PRYING OPEN EXECUTIVE PRIVILEGE WITH A BUSINESS LEVER*

*Chief Justice Reynato S. Puno***

I. INTRODUCTION

It would be interesting and timely to write on the subject of executive privilege and business. The conjunction "and" may seem misplaced, as these two topics are not frequently seen together like carrots and peas, but there is more than meets the eye. The goal in this discourse is not to prescribe the lens with which to view specific issues falling under the topic at hand, but to make an exposition, albeit a limited one, given the limited time for us to examine the interstices of this doctrine of executive privilege and how it can affect business and industry; hence, the title "Prying Open Executive Privilege with a Business Lever."

Allow me to fancy your imagination for a moment and take you to the Board meeting of a giant multinational chemical company, a client of a recognized law firm. Chemical Company X produced Chemical Agent A for use of the Philippine government in its defense program. The company manufactured the chemical agent according to specifications provided by the government, but as it turned out, Chemical Agent A wrought disastrous side effects on a large population caught in the cross-fire of the government's anti-insurgency efforts. A tort class suit was filed against Company X. To prop up its defense, the company requested documents from the Secretary of Defense to show that Chemical Agent A was manufactured with nary a deviation from government specifications drawn up from years of research. Invoking executive privilege, the Secretary of Defense refused to release the documents, as their disclosure would compromise confidentiality of security matters. Company X turned to its counsel, seeking a remedy to access the classified files.

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Does Company X face an insurmountable wall of executive privilege? An attempt to address the question would take us through a meandering path back to the founding days of the United States of America, when executive privilege began to take its mold.

II. DEFINITION, ROOTS AND TRAJECTORY

"Executive privilege" has been defined as the right of the President and high-level executive branch officials to withhold information from Congress, the courts, and the public.[1] Schwartz defines "executive privilege" as the "power of the Government to withhold information from the public, the courts, and the Congress."[2]

The phrase "executive privilege" nowhere appears in the Philippine Constitution or in the U.S. Constitution after which our constitution was patterned. This absence is in large part the reason why the doctrine is controversial. Opponents of executive privilege go even as far as describing it as a "constitutional myth."[3] The phrase "executive privilege" is, in fact, not even half a century old, having made its maiden appearance only in the 1958 case *Kaiser Aluminum & Chemical Co. v. United States,*[4] wherein Justice Reed, sitting on the United States Court of Claims, wrote:

> "The power must lie in the courts to determine *executive privilege* in litigation x x x (T)he privilege for intra-departmental advice would very rarely have the importance of diplomacy or security."[5] (emphasis supplied)

Nonetheless, the practice of the president withholding information has been consistently observed since the diaper days of the US Republic. Given the developments in the executive and legislative branches of government, it has been predicted that the occasions for invoking executive

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[1] M. Rozell, *Executive Privilege and the Modern Presidents: In Nixon's Shadow, Symposium on United States v. Nixon: Presidential Power and Executive Privilege: Twenty-Five Years Later*, 83 MINN. L. REV. 1069 (1999).

[2] Senate of the Philippines, Represented by Franklin M. Drilon, in His Capacity as Senate President, et al. v. Eduardo R. Ermita, in His Capacity as Executive Secretary and Alter-Ego of President Gloria Macapagal-Arroyo, et al, 488 SCRA 1, 45 (2006), citing B. Schwartz, "Executive Privilege and Congressional Investigatory Power," 47 Cal. L. Rev. 3.

[3] R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH (1974).

[4] 157 F. Supp. 939 (Ct. Cl. 1958).

[5] K.A. McNeely-Johnson, *United States v. Nixon, Twenty Years After: The Good, the Bad and the Ugly – An Exploration of Executive Privilege*, 14 NORTHERN ILL. UNI. L. REV. 251, 261-262 (1993), citing Kaiser Aluminum & Chemical Co. v. United States. 157 F. Supp. 939 (Ct. Cl. 1958), 946.

privilege in the United States will likely become more numerous.[6] There has been a dramatic growth in the bureaucracy directly reporting to the President and an increasing number and complexity of administrative tasks at the national level that have prompted a burgeoning of congressional staff and oversight, all taking place in a political atmosphere of "open government"[7] that supports executive disclosure of information.[8] The situation in the Philippines is not very different, with the ratification of the 1987 Constitution and its provisions on transparency and openness of government and the public's right to information. Hence, it will be good to hammer out a conceptual hook with which to grasp the subject of executive privilege and be a step ahead in its trajectory.

A. THE RATIONALE OF EXECUTIVE PRIVILEGE

Executive privilege is a direct descendant of the constitutionally designed separation of powers among the legislative, executive and judicial branches of government. The separation of powers was fashioned to avert tyranny by "safeguar[ding] against the encroachment or aggrandizement of one branch at the expense of the other."[9] As James Madison explained in *The Federalist No. 47*:

> The reasons on which Montesquieu grounds his maxim [that the legislative, executive and judicial departments should be separate and distinct] are a further demonstration of his meaning. "When the legislative and executive powers are united in the same person or body," says he, "there can be no liberty, because apprehension may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner." Again: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge

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[6] P. Shane, *Legal Disagreement and Negotiation in a Government of Laws: The Case of Executive Privilege against Congress*, 71 MINN. L. REV. 461, 463-464 (1987).

[7] *Id.* at 464 n.6, citing The Freedom of Information Act, Pub. L. No. 89-554, 80 Stat. 383 (1966) (codified as amended at 5 U.S.C. § 552 (1982)), and the Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241 (1976) (codified at 5 U.S.C. § 552b (1982)), which dramatically increased public access to written government records and to meetings of multi-headed government agencies, illustrate the trend in recent decades toward an "open government" philosophy.

[8] *Id.* at 463-464.

[9] R. Iraola, *Congressional Oversight, Executive Privilege, and Requests for Information Relating to Federal Criminal Investigations and Prosecutions*, 7 IOWA L. REV. 1559 (2002) 1565, *citing* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102 (1998).

> would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor."[10]

The Framers of the Constitution, however, recognized that a "hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively"; hence, the separation of powers between the branches is not absolute.[11] The Constitution contemplates that practice will integrate the dispersed powers into a workable government. "It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."[12] The boundaries established by the Constitution delineating the powers of the three branches must be fashioned "according to common sense and the x x x necessities of governmental co-ordination."[13] This constitutional design would consist of an internal balancing mechanism by which government powers cannot be abused.[14]

Although the U.S. Constitution does not directly mention "executive privilege," commentators believe that the privilege of confidentiality is constitutionally based, insofar as it relates to the President's effective discharge of executive powers.[15] The Founders of the American nation recognized an implied constitutional prerogative of presidential secrecy, a power they believed was occasionally necessary and proper. In the early years of the Republic, the leading founders either exercised or acknowledged the right of executive branch secrecy. [16]

In the 1974 case *United States v. Nixon*,[17] the case where the U.S. Supreme Court for the first time officially recognized executive privilege, the Court declared that the privilege derives from the supremacy of each branch in the process of carrying out its constitutional responsibilities. In addition, the Court held that the privilege is "fundamental to the operation of Government and inextricably rooted in the separation of powers under

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[10] *Id.*, citing JAMES MADISON, THE FEDERALIST NO. 47, 315 (1937) (____).

[11] *Id.*, citing Buckley v. Valeo, 424 U.S. 1 at 120-21.

[12] *Id.* at 1566, citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

[13] *Id.*, citing J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406 (1928).

[14] Doherty, *Executive Privilege or Punishment? The Need to Define Legitimate Invocations and Conflict Resolution Techniques*, 19 NORTHERN ILL. UNI. L.REV. 801, 808 (1999).

[15] *Id.* at 810. (footnotes omitted)

[16] M. Rozell, *Restoring Balance to the Debate Over Executive Privilege: A Response to Berger," Symposium: Executive Privilege and the Clinton Presidency*, 8 WILLIAM AND MARY BILL OF RIGHTS J. 541, 569 (2000).

