courts would probably intervene further in areas previously considered to be immune from judicial action by this doctrine.⁵¹ The key decisions in this regard were *Powell v. McCormack*⁵² (involving congressional power to expel one of its own members) and *Baker v. Carr*⁵³ (reapportionment suits are justiciable). In the latter case, the Court spelled out the criteria that would determine whether the Court would consider an issue to be capable of judicial resolution.⁵⁴ It was emphasized that the Court must have the appropriate criteria for judgment and recourse to an appropriate remedy. Berger argues that the issue of executive privilege satisfies both of these criteria.⁵⁵ In addition, any serious conflict between the branches is so significant that it must be resolved. Berger makes so convincing an argument, particularly when read in conjunction with *United States v. Nixon*, that courts should find little problem in establishing their jurisdiction to decide such a case should it arise. Both as a matter of law and as a matter of practical necessity in

⁴⁹ This point was shown to be correct in the *Nixon* case, where the Supreme Court held that the Special Prosecutor's dispute with the President, even though he was technically a member of the executive branch, was "the kind of controversy courts traditionally resolve." U.S. at, 94 S. Ct. at 3102.

⁵⁰ "The courts were undoubtedly the best 'Department' in which to vest such a power, since by the independence of their tenure they were least likely to be influenced by diverting pressure." L. HAND, *THE BILL OF RIGHTS* 29 (1965).

⁵¹ R. BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 103-121 (1972). See also B. STRUM, *THE SUPREME COURT AND "POLITICAL QUESTIONS": A STUDY IN JUDICIAL EVASION* (1974).

⁵² 395 U.S. 486 (1969). See K. WEEKS, *ADAM CLAYTON POWELL AND THE SUPREME COURT* (1971); P. DIONISOPOULOS, *REBELLION, RACISM, AND REPRESENTATION: THE ADAM CLAYTON POWELL CASE AND ITS ANTECEDENTS* (1970).

⁵³ 369 U.S. 186 (1962).

⁵⁴ *Id.* at 217.

⁵⁵ In the *Nixon* case, the Court indicated this assumption was correct, at least in a suit involving information sought for a criminal prosecution. See U.S., 93 S. Ct. at 3100-03.

a separation of powers system, the courts would not be justified in seeking to avoid a ruling if such a case should materialize.

Berger's express purpose in producing this volume was to demonstrate that executive privilege was a constitutional "myth," deserving of no support. While he has failed in that goal, his approach to the issue, his framing of the important elements of analysis, and his amassing of historical evidence have provided an invaluable framework for analyzing the issue. This will become increasingly important in the future, for it seems likely that the courts will be called upon to balance the competing claims for constitutional power between executive privilege and congressional demands for information. This certainly seems to be the message of *United States v. Nixon*, which was unanimously decided in July of 1974. What the Court attempted to do in *Nixon* was to balance an apparently legitimate general interest of the Presidency in maintaining privileged information, with the special needs of the judicial process which was engaged in the trial of a criminal case which demanded those materials as crucial pieces of evidence.⁵⁶ This is precisely the kind of balancing the Court engaged in during the 1950's and 1960's in relation to congressional demands for information which conflicted with the privacy rights of individuals and groups.⁵⁷ "Since the courts can determine only the concrete case before them," as Kramer and Marcuse have acknowledged, "a single opinion cannot decide the broad problem of executive privilege in all its ramifications."⁵⁸ Nonetheless, some suggestive conclusions seem in order, based upon the *Nixon* opinion.

The first point that strikes a reader of the decision is that the Supreme Court simply assumes the existence and legitimacy of executive privilege as a general policy. In other words, there is a presumption that executive privilege usually ought to be sustained. The second point is that the general presumption can (like the general presumption behind the absolute nature of the first amendment) be overborne on occasion, if a competing interest of greater public importance can be demonstrated. In short, executive privilege is qualified. In the *Nixon* case, it was the necessity for the judiciary to be able to function in meeting its constitutional responsibilities that overrode the President's claim of privilege. The Court suggests, however, that the cases in which the legitimacy of executive privilege is overborne will be so infrequent as not to undermine the confidentiality of the executive branch. Since the Court framed the *Nixon* issue in terms of the needs of the judicial branch to discharge its constitutional responsibilities, it is likely that Congress will have to estab-

⁵⁶ "In this case we must weigh the importance of the general privilege of confidentiality of presidential communication in performance of his responsibilities against the inroads of such a privilege on the fair administration of criminal justice." U.S. at, 94 S. Ct. at 3109.

⁵⁷ These developments are discussed in Clark, *Constitutional Sources of the Penumbral Right to Privacy*, 19 VILL. L. REV. 833 (1974).

⁵⁸ Kramer & Marcuse, *supra* note 6, at 904.

lish, to the satisfaction of the judiciary, the absolute indispensability of the information which Congress seeks in order to perform its own constitutional obligations. This may prove to be a very heavy burden indeed.

What seems to lie ahead is further detailing by the courts of the proper boundaries between the executive power to withhold and the congressional authority to demand certain types of information. Even though the Supreme Court has previously evaluated claims for legislative investigatory power in relation to the legislative need, to its pertinency, and to civil liberties,⁵⁹ the Court will now have to draw further lines relating to the limits imposed upon the investigatory power of Congress when it is met by the Presidency's need for confidentiality. This is why Berger's analysis, though in this reviewer's opinion fundamentally incorrect in its central thesis, will be invaluable for the future. The complex range of necessary considerations which must be included within any such judicial judgment are all addressed and analyzed within the volume. The book itself makes it unmistakably clear that limits must be imposed upon the invocation of executive privilege, and that the argument in support of the practice of asserting executive privilege contains major gaps. It is in this process of making everyone aware of the difficult considerations surrounding the issue, particularly as to the contrasting constitutional responsibilities and needs of the two branches, that Berger's fine book will continue to make a major contribution.

⁵⁹ For discussion of Supreme Court holdings relating to congressional investigations, see McKay, *Congressional Investigations and the Supreme Court*, 51 CALIF. L. REV. 267 (1963); Alfange, *Congressional Investigations and the Fickle Court*, 30 U. CIN. L. REV. 113 (1961); Gose, *The Limits of Congressional Investigating Power*, 10 WASH. L. REV. 61 (1935).