How the Privilege for Governmental Information Met Its Watergate

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The author describes in detail the ill-starred course of Proposed Federal Rule of Evidence 509, which concerned state secrets and official information. This rule, which would have provided a guide to the contours of executive privilege, was rejected by Congress at the time it was responding to the events of Watergate and while the Supreme Court was making its own statement on executive privilege. The author discusses United States v. Nixon and its role in the development of executive privilege, reasoning that the Supreme Court's decision may have affirmed the supremacy of the judiciary on questions of privilege at the expense of Congress' ability to obtain information from the executive branch. She concludes that rule 509 would have provided the basis for a sounder result without such far-reaching implications.

I. INTRODUCTION

Now that the Federal Rules of Evidence have finally been adopted,¹ and the Watergate² affair has in large measure been resolved, the interrelationship between these two events has become manifest. Nowhere is this more apparent than in the birth and demise of proposed rule 509 of the Federal Rules of Evidence, which recognized that under certain circumstances the government has an evidentiary privilege to withhold information bearing on state secrets and official information.³ The fate of this rule in particular, and the fate of the rules of evidence in general, became inextricably interrelated with Watergate because, by an accident of history, Watergate and consideration of the rules coincided,⁴ triggering kindred responses. Even the cast of characters was the same: By the time

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2. Throughout this article, unless otherwise specified, "Watergate" not only refers to the events stemming from the break-in of Democratic Headquarters, but is also intended to encompass other matters which led to former President Nixon's resignation.

3. See text of rule 509 at note 50 infra.

4. See note 132 infra.
President Nixon resigned, the rules and the subject matter of rule 509 had been touched by the actions of Judge Sirica, Senator Ervin, the House Judiciary Committee, and the Supreme Court, all of whom also starred in Watergate. As a result of Congressional reaction to the collision of the rules and Watergate, rule 509 was scrapped, and the effective date of the rules was delayed by 2 years. Ironically, the way was paved for the Supreme Court's decision in United States v. Nixon, which might have rested on narrower grounds, ultimately more pleasing to Congress, had rule 509 been in effect.

The Federal Rules of Evidence were developed by an Advisory Committee appointed by Chief Justice Warren under the rulemaking power delegated by Congress to the Supreme Court through various enabling acts. The enabling acts authorize the Supreme Court to promulgate rules of "practice and procedure" which do not "abridge, enlarge or modify any substantive right," and provide that rules promulgated by the Supreme Court automatically take effect 90 days after the Court transmits them to Congress, unless they are vetoed. Basically, the Supreme Court acts as a conduit; the actual work of drafting the rules is done by the Advisory Committee, subject to approval by the Standing Committee on Rules of Practice and Procedure and the Judicial Conference of the United States.

5. In addition, Richard G. Kleindienst, Attorney General at the time of the Watergate break-in, who later pleaded guilty to not testifying fully before the Senate Judiciary Committee, was the author of the Department of Justice letter objecting to rule 509 (see note 42 infra). Albert E. Jenner, Jr., Chairman of the Advisory Committee on Rules of Evidence, became the Chief Minority Counsel to the House Judiciary Committee. Charles Alan Wright, who aided in drafting the rules as a member of the Standing Committee on Rules of Practice and Procedure, later served as special White House legal consultant on Watergate.

6. Had Congress acquiesced in the Rules as promulgated by the Supreme Court, the effective date would have been July 1, 1973, instead of July 1, 1975.


8. The Advisory Committee on Rules of Evidence was appointed by Chief Justice Warren on March 8, 1965, on the recommendation of the Judicial Conference of the United States (see 28 U.S.C. § 331 (1970)).


The present Rules produced under 28 U.S.C. § 2072 are not prepared by us but by Committees of the Judicial Conference designated by
years of work, the Advisory Committee produced three drafts: a preliminary draft, which was published in 1969; a revised draft, which was published in March 1971; and a revised final draft, which was transmitted to the Supreme Court in December 1971, but was not officially published until after promulgation by the Court in November 1972. Thereafter, the rules were transmitted to Congress where they were referred to the Judiciary Committee of the House of Representatives, whose Special Subcommittees on Reform of Federal Criminal Laws held several days of public hearings.

II. RULE 509: THE PRIVILEGE FOR GOVERNMENTAL INFORMATION

A. State Secrets

In its final form, rule 509 provided for two privileges: a privilege for Secrets of State and a privilege for Official Information. The existence of a common law evidentiary privilege to withhold state secrets from litigants "has never been doubted." Although in

the Chief Justice, and before coming to us they are approved by the Judicial Conference pursuant to 28 U.S.C. § 331. The Committees and the Conference . . . do the work, not we, and the rules have only our imprimatur. The only contribution that we actually make is an occasional exercise of a veto power.

Id. at 870 (footnotes omitted).