[17] 418 U$ 613 (1974).

the Constitution."[18] Nonetheless, the Court also recognized that the privilege is not absolute, but rather a qualified privilege, as "(t)he impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Art. III."[19] The Court made it clear that, within the separateness of the three branches of government, there must also be interdependence such that the government will exist in a workable system.[20]

B. HISTORY OF EXECUTIVE PRIVILEGE

1. In the United States

As the first U.S. President, George Washington established time-honored principles that have since molded the doctrine of executive privilege. He well understood the crucial role he played in setting precedents as shown by a letter he wrote on May 5, 1789 to James Madison. In that letter he said, "As the first of every thing *in our situation* will serve to establish a precedent, it is devoutly wished on my part that these precedents may be fixed on true principles."[21]

Though not yet then denominated "executive privilege," President Washington originally claimed authority to withhold information in the St. Clair investigation in 1792, when a committee of Congress requested papers and records from the executive to assist them in *investigating a military expedition* headed by General Arthur St. Clair against Native Americans.[22] After conferring with his cabinet, President Washington decided that disclosure was in the public interest; but, as Secretary of State Jefferson explained, the President was inclined to *withhold papers that would injure the public.*

In 1794, in response this time to a Senate request, Washington replied that he would allow the Senate to examine some parts of, but *withhold certain information in relation to, correspondence between the French government and the American minister to France, and between the minister and Secretary of State Randolph,*

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[18] *Id.* at 708. (footnote omitted)

[19] *Id.* at 707.

[20] *Id.*

[21] Rozell,, *supra* note 17, at 555-556, citing *Letter from George Washington to James Madison (May 5, 1789)*, in 30 THE WRITINGS OF GEORGE WASHINGTON, 1745-1799, 311 (Fitzpatrick ed., 1931-1944).

[22] Doherty, *supra* note 15, at 821.

because the information could prove damaging to the public interest. The Senate never challenged his action.[23]

In 1796, Washington refused to comply with a House resolution requesting information about his instructions to the U.S. Minister to Britain regarding the Jay Treaty negotiations, claiming *that "(t)he nature of foreign negotiations requires caution, and their success must often depend on secrecy* x x x" He explained that "the boundaries fixed by the Constitution between the different departments should be preserved, a just regard to the Constitution and to the duty of my office x x x forbids a compliance with your request."[24]

Thus, Washington established historical precedent for executive privilege that is firmly rooted in two theories: first, a separation of powers theory that certain presidential communications should be free from compulsion by other branches; and second, a structural argument that secrecy is important to the President's constitutional duties in conducting state and foreign affairs.[25] Washington established that he had the right to withhold information if disclosure would *injure the public*, but he did not believe that it was appropriate to withhold embarrassing or politically damaging information.[26]

Then came President Thomas Jefferson, who also thoroughly defended executive secrecy. In the 1807 case *United States v. Burr*,[27] Jefferson was ordered to comply with a subpoena *duces tecum* for a letter concerning Vice President Aaron Burr who was on trial for treason arising from a secessionist conspiracy. The court reasoned that what was involved was a capital case involving important rights; that producing the letter advanced the cause of justice, which Jefferson as chief executive had a duty to seek; that the letter contained no state secrets; and that even if state secrets existed therein, *in camera* review would be appropriate. Thus, as early as 1807, the Burr case established the doctrine that the President's authority to withhold information is *not absolute*, the President is amenable to compulsory process,

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[23]Rozell, *supra* note 17, at 557. *See also* J.R. Boughton,, *Paying Ambition's Debt: Can the Separation of Powers Tame the Impetuous Vortex of Congressional Investigations?*, 21 WHITTIER L. REV. 797 (2000). (footnotes omitted)

[24]Rozell, *supra* note 17 at 559, *citing* A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, 186-87 (James D. Richardson ed., Washington, Government Printing Office, 1896). *See also* Boughton, *supra* note 23.

[25]Boughton, *supra* note 24, at 814.

[26]Rozell, *supra* note 17, at 582.

[27]25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692d).

and the interests in secrecy must be weighed against the interests in disclosure.[28]

Despite the *Burr* precedent, the mid-nineteenth century Presidents exercised the power of secrecy without much hesitation. There was a growing trend among Chief Executives, following President Washington's lead, of withholding information, either because a particular request would have given another branch the authority to exercise a constitutional power reserved solely to the President under Article II of the US Constitution, or because the request would interfere with the President's own exercise of such a power.[29] During the infancy of the United States, the legislature generally accepted the secrecy privilege, as the framers of the constitution attempted to put into practice the principles they had created.[30]

The trend continued among U.S. Presidents of the early to mid-twentieth century. Despite aggressive attempts of Congress to assert its own constitutional investigative and oversight prerogatives, the twentieth century American Presidents protected their own prerogatives with virtually no interference from the judiciary, often forcing a quick congressional retreat.[31]

The latter half of the twentieth century gave birth to the term "executive privilege" under President Dwight Eisenhower. But assertions of the privilege were marked less by the constitutional absolutes typical of assertions of previous Presidents, and more by the judiciary's efforts to define and circumscribe the privilege. In *United States v. Reynolds*,[32] the widows of three civilians killed in an Air Force plane crash brought suit pursuant to the Federal Tort Claims Act seeking production of the Air Force's report concerning the incident.

The U.S. Supreme Court gave wide deference to the military's national security needs, but pronounced that the privilege was *not absolute.* Chief Justice Vinzons' opinion, analogizing the Fifth Amendment privilege against self-incrimination, held that "[t]oo much judicial inquiry into the claim of privilege would force disclosure of the thing the privilege was meant to protect, while a complete abandonment of judicial control would

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[28]Boughton, *supra* note 24, at 815.
[29]*Id.* (footnotes omitted).
[30]Doherty, *supra* note 15, at 822.
[31]Boughton, *supra*, note 24, at 817.
[32]345 U.S. 1 (1953).

lead to intolerable abuses." The Court found that "even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake."

It was during the administration of President Richard Nixon, where the most significant developments in executive privilege were produced. His administration signified a turning point in how the doctrine was exercised and received, perpetuating public distrust of private government action.[33] While his administration initially professed an "open" presidency, in which information would flow freely from the executive to Congress to the public, executive privilege during this period was invoked not for the protection of national security interests, foreign policy decision-making or military secrets as in the past, but rather to keep under wraps politically damaging and personally embarrassing information. In Rozell's words, Nixon's abuses served to "politically discredit a legitimate, necessary constitutional power of the presidency."[34]

The well-known case *United States v. Nixon*[35] came about because of a break-in at the Democratic offices in the Watergate Hotel. The Senate Watergate Committee was created to investigate the alleged illegal and unethical activity. The Committee called various executive aides to testify. On July 16, 1973, one such aide testified before the Committee that President Nixon had tape-recorded conversations with various aides and advisers in the Oval Office and in the Executive Office Building. Subsequently, the Committee, as well as the Watergate special prosecutor, requested the tapes, but both were denied access through a claim of executive privilege. The special prosecutor brought the matter to a federal court. Eventually, a federal judge demanded that the tapes be turned over for *in camera* inspection. This order was appealed by Nixon's attorney and the Supreme Court granted certiorari prior to the lower court's ruling.[36]

A unanimous Court made a comprehensive disquisition on executive privilege. The Court recognized the President's need for confidentiality and candid advice from advisers, as well as important separation-of-powers principles involved in construing the privilege, but it ultimately rejected Nixon's assertion that executive privilege was absolute.

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[33]Doherty, *supra* note 15, at 826.

[34]*Id.*, citing M. ROZELL, EXECUTIVE PRIVILEGE: THE DILEMMA OF SECRECY AND DEMOCRATIC ACCOUNTABILITY (1994).

[35]418 U.S. 683 (1974).

[36]Doherty, *supra* note 15, at 826.

Carefully circumscribing the limits of its ruling to the instant context of criminal prosecutions and explicitly avoiding the privilege issue in the congressional milieu, the Court acknowledged that the judiciary must, out of "high respect" for the President's constitutional stature, view the privilege as *presumptively valid.* The Court must then engage in a balancing process to determine whether a demonstrated specific need for the information outweighs the privilege, with a view to the "legitimate needs of the judicial process." The Court reasoned that executive privilege should not prevail when it is generalized, but is stronger when it involves military or diplomatic secrets -- areas in which the courts "have traditionally shown the utmost deference to Presidential responsibilities."

The Court ultimately rejected Nixon's claim of executive privilege over the requested materials and believed that the *in camera* inspection was a protective method for the court to determine the nature of the material and its potential risk to the public interest. In the aftermath of the Watergate scandal, the public began to equate government secrecy with political wrongdoing and corruption, and the doctrine of executive privilege continues to stand in the middle of this public ire.[37]

Subsequently, while executive privilege was asserted commonly during the Ford, Carter, Reagan and Bush Administrations, it had only a marginal impact on constitutional law.[38] The modern trend has become for presidents to assert the claim of executive privilege and then be forced to retreat the claim and agree to disclose information under political pressure.[39]

It was the presidency of William or Bill Clinton that again catapulted executive privilege to the limelight, bringing to new heights the President's amenability to judicial process and the President's invocation of executive privilege to avoid such process. In Boughton's words, "President Clinton's frequent, unprincipled use of the executive privilege for self-protection rather than the protection of constitutional prerogatives of the presidency or governmental process ultimately weakened a power historically viewed with reverence and deference by the judicial and legislative branch."[40]

This development occurred despite the rubric of this "Administration to comply with congressional requests for information to

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[37]Doherty, *supra* note 15, at 826-827.
[38]Boughton, *supra* note 24, at 819.
[39]Doherty, *supra* note 15, at 828.
[40]Boughton, *supra* note 24, at 819.

the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch x x x[E]xecutive privilege will be asserted only after (a) careful review demonstrates that assertion of the privilege is necessary to protect Executive Branch prerogatives... In circumstances involving communications relating to investigations *of personal wrongdoing* by government officials, it is our practice *not to assert* executive privilege, either in judicial proceedings or in congressional investigations and hearings."[41] (emphasis supplied)

In all, the modern period of executive privilege has thus far given it this contour: executive privilege, though a constitutional presumption, is limited and must yield to the needs associated with the administration of the criminal and civil justice systems. Modern examples show that the privilege is strongest when based not on a bare personal desire to avoid responsibility, but on a *legitimate need* to protect the President's *constitutional* mandate, the prudential separation of powers, and ultimately the public interest that is served by the President's performance of a constitutionally mandated duty. Under these circumstances, both the Congress and the judiciary have afforded most respect to the President's prerogatives.[42]

2. In the Philippines

Executive privilege did not have an exogenous growth in the field of Philippine constitutional law, as our early organic acts and constitutions – their structure and design – follow the mold of the U.S. Constitution. Thus, executive privilege also lies deeply embedded in the mantle of presidential power found in our constitution. Admittedly, adjudication on executive privilege in the Philippines is still in its chrysalis stage, with the Supreme Court having had only three occasions to resolve cases that directly dealt with the privilege, all decided relatively recently in a short span of twelve years.

The 1995 case *Almonte v. Vasquez*[43] involved an investigation by the Office of the Ombudsman of petitioner Jose T. Almonte, who was formerly Commissioner of the Economic Intelligence and Investigation Bureau (EIIB); and Villamor C. Perez, Chief of the EIIB's Budget and Fiscal Management Division. An anonymous letter from a purported employee of

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[41]Rozell, *supra* note 17, at 1117.
[42]Boughton, *supra* note 24, at 820.
[43]Almonte, et al. v. Vasquez, et al., 244 SCRA 286 (1995).

the bureau -- a concerned citizen alleging that funds representing savings from unfilled positions in the EIIB had been illegally disbursed -- spurred the investigation. The Ombudsman required the Bureau to produce all documents relating to Personal Services Funds for the year 1988 and all other pieces of evidence, such as vouchers (salary) for the whole *plantilla* of EIIB for 1988. Petitioners refused to comply.

The Court recognized a government privilege against disclosure with respect to state secrets bearing on military, diplomatic and similar matters. Citing *United States v. Nixon*, the Court acknowledged that the necessity to protect public interest in candid, objective and even blunt or harsh opinions in Presidential decision-making justified a presumptive privilege of Presidential communications. It also acknowledged that the "privilege is fundamental to the operation of the government and inextricably rooted in the separation of powers under the Constitution," as pronounced by the U.S. Supreme Court in *Nixon*.

The Court found, however, that no military or diplomatic secrets would be disclosed by the production of records pertaining to the personnel of the EIIB. Neither were there any classified lawmaking personnel records of the EIIB. Thus, the Court held that the Ombudsman's need for the documents *outweighed* the petitioners' claim of confidentiality. It also emphasized that even if the subpoenaed documents were treated as presumptively privileged, this decision would only justify ordering their inspection *in camera*, but not their non-production.

Then came the 1998 case *Chavez v. PCGG*.[44] The question posed before the Court was whether the government, through the Presidential Commission on Good Government (PCGG), could be required to reveal the proposed terms of a compromise agreement with the Marcos heirs as regards their alleged ill-gotten wealth. The petitioner, a concerned citizen and taxpayer, sought to compel respondents *to make public* all negotiations and agreements, be they ongoing or perfected, and all other documents related to or relating to such negotiations and agreements between the PCGG and the Marcos heirs.

The Court ruled in favor of petitioner. While acknowledging petitioner's right to information under the Bill of Rights of the 1987 Constitution, the Court also recognized restrictions on the exercise of this

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[44]299 SCRA 744 (1998).

right, *viz.* national security matters, trade secrets and banking transactions, criminal/law enforcement matters, other confidential or classified information officially known to public officials by reason of their office and not made available to the public, diplomatic correspondence, closed door Cabinet meetings, executive sessions of either house of Congress, as well as the internal deliberations of the Supreme Court.

Addressing the particular issue of whether the petitioner could access the settlement documents, the Court held that it was incumbent upon the Presidential Commission on Good Government (PCGG) and its officers, as well as other government representatives, to disclose *sufficient public information* on any proposed settlement they have decided to take up with the ostensible owners and holders of ill-gotten wealth. Such information, however, must pertain to definite propositions of the government, not necessarily to intra-agency or inter-agency recommendations or communications during the "exploratory" stage. At the same time, the Court noted the need to observe the same restrictions on disclosure of information in general, such as on matters involving national security, diplomatic or foreign relations, intelligence and other classified information.

Quite recently, the 2006 case *Senate of the Philippines v. Ermita*[45] was decided by the Supreme Court. At issue in this case was the constitutionality of Executive Order (EO) No. 464, "Ensuring Observance of the Principle of Separation of Powers, Adherence to the Rule on Executive Privilege and Respect for the Rights of Public Officials Appearing in Legislative Inquiries in Aid of Legislation under the Constitution, and for Other Purposes." The presidential issuance was handed down at a time when the Philippine Senate was conducting investigations on the alleged overpricing of the North Rail Project, and the alleged fraud in the 2004 national elections exposed through the much-publicized taped conversation allegedly between President Gloria Macapagal-Arroyo and Commission on Elections Commissioner Virgilio Garcillano.

EO No. 464 required heads of the executive departments of government and other government officials and officers of the Armed Forces of the Philippines and the Philippine National Police to secure prior consent from the President before appearing in Congressional inquiries. Citing the *Almonte* case, the issuance emphasized that the rule on

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[45]488 SCRA 1 (2006).

confidentiality based on executive privilege was necessary in the operation of government and rooted in the separation of powers. Making reference to both the *Almonte* and the *Chavez* cases, the executive order enumerated the kinds of information covered by executive privilege, *viz.*: (1) conversations and correspondences between the President and the public official covered by the executive order; (2) military, diplomatic and other national security matters which in the interest of national security should not be divulged; (3) information between inter-government agencies prior to the conclusions of treaties and executive agreements; (4) discussions in closed-door Cabinet meetings; and (5) matters affecting national security and public order.

On the strength of EO No. 464, various government officials did not appear in the hearings of the Senate on the North Rail Project and the alleged fraud in the 2004 elections, prompting various cause-oriented groups to file suits in the Supreme Court to seek the declaration of the unconstitutionality of EO No. 464.

The Court upheld the doctrine of executive privilege, but found the presidential issuance partly infirm; specifically, Section 2(b) and Section 3, which require government officials below the heads of executive departments to secure consent from the President before appearing in congressional hearings and investigations. The Court ruled, *viz.*:

> Congress undoubtedly has a right to information from the executive branch whenever it is sought in aid of legislation. If the executive branch withholds such information on the ground that it is privileged, it must so assert it and state the reason therefor and why it must be respected.
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> The infirm provisions of E.O. 464, however, allow the executive branch to evade congressional requests for information without need of clearly asserting a right to do so and/or proffering its reasons therefor. By the mere expedient of invoking said provisions, the power of Congress to conduct inquiries in aid of legislation is frustrated. That is impermissible. For
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> > [w]hat republican theory did accomplish was to reverse the old presumption in favor of secrecy, based on the divine right of kings and nobles, and replace it with a *presumption in favor of publicity*, based

> on the doctrine of popular sovereignty. (Italics supplied)
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> Resort to any means then by which officials of the executive branch could refuse to divulge information cannot be presumed valid. Otherwise, we shall not have merely nullified the power of our legislature to inquire into the operations of government, but we shall have given up something of much greater value -- our right as a people to take part in government.[46]

III. SCOPE AND CONTEXT OF EXECUTIVE PRIVILEGE

In their treatise, Professors Charles A. Wright and Kenneth W. Graham, Jr. observe that "(a)lthough much has been written about government privileges and related issues, the writers have reached no consensus regarding the number of these privileges or the proper nomenclature to apply to them."[47] They note that "(o)ne common variant is to lump some or all of the governmental privileges under the heading of 'executive privilege.'"[48]

Presidential information requests, which give occasion to the invocation of executive privilege, may arise in many ways. The request may come from Congress or via a criminal or a civil case in court. In a criminal case, the request may come from the defendant, or from the prosecution if the case is being conducted by an independent counsel. The request may also come from a party in a civil case between private parties, or in a civil case by or against the government. The proceeding may or may not be for the investigation of alleged wrongdoing in the executive branch.[49] Mining and refining the ore of executive privilege, we can identify its components in *criminal* and *civil litigation* contexts as follows: (1) military and state secrets, (2) presidential communications, (3) deliberative process, and (4) law enforcement privileges.[50]

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[46]*Id.* at 72.

[47]Iraola, *supra* note 10, at 1571, citing C. WRIGHT & K. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5662, 484-90 (1992). (footnotes omitted)

[48]*Id.* citing WRIGHT & GRAHAM, JR., *id.* at 490 n.3.

[49]P. Wald and J. Siegel, *The D.C. Circuit and the Struggle for Control of Presidential Information.*, 90 GEO. L.J. 737, 740 (2002).

[50]Iraola, *supra* note 10 at 1571.

First, military and state secrets. The state-secrets privilege "is a common- law evidentiary rule" that allows the government to protect "information from discovery when disclosure would be *inimical to national security*"[51] or result in "impairment of the nation's defense capabilities, disclosure of intelligence-gathering methods or capabilities, and disruption of diplomatic relations with foreign governments."[52] The privilege belongs to the government and may be asserted by the government, whether it is a party to a case or not.[53] To invoke the privilege properly, "[t]here must be a formal claim of privilege, lodged by the head of the department[54] having control over the matter, after actual personal consideration by that officer."[55]

A court confronted with an assertion of the state-secrets privilege must find "that there is a reasonable danger that disclosure of the particular facts x x x will jeopardize national security."[56] While the privilege should not be invoked lightly in making this judicial assessment, the court must not "forc[e] a disclosure of the very thing the privilege is designed to protect" and "must accord the 'utmost deference' to the executive's determination of the impact of disclosure on diplomatic and military security."[57] Finally, "even the most compelling necessity cannot overcome the claim of privilege

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[51] *Id.*

[52] *Id.* at 1572, (citing Ellsberg v. Mitchell, 709 F.2d 51, 57 (D.C. Cir. 1983) (footnotes omitted)). It has been aptly noted that "[i]n the hierarchy of executive privilege, the 'protection of national security' constitutes the strongest interest that can be asserted by the President and one to which the courts have traditionally shown the utmost deference." 12 Op. Off. Legal Counsel 171, 176-77 (1988).

[53] *Id.* ("A government department may intervene in litigation to which it is not a party and assert the privilege, thereby preventing either party in the litigation from obtaining sensitive government information in discovery." (quoting Bareford, 973 F.2d at 1141)). *See also* R.Miller, *Congressional Inquests: Suffocating the Constitutional Prerogative of Executive Privilege*, 81 MINN. L. REV. 631, 642 (1997) ("The state secrets privilege need not be asserted by the President himself.").

[54] *Id.* Whether assertion of the privilege in this context by a government official who is not the overall head of the department may be sufficient is an open question, at least for some courts. *See* Landry v. FDIC, 204 F.3d 1125, 1136 (D.C. Cir. 2000) ("We express no opinion on who may assert that privilege."). (footnote added by author)

[55] *Id.*, citing Bowles v. United States, 950 F.2d 154, 156 (4th Cir. 1991); *In re* United States, 872 F.2d 472, 475 (1989); United States v. Reynolds, 345 U.S. 1, 7-8 (1953).

[56] *Id.*, citing Zuckerbraun v. Gen. Dynamics Corp., 935 F.2d 544, 547 (1991); *see also* Reynolds, 345 U.S. at 10 (arguing that the state secrets privilege excludes evidence where "there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged"); Halkin v. Helms, 690 F.2d 977, 990 (D.C. Cir. 1982) (stating that a court must uphold the privilege if the government demonstrates that "the information poses a reasonable danger to secrets of state.").

[57] *Id.*, citing Black v. United States, 62 F.3d 1115, 1119 n.5 (8th Cir. 1995) (quoting Zuckerbraun, 935 F.2d at 547).

if the court is ultimately satisfied that military secrets are at stake."[58] In this sense, this aspect of executive privilege is almost absolute.

Second, presidential communications. The US Supreme Court recognized in *Nixon* that there is "a presumptive privilege for Presidential communications" based on the "President's generalized interest in confidentiality." The Court noted that this confidentiality finds roots in the "necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decision-making." It further acknowledged that "(h)uman experience teaches that those who expect public dissemination of their remarks may well temper candor with concern for appearances and for their own interests to the detriment of the decision-making process."

Aside from being "inextricably rooted in the separation of powers under the Constitution, the privilege can be said to derive from the supremacy of each branch within its assigned area of constitutional duties." But the Court made it clear 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 in all circumstances."

With respect to evidence in a criminal prosecution, a claim of privilege "based only on the generalized interest in confidentiality ...must yield to the demonstrated specific need for evidence."

In *Nixon v. Administrator General Services*,[59] former President Nixon challenged legislation transferring custody of his taped conversations and other presidential documents to the custody of the General Services Administration. The Court held that a former President could assert the privilege, but his claim would be given less weight than that of an incumbent President. With respect to the contours of the privilege, the Court ruled that the privilege was "limited to communications 'in performance of [a President's] responsibilities x x x of his office x x x in the process of shaping policies and making decisions.'" The Court held that since the Administrator was supposed to promulgate regulations allowing for claims of privilege to be raised before the materials were made available to the public, the only intrusion into the confidentiality of presidential

[58] *Id.* at 1573, citing Reynolds 345 U.S. 1, 11 (1953).
[59] 433 US 425 (1977).

communications occurred when archivists screened the materials. But this intrusion, according to the Court, was "very limited" and was also justified by the important public interests served by the legislation.

Parenthetically, the Court also recognized the privacy rights of the President, stating that the President was "not wholly without constitutionally protected privacy rights in matters of personal life unrelated to any acts done by [him] in [his] public capacity." The Court balanced the right of the President to protect personal, private materials against the public interest in the disclosure of the materials requested. Furthermore, the Court required that the private documents would be processed in an orderly manner in order to return to the President those that were private and personal, and the extent of public access to these materials was also limited. The Court noted that the President should not be viewed as possessing the protections of normal citizens, for he has chosen a public life and has therefore limited his/her right to privacy.

In summary, under the Nixon cases, the President can invoke the presidential communications privilege "when asked to produce documents or other materials that reflect presidential decision-making and deliberations and that the President believes should remain confidential. If the President does so, the documents become presumptively privileged." This privilege, however, is qualified and may be overcome by a sufficient showing of need. Additionally, if the court determines that the presidential communications privilege alone is not sufficient to withhold production of the material, the President should be afforded the opportunity to raise more specific claims of privilege.[60]

Another case of importance that involves presidential communication is *In re Sealed Case*,[61] wherein the court ruled that "the public interest is best served by holding that communications made by presidential advisors in the course of preparing advice for the President come under the presidential communications privilege, even when these communications are *not made directly to the President.*" The court was careful to state that the ruling "should not be read as in any way affecting the scope of the privilege in the congressional-executive context, the arena where conflict over the privilege of confidentiality arises most frequently." The court reasoned that the "President's ability to withhold information from Congress implicates

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[60] Iraola, *supra* note 10, at 1575-1576.
[61] 121 F.3d 729.

different constitutional considerations than the President's ability to withhold evidence in judicial proceedings."

Third, deliberative process. Of the various components of executive privilege, the deliberative process privilege is the most frequently litigated. It made its maiden appearance in the federal courts in the 1958 case *Kaiser Aluminum & Chem. Corp.* As one writer noted, "Once *Kaiser* was decided, the deliberative process privilege spread through the federal courts like wildfire."[62] The privilege "rests most fundamentally on the belief that were agencies forced to operate in a fishbowl, [a] frank exchange of ideas and opinions would cease and the quality of administrative decisions would consequently suffer."[63] To be invoked properly, there must be a formal assertion of privilege by the head of the department in control of the information, based on his actual personal consideration of the matter and an explanation as to why the information sought falls within the scope of the privilege.[64] It has been held, however, that officials lesser than head of the overall agency or department are "of sufficient rank to achieve the necessary deliberateness in assertion of the deliberative process."[65]

Of common-law origin, the deliberative process privilege allows the government to withhold documents and other materials that would reveal "advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated."[66] Courts have identified three purposes in support of the privilege: (1) it protects candid discussions within an agency, (2) it prevents public confusion from a premature disclosure of agency opinions before the agency establishes a final policy, and (3) it protects the integrity of an agency's decision -- the public should not judge officials based on information they

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[62]Iraola, *supra* note 10, n.98, citing K. Jensen, *The Reasonable Government Official Test: A Proposal for the Treatment of Factual Information under the Federal Deliberative Process Privilege*, 49 DUKE L.J. 561, 567 (1999).

[63]*Id.* at 1577, citing First E. Corp. v. Mainwaring, 21 F.3d 465, 468 (D.C. Cir. 1994) (quoting Dudman Communications Corp. v. Dept. of Air Force, 815 F.2d 1565, 1567 (D.C. Cir. 1987)); *See also* Missouri v. United States Army Corps of Eng'rs, 147 F.3d 708, 710 (8th Cir. 1998) ("The purpose of the deliberative process privilege is to allow agencies freely to explore alternative avenues of action and to engage in internal debates without fear of public scrutiny.").

[64]*Id.*, citing Northrop Corp. v. McDonnell Douglas Corp., 751 F.2d 395, 399 (D.C. Cir. 1984).

[65]*Id.*, citing Landry v. FDIC, 204 F.3d 1125, 1136 (D.C. Cir. 2000).

[66]*Id.*, citing Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 324 (D.D.C. 1966), aff'd, 384 F.2d 979 (D.C. Cir. 1967); accord NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151-53 (1975); EPA v. Mink, 410 U.S. 73, 86-93 (1973).

considered prior to issuing their final decisions.[67] For the privilege to be validly asserted, the material must both be *pre-decisional* and *deliberative.*[68]

The deliberative process privilege is a qualified privilege that may be overcome by a sufficient showing of need.[69] In general, courts balance the evidentiary *need for information* against the *harm that may result from disclosure.*[70] And where, for example, there is reason to believe that the documents or other information sought may shed light on government misconduct, the privilege is denied on the grounds that shielding such deliberations does not advance "the public's interest in honest, effective government."[71]

Although closely associated, the deliberative process privilege and the presidential communications privilege have different scopes and are distinct.[72] The court explained the distinction in the *In re Sealed Case*, *viz.*:

> Both are executive privileges designed to protect executive branch decision-making, but one applies to decision-making of executive officials generally, the other specifically to decision-making of the President. The presidential privilege is rooted in constitutional separation of powers principles and the President's unique constitutional role; the deliberative process privilege is primarily a common law privilege.[73]

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[67] *Id.* at 1578, citing Judicial Watch, Inc. v. Clinton, 880 F. Supp. 1, 12 (D.D.C. 1995) (citation omitted), aff'd, 76 F.3d 1232 (D.C. Cir. 1996). Another rationale advanced for the privilege under Morgan v. United States, 298 U.S. 468 (1936), and its progeny is "that the privilege protects the independence of the executive branch and preserves the separation of powers by preventing judicial probing into the thought processes of executive officials."

[68] *Id.* at 1578, (footnotes omitted)

[69] *Id.* at 1578, citing *In re* Sealed Case, 121 F.3d 729, 737 (D.C. Cir. 1997); Texaco P.R., Inc., 60 F.3d at 885; Redland Soccer Club, Inc. v. Dep't of the Army, 55 F.3d 827, 854 (3d Cir. 1995); United States v. Farley, 11 F.3d 1385, 1389 (7th Cir. 1993).

[70] *Id.* at 1578, citing *In re* Sealed Case, 121 F.3d at 737-38; *see also* In re Subpoena Served Upon the Comptroller of the Currency, 967 F.2d 630, 634 (D.C. Cir. 1992) (discussing how, in balancing competing interests, the court should consider a number of factors such as the relevance of the evidence, seriousness of the litigation, and availability of other evidence); K. Jensen, *The Reasonable Government Official Test: A Proposal for the Treatment of Factual Information under the Federal Deliberative Process Privilege*, 49 DUKE L.J. 561, 578-579 (1999) (discussing and identifying the factors).

[71] *Id.* at 1579, citing Hinckley v. United States, 140 F.3d 277, 285 (D.C. Cir. 1998); Texaco P.R., Inc., 60 F.3d at 885.

[72] *Id.* at 1579, n.109.

[73] *In re* Sealed Case, 121 F.3d at 745.

Thus, "unlike the deliberative process privilege, the presidential communications privilege applies to documents in their entirety, and covers final and post-decisional materials as well as pre-deliberative ones."[74]

The former Chief Judge of the United States Court of Appeals for the District of Columbia Circuit, Patricia M. Wald, and Georgetown University law professor Jonathan R. Siegel compare the presidential communications privilege and deliberative process privilege, *viz.*:

> Although the presidential privilege is only a qualified one, the court has found more strength in this constitutionally based privilege than in the common-law deliberative process privilege. The presidential privilege covers the entire document to which it applies, and it covers both final and post-decisional documents. The deliberative process privilege, on the other hand, covers only the advisory or recommendatory portions of documents, and the documents must be pre-decisional documents. Moreover, the deliberative process privilege yields to any serious allegation of misconduct, whereas the presidential privilege must still be overcome by a showing of need, even when misconduct is alleged. Thus, while the D.C. Circuit undoubtedly took a very significant step (as did the Supreme Court in *United States v. Nixon*) in rejecting the President's claim of absolute privilege, it left the President with a substantial barrier that he could use in combating criminal discovery requests.[75]

Fourth, law enforcement privilege. The law enforcement privilege protects against the disclosure of confidential sources and law enforcement techniques, safeguards the privacy of those involved in a criminal investigation, and otherwise prevents interference with a criminal investigation.[76] Similar to invoking the deliberative process privilege, to invoke the law enforcement privilege properly, a responsible government official must lodge a formal claim based on personal consideration of the

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[74]*Id.*

[75]Wald and Siegel, *supra* note 49, at 768.

[76]Iraola, *supra* note 10 at 1579, citing *In re* Dep't of Investigation, 856 F.2d 481, 484 (2d Cir. 1988); United States v. Winner, 641 F.2d 825, 831 (10th Cir. 1981); Black v. Sheraton Corp. of Am., 564 F.2d 531, 545 (D.C. Cir. 1977).

information sought.[77] The claim must assert with particularity the information sought to be protected, and why the information falls within the scope of the privilege.[78]

The law enforcement privilege is *qualified*[79] and may be overridden.[80] Courts carefully balance the *public's interest in nondisclosure* against the *need of a particular litigant for access* to the privileged information.[81] A strong presumption operates against overthrowing the privilege;[82] the presumption prevents courts from being propelled too deeply into the process operating in criminal investigations.[83]

We now come to the executive-legislative context of executive privilege. The U.S. Supreme Court has yet to resolve a case involving a dispute over information requested by Congress, where executive privilege was explicitly invoked. There are a few lower court cases, however, that are instructive and worth mentioning. For the most part, information disputes in this context are handled through a process of negotiation and accommodation between the executive and the legislative departments.

First, the cases. In *Senate Select Committee on Presidential Campaign Activities v. Nixon*,[84] the Senate Committee issued a subpoena *duces tecum* to

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[77]*Id.*, citing *In re* Polypropylene Carpet Antitrust Litig., 181 F.R.D. 680, 687 (N.D. Ga. 1998); United States ex rel Burroughs v. DeNardi Corp., 167 F.R.D. 680, 687 (S.D. Cal. 1996).

[78]*Id.*, citing Friedman v. Bache Halsey Stuart Shields, Inc., 738 F.2d 1336, 1341 (D.C. Cir. 1984); Winner, 641 F.2d at 831.

[79]*Id.*, citing Dellwood Farms, Inc. v. Cargill, Inc., 128 F.3d 1122, 1125 (7th Cir. 1997); Tuite v. Henry, 98 F.3d 1411, 1417-18 (D.C. Cir. 1996)

[80]*Id.*, citing Dellwood, 128 F.3d at 1125; Tuite, 98 F.3d at 1417.

[81]*Id.*, at 1580, footnote 115 citing *In re* Sealed Case, 121 F.3d 729 (D.C. Cir. 1997); Black v. Sheraton Corp. of Am., 564 F.2d 531, 545 (D.C. Cir. 1977). In making this determination, courts consider a number of factors including:

> ...(1) the extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information; (2) the impact upon persons who gave the information of having their identities disclosed; (3) the degree to which governmental self-evaluation and consequent program improvement will be chilled by disclosure; (4) whether the information sought is factual data or an evaluative summary; (5) whether the party seeking discovery is an actual or a potential defendant in any criminal proceeding either pending or reasonably likely to follow from the incident in question; (6) whether the police investigation has been completed; (7) whether any intradepartmental disciplinary proceedings have arisen or may arise from the investigation; (8) whether the plaintiff's suit is non-frivolous and brought in good faith; (9) whether the information sought is available through other discovery or from other sources; [and] (10) the importance of the information sought to the plaintiff's case.

[82]*Id.*, at 1580, citing Black, 564 F.2d at 545-47.

[83]*Id.*, at 1580, citing Dellwood, 128 F.3d at 1125.

[84]370 F. Supp. 521 (D.D.C. 1974).

President Nixon for tape recordings of five conversations with White House Counsel John Dean.[85] President Nixon claimed executive privilege and refused to provide the tapes.[86] The district court ruled in favor of the President,[87] and this ruling was affirmed on appeal by the United States Court of Appeals for the District of Columbia Circuit. [88]

The court of appeals found that the Select Committee failed to demonstrate that the subpoenaed materials were "*demonstrably critical* to the responsible fulfillment of the Committee's functions," as the President had publicly released transcripts (with partial deletions) of the tapes sought by the subpoena, and copies of the tapes were already in the possession of another congressional committee. The Select Committee argued that the recordings were necessary "in order to verify the accuracy of" the transcripts, to supply deleted portions, and to gain an understanding that could be obtained solely by listening to the tone and inflection of the voice of the speakers.

The court was not convinced. It ruled that a legislative committee seldom needs a "precise reconstruction of past events." Since the Select Committee demonstrated "no more than that the materials deleted from the transcripts may possibly have some arguable relevance to the subjects it ha[d] investigated and to the areas in which it may propose legislation," the court held that the need asserted by the Committee was "too attenuated and too tangential to its function" to overcome the presumption in favor of the privilege.

Then came *United States v. American Telephone & Telegraph Co. (AT&T)*.[89] This case arose from an investigation by the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce relating to domestic warrantless wiretapping for national security purposes. The focus of the investigation was the warrantless

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[85]*Id.* The Committee also served a second subpoena, enforcement of which was denied by the court.

[86]*Id.* at 522.

[87]Iraola, *supra* note 10, at 1581 n.122. (In doing so, however, the district court rejected the President's claim of privilege insofar as it was premised on confidentiality. As the court explained, "The President's unwillingness to submit the tapes for the [c]ourt's in camera *ex parte* inspection or in any other fashion to particularize his claim of executive privilege preclude[d] judicial recognition of that privilege on confidentiality grounds.").

[88]Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 733 (D.C. Cir. 1974) (*en banc*) (The court of appeals affirmed the district court's ruling on grounds different than those advanced below by the district court.).

[89]551 F.2d 384 (D.C. Cir. 1976).

wiretaps obtained through facilities provided by AT&T upon receipt of "request" letters from the Federal Bureau of Investigation.

The Subcommittee had issued a subpoena to AT&T for these request letters, as well as records of wiretaps prior to the initiation of the practice of sending letters. The White House and the Subcommittee negotiated for alternative arrangements to meet the Subcommittee's informational needs, but negotiations failed. The Department of Justice brought an action against AT&T seeking to enjoin it from complying with the subpoena, arguing that because of the national security implications involved, the decision of the executive branch not to provide these materials was essentially not subject to review. For its part, the Subcommittee maintained that it was exercising its power to investigate and acquire information appropriately by inquiring into a suitable area of federal legislation -- the interception of interstate telephone communications.

The district court permanently enjoined AT&T from providing the documents, and the Chairman of the Subcommittee, who had been permitted to intervene, appealed the ruling. The court of appeals remanded the case for the negotiation of a settlement, which proved unavailing. The appellate court then outlined a procedure under which the Subcommittee was granted limited access to the documents requested, with any resulting disputes surrounding the accuracy of redacted documents to be resolved by the district court *in camera.*

Lastly, the case *United States v. House of Representatives.*[90] In this case, the Investigations and Oversight Subcommittee of the House Committee on Public Works and Transportation subpoenaed the Administrator of the Environmental Protection Agency ("EPA"), Anne Gorsuch, demanding that she testify and produce certain documents. Upon Gorsuch's refusal to provide the Subcommittee with "sensitive documents found in open law enforcement files," the House held her in contempt. However, before the contempt citation was presented to the grand jury by the United States Attorney for the District of Columbia, the Department of Justice filed an action for a declaratory judgment against the House and some of its members and committees, seeking a ruling that the decision to withhold documents requested by the Subcommittee had been lawful.

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[90]556 F. Supp. 150 (D.D.C. 1983)

The defendants' motion to dismiss the complaint was granted by the district court, which reasoned that constitutional claims of executive privilege, or other general objections to congressional investigatory procedures, were raised as defenses to a criminal prosecution for contempt. In the instant case, however, Gorsuch had not yet become a defendant in a criminal contempt proceeding or other action initiated by Congress. Thus, since the case "raise[d] difficult constitutional questions in the context of an intra-governmental dispute," the court found it inappropriate to address such issues until the circumstances indicated that judicial intervention was warranted. Ultimately, the dispute was settled by permitting Subcommittee members and staff to review the materials under procedures that ensured protection of the confidentiality of the information.

From the above three cases involving House committees, the following conclusions regarding the operation of executive privilege in the congressional context – at least from the judicial perspective – can be drawn:

> First, in aid of its oversight and legislative functions, Congress has the power, under the Constitution, to demand information. The President, for his part, has constitutional power to withhold disclosure of information that would "impede the performance of executive branch responsibilities." A "presumptive privilege for Presidential communications," even those based on the "President's generalized interest in confidentiality," has been recognized by the Supreme Court. "Executive privilege, however, is defeasible, and a claim of privilege based on a generalized interest in confidentiality may carry less force than narrower claims based on military and state secrets." Finally, under the governing law, "the privilege can be overridden in the congressional setting only by a showing that the information is 'demonstrably critical to the responsible fulfillment of the [congressional entity's] functions.'"[91]

Next, negotiation and accommodation. As previously mentioned, congressional requests for information from the executive branch are handled through an informal process of accommodation and negotiation, away from the judicial portals. As this mode of settling informational

[91]Iraola, R., *supra* note 10, at 1585-1586.

disputes involves essentially a political process, not a judicial and legal issue, this discourse will not extensively discuss this mode. Suffice it to state that the success of the accommodation process will hinge on the balance of interests between Congress and the executive branch. The more diffused the interest of the executive branch in withholding the disputed information, the more likely this interest will be overcome by a specifically articulated congressional need related to the effective performance of a legislative function. Conversely, the less specific the congressional need for the information and the more definite the need for secrecy, the more likely the dispute will be resolved in favor of the executive.[92] In arriving at an accommodation, what is "required is not simply an exchange of concessions or a test of political strength. It is an *obligation* of each branch to make a principled effort to acknowledge, and if possible to meet, the legitimate needs of the other branch."[93]

If a compromise cannot be reached, notwithstanding the best efforts of both branches, the President is then faced with the question of whether or not to assert executive privilege. Some commentators posit the view that in the aftermath of the Nixon Presidency, "(a) president who asserts the privilege will suffer political damage by relying on a tool which the American political culture presumes is intended to cloak corruption."[94] Moreover, it has been noted that Congress possesses a commanding arsenal of political responses if executive privilege is asserted with respect to a congressional subpoena, including holding executive officers in contempt, threatening to withhold appropriations, and deferring action on Presidential initiatives and nominees--all actions possibly aimed at generating front page headlines that suggest wrongdoing.[95]

IV. EXECUTIVE PRIVILEGE IN RELATION TO BUSINESS

With the pungent and powerful criticisms hurled at President Nixon for his attempt at unfettered secrecy through the invocation of "executive privilege," subsequent Presidents were careful to avoid using "executive

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[92] *Id.* at 1586, n.160, citing 6 Op. Off. Legal Counsel 481, 487 (1982).

[93] *Id.* at 1586, n.161, citing 5 Op. Off. Legal Counsel 27, 31 (1981); *see also* 10 Op. Off. Legal Counsel 68, 92 (1986) ("[I]n cases in which Congress has a legitimate need for information that will help it legislate and the Executive Branch has a legitimate, constitutionally recognized need to keep information confidential, the courts have referred to the obligations of each branch to accommodate the legitimate needs of the other." (citing United States v. AT&T, 567 F.2d 121, 130 (D.C. Cir. 1977).

[94] R. Miller, *Congressional Inquests: Suffocating the Constitutional Prerogative of Executive Privilege*, 81 MINN. L. REV. 631, 670 (1997).

[95] *Id.* at 670-71.

privilege" to shield information, as the doctrine had almost become synonymous with covering up a wrongdoing. President George H.W. Bush, for example, on many occasions used names or sources of authority other than "executive privilege" to justify secrecy, invoking deliberative process privilege, attorney-client privilege, . attorney work product, internal departmental deliberations, deliberations of another agency, secret opinions policy, sensitive law enforcement materials, and ongoing criminal investigations, among others.[96] Some of these species of confidentiality weapons are considered forms of executive privilege as we have mentioned earlier. In the absence or failure of statute-based claims of confidentiality, may executive privilege trump demands from the executive for information that may affect business and commerce?

Several illustrations may prove instructive:

First, the Morton documents. In 1975, Congress prevailed over the executive in its request for reports compiled by the Department of Commerce identifying the U.S. companies that had been asked to join a boycott – organized by Arab nations – of companies doing business with Israel. Secretary of Commerce Rogers Morton refused to release the documents to a House Interstate and Foreign Commerce Subcommittee on the strength of Section 7(c) of the Export Administration Act of 1969, *viz.*

> No department, agency, or official exercising any functions under this Act shall publish or disclose information obtained hereunder which is deemed confidential or with reference to which a request for confidential treatment is made by the person furnishing such information, unless the head of such department or agency determines that the withholding thereof is contrary to the national interest.

Morton wrote the subcommittee, saying that he understood the need to provide Congress "with adequate information on which to legislate," but concluded that "disclosing the identity of reporting firms would accomplish little other than to expose such firms to possible economic retaliation by certain private groups merely because they reported a boycott request, whether or not they complied with that request."

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[96]Rozell, *supra* note 17, at 1099.

The subcommittee issued a subpoena. In a letter to the committee, Morton reiterated his refusal to release the documents, explaining that his decision was not based "on any claim of executive privilege, but rather on the exercise of the statutory discretion conferred upon me by the Congress." He said however that he was prepared to make copies of the documents available, "subject only to deletion of any information which would disclose the identity of the firms reporting, and the details of the commercial transactions involved."

At a subsequent Subcommittee hearing, Representative John Moss, chairperson of the subcommittee seeking the documents, told Morton that Section 7(c) did not "in any way refer to the Congress nor does the Chair believe that any acceptable interpretation of that section could reach the result that Congress by implication had surrendered its legislative and oversight authority under Article I and the Rules of the House of Representatives."

Morton told Moss that Attorney General Edward Levi had advised him not to make the documents available to the committee. The subcommittee voted Morton in contempt for failure to comply with the subpoena. The prospect of contempt proceedings urged Morton to release the material to the subcommittee. Congress later amended Section 7(c) making explicit that information obtained under the section is available to any committee or subcommittee of Congress.[97]

Second, the Califano documents. In 1978, a subcommittee of the House Committee on Interstate and Foreign Commerce commenced investigating on the manufacturing process used by drug companies for making generic drugs and for pricing brand-name drugs. The body looked into charges that drug companies merely put trade names on drugs manufactured by generic drug firms and sold them at much higher prices. One way to claim manufacturing responsibility was for a trade name company to put an employee in a generic drug house while the product was being manufactured. To dig deeper into this "man-in-the-plant" strategy, the subcommittee requested documents from the Department of Health, Education, and Welfare (HEW). Legislation was introduced to limit or eliminate the man-in-the-plant practice.

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[97] L. Fisher, *Congressional Access to Information: Using Legislative Will and Leverage, Politics and Policy: Executive Privilege and the Bush Administration*, 52 DUKE L.J. 323, 348-350 (2002). (footnotes omitted)

The subcommittee sent several letters to Secretary of HEW Joseph Califano, Jr., for the documents. Having failing to receive the material, the subcommittee agreed to subpoena Califano. In a memorandum, the Department of Justice (DOJ) took the position that withholding the material from the subcommittee was justified in view of the language in the Food, Drug, and Cosmetics Act, which prohibited Food and Drug Administration employees from disclosing *trade secret* information. The memorandum argued that there was no clearly expressed congressional intent in the statute to exclude committee access from the general restriction on disclosure; significantly, the statute provided for disclosure to the courts, but not to the committees of Congress.

At a meeting with the subcommittee, Califano produced some materials but also stated that any documents relating to trade secret information and the manufacturing process would be blackened out because of the DOJ position. Subcommittee chairperson John Moss stated in no uncertain terms that the blackened-out material did not comply with the subpoena. Califano explained that his refusal to release the unredacted material had nothing to do with separation of powers or executive privilege, but rather, with the statutory prohibition on the release of trade secret information. Congress, he said, "has the power to change that statute."

The subcommittee then voted Califano in contempt for failing to comply with the subpoena. A month later, the subcommittee dropped the contempt action after Califano turned over the materials that had been subpoenaed. He explained that the HEW had further reviewed the withheld materials and found that some information had been "inappropriately deleted" from documents given to the panel.[98]

Third, the Cheney energy committee. In 2001, shortly after President George W. Bush took office, he established the National Energy Policy Development Group (NEPDG) in the office of Vice President Richard Cheney. The Vice President came into the White House from the chief offices of a company that had one foot in the energy business and the other in defense contracting. While the formal members of the NEPDG were all government officials, critics charged that oil company executives and energy company lobbyists sat in on its meetings.

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[98] *Id* at 350-352. (footnotes omitted)

The activities of the NEPDG drew the attention of Representative Henry Waxman, a ranking minority member of the House Committee on Government Reform, who asked the Vice President for documents on NEPDG's secret meetings. When the Vice President declined the request, Congressman Waxman and a ranking member of the House Committee on Energy and Commerce asked the General Accounting Office (GAO), Congress' independent investigative arm, to investigate the process by which the NEPDG Report on National Energy Policy was developed, purportedly containing portions that were unduly favorable to oil companies.

The Vice President questioned the jurisdiction of the GAO, urging it to sue to enforce its mandate.[99] While the Vice President did not technically invoke executive privilege in his response, his argument was steeped in executive privilege principles.[100] The case was dismissed on grounds of standing and separation of powers.[101] But several interest groups and a conservative political group filed suits seeking similar disclosure. Without explicitly invoking executive privilege, the Vice President filed an emergency motion for a writ of mandamus to keep the operation of NEPDG secret.

The cases found their way to the Supreme Court, which ruled that the assertion of executive privilege was not a necessary precondition for the objections to the government's separation of powers. In the end, the Vice President succeeded in keeping his secrets.[102] In the meantime, public interest groups brought suits seeking the same documents, not from the Vice President, but from the Department of Energy and other federal agencies. These cases resulted in the release of thousands of pages of deliberations of the Task Force.[103]

Fourth, foreign participation in mining companies. In 1981, President Reagan set the tone for executive privilege disputes during his presidency. In that year, a House subcommittee investigated the Mineral Lands Leasing Act because of takeovers of U.S. companies by foreign interests. Responding to a subcommittee request, Interior Secretary James Watt ruled that thirty-one documents contained sensitive information and

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[99] K. Graham, *Government Privilege: A Cautionary Tale for Codifiers*, 38 LOY. L.A. L. REV. 861, 880-881 (2004).

[100] H. Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 2 IOWA L. REV. 489, 497 (2007).

[101] Graham, *supra* note 100, at 880-881.

[102] *Id.* at 880-888, citing Cheney v. United States Dist. Court, 124 S. Ct. 2576, 2580 (2004).

[103] R. Steinzor, *Democracies Die Behind Closed Doors: The Homeland Security Act and Corporate Accountability*, 12 SPG KAN. J. OF LAW AND PUB. POL. 641, 660 (2003).

refused to supply them to Congress. The subcommittee responded with a subpoena.

President Reagan sought the opinion of Attorney General William French Smith regarding the executive's right to withhold the documents. Smith defended an assertion of executive privilege. The documents were "either necessary and fundamental to the deliberative process presently ongoing in the Executive Branch or relate to sensitive foreign policy considerations." According to Smith, by demanding confidential documents, Congress was trying to participate in executive branch decision-making. In a most controversial opinion adopted by his successors, Smith alleged that Congress lacked an interest in the executive branch information requested for investigative purposes.

Armed with the attorney general's opinion and a memorandum from the President asserting executive privilege, Watt appeared before the subcommittee. He refused to answer subcommittee members' questions about the documents. The President refused a subsequent request to release the documents. The subcommittee did not accept the claim of executive privilege. The General Counsel to the Clerk of the House refuted the Attorney General's legal opinion. The subcommittee voted Watt in contempt and referred the conflict to the full committee. The Committee on Energy and Commerce recommended that Watt be cited by the full House for contempt of Congress. President Reagan made the documents available to the subcommittee. The Committee dropped the contempt citation.[104]

Fifth, trade agreement negotiations. In recent years in the U.S. as in the rest of the world including the Philippines, expansive government-negotiated bilateral and multilateral international trade agreements have gained momentum. This development has prompted concerns about the far-reaching implications of such agreements, especially on private conduct, and an increased focus upon the processes by which they are negotiated. There are calls for *greater openness* and *public participation* in the negotiations over these agreements, as well as greater access to the negotiating documents shared by the United States with other governments prior to the conclusion of a free trade agreement. The fact that three hundred years or even as recently as twenty-five years ago, international agreements negotiated in secret can no longer in themselves, justify the continuation of

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[104] Rozell, *supra* note 1, at 1095-1096. (footnotes omitted)

that approach in this age of the North American Free Trade Agreement (NAFTA), the Central American Free trade Agreement (CAFTA) or the General Agreement on Tariffs and Trade (GATT).[105]

Admittedly, the secrecy of negotiations permits frank discussions, minimizes posturing, and allows for flexibility in negotiating positions that are essential to conclude an agreement. At the same time, however, government secrecy may be prone to abuse; its use is often assailed as undemocratic, as it can weaken accountability and undermine the legitimacy of government action in the public eye.

Legal efforts have been initiated to compel disclosure of negotiation documents. In a motion for summary judgment filed in a dispute over the Office of the United States Trade Representative's withholding of the negotiating documents of the Free Trade Agreement of the Americas (FTAA), plaintiff public advocacy groups insisted that "(d)isclosure of all or part of the documents would permit Plaintiff and other members of the US public to provide useful and informed input to the US government." The groups warned, though, that the documents only had value while there was still time to modify U.S. positions: "If the public is not informed of the exact terms of the (agreement) until the conclusion of the process, then any opportunity for meaningful input is lost." With the rise of international trade, secrecy issues in negotiating trade agreement also merit significantly increased attention.[106]

The above examples show various ways by which the executive's disclosure or non-disclosure of information can significantly affect businesses and industries. Whether dealing with information on business transactions of companies, trade secrets or product information, foreign participation in businesses, formulation of industry policies arrived at with the participation of businessmen, or conclusion of trade agreements that impact on businesses, the coordinate branches of government and the interplay of their powers hold the key to the opening or closing of information doors that affect the bottom line and dynamics of industries.

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[105] W. Katt, Jr., *The New Paper Chase: Public Access to Trade Agreement Negotiating Documents*, 106 COL. L. REV. 679, 681, 686, 707 (2006). (footnotes omitted)

[106] *Id.*

IV. CONCLUSION

Information, knowledge, exchange, and enlightened judgment constitute the air that democracy breathes. The great statesman Thomas Jefferson admonished people in a democracy to be informed, saying that "(i)f a nation expects to be ignorant and free in a state of civilization, it expects what never was and never will be."[107] For "(w)hen information which properly belongs to the public is systematically withheld by those in power, the people soon become ignorant of their own affairs, distrustful of those who manage them, and eventually incapable of determining their own destinies."[108]

Ironically, those words trumpeting the tenets of democracy were uttered by President Nixon just three months prior to the Watergate break-in.[109] As with all other grants of authority, the power to do good is also the power to do bad, if the authority is filtered through the sieve of self-interest. To strip away the authority so that the power to do bad may be avoided will consequently also eliminate the ability to do the good.[110] But history and precedent have shown that the doctrine of executive privilege is a viable and valid exercise of executive power.[111] The key, as we have seen from the cases and situations discussed above, is not to do away with the authority; rather, to turn to the theory of separation of powers, which offers the necessary mechanisms by which presidential prerogatives can be exercised, challenged, and constrained by the legislature and the judiciary.[112] It is acknowledged that the privilege should not be invoked to conceal wrongdoing.[113]

There is no escaping the truth that executive privilege is not only a constitutionally valid authority, but a necessity -- just as secrecy is as indispensable to human beings as fire, and as greatly feared.[114] But with a legislature and a judiciary working as independent yet coordinate branches of

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[107] J. Levinson, *An Informed Electorate: Requiring Broadcasters to Provide Free Airtime to Candidates for Public Office*, B.U. L. REV. 143 (1992), citing Letter from Thomas Jefferson to Colonel Charles Yancey (1816) *in* 10 THE WRITINGS OF THOMAS JEFFERSON 4 (Paul L. Ford ed., 1899) as cited in Library of Congress, Respectfully Quoted 97 (Suzy Platt ed., 1989).

[108] Rozell, *supra* note 17, at 549, citing DAVID WISE, THE POLITICS OF LYING: GOVERNMENT DECEPTION, SECRECY, AND POWER 339 (1973), quoting President Richard Nixon.

[109] *Id.*

[110] *Id.* at 541.

[111] Doherty, *supra* note 15.

[112] Rozell, *supra* note 17.

[113] Iraola, *supra* note 10.

[114] Rozell, *supra* note 2; Katt, Jr., *supra* note 105,citing S. BOK, SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION (1982).

government and a citizenry participating in a robust democracy, executive privilege cannot ignite a firestorm that will burn the soul of a transparent and honest government.

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