14. This draft was published informally by the Judicial Conference of the United States in October 1971, and, with minor changes not pertinent to this article, (see Hearings on Proposed Rules of Evidence Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary, 93d Cong., 1st Sess., ser. 2, at 42-59 (1973) [hereinafter cited as Hearings on Proposed Rules]) was promulgated by the Supreme Court on Nov. 20, 1972. Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183 (1973) [hereinafter cited as Final Draft]. Congressional reaction to the rules is discussed in Part III, infra.

15. The first two drafts dealt only with state secrets, that is, secrets concerning the national defense or international relations of the United States. Final Draft 251. The Preliminary Draft, at 375, failed to extend privilege status to official information. The privilege was eventually extended to protect official information only as a result of political pressures. See text accompanying notes 64-67 infra. State secrets and official information are defined in rule 509(a)(1), (2). See note 51 infra.

16. 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2378, at 794 (J. McNaughten ed. 1961) (footnotes omitted). "It is generally conceded that
theory the privilege would apply to purely diplomatic secrets, the few cases in which state secret information has been considered have had military undertones.

The privilege has often been spoken of as "absolute," but such a characterization is misleading unless the context in which the privilege is invoked is considered. Certainly, the operation of the privilege is absolute in barring the production of military or diplomatic secrets in open court. The rationale is obvious: The danger of harm to the nation outweighs any public or private interest in truthful and efficient fact-finding. However, the privilege is not absolute in the sense that no price must be paid by the government for asserting the

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17. Cf. Zagel, The State Secrets Privilege, 50 MINN. L. REV. 875, 877 n.8 (1966): "The instances when purely diplomatic secrets are likely to be tenaciously safeguarded are few." "Most highly sensitive diplomatic information will also involve profound considerations of national defense . . . ." Id. at 877 n.9.

18. See, e.g., United States v. Reynolds, 345 U.S. 1 (1953) (secret electronic equipment); Heine v. Raus, 399 F.2d 785 (4th Cir. 1968) (details of employment as CIA agent may not be disclosed); United States v. Burr, 25 F. Cas. 30, 37 (No. 14,692d) (C.C.D. Va. 1807) (letter from President Jefferson to General Wilkinson "showing the situation of this country with Spain," at a time of considerable tension between the two countries); Republic of China v. National Union Fire Ins. Co., 142 F. Supp. 551 (D. Md. 1956) (insurance company sought memorandum of negotiations between Britain and United States concerning return of ships owned by the Republic of China which were left in British harbors after the crews defected to Red China; court refused to order disclosure since problems bearing on the recognition of Communist China would be revealed); Firth Stirling Steel Co. v. Bethlehem Steel Co., 199 F. 353 (E.D. Pa. 1912) (naval blueprints); cf. Epstein v. Resor, 421 F.2d 930, 933 (9th Cir.), cert. denied, 398 U.S. 965 (1970) (suit brought under Freedom of Information Act to obtain file relating to forced repatriation of Soviet citizens; court considered this a question affecting "national defense and foreign policy").

19. Even disclosure to counsel may pose hazards. See Letter from Senator John L. McClellan to Hon. Albert B. Maris, Committee on Rules of Practice and Procedure, Aug. 12, 1971, in Hearings on Proposed Rules of Evidence (Supplement) Before the Subcomm. on Criminal Justice (Formerly designated as Special Subcomm. on Reform of Federal Criminal Laws) of the House Comm. on the Judiciary, 93d Cong., 1st Sess., ser. 2, at 47-61 (1973). In regard to rule 509, Senator McClellan wrote that the experience with disclosure in the area of electronic surveillance showed that "disclosure to counsel too often means disclosure to accused and the newspapers. It would be most unwise to go down that road again." Id. at 52.
privilege. Case law and rule 509 point out the consequences that attend the government's suppression of relevant evidence.

The crucial question—as the events of Watergate have made clear—is whether the Government has an absolute constitutionally grounded right to determine for itself the propriety of the claim of privilege. Must the court, in all cases, defer to the Executive's claim, or may the court examine the materials in camera to determine whether they would reveal a state secret? At the time the Advisory Committee was drafting rule 509, the only Supreme Court case directly in point was United States v. Reynolds. Chief Justice Vinson's opinion for the majority, however, seems deliberately vague on this essential point.

In Reynolds, the widows of three civilians, who had been killed in the crash of a military aircraft that was testing secret electronic equipment, sued the government under the Federal Tort Claims
Act. Plaintiffs sought discovery of the Air Force's official accident investigation report and the statements of the surviving crew members taken by the government. The Secretary of the Air Force refused to produce the requested material on the ground of privilege, but offered to make the witnesses available for examination and to allow them to refresh their memories from any statements they had given. The district court ordered the materials produced in camera to permit the court to determine the validity of the claim. When the government refused to comply, the court ordered the facts on the issue of negligence to be taken as established in plaintiffs' favor. The Third Circuit affirmed. The Supreme Court reversed.

Taken out of context, individual sentences in the Court's opinion seem to assert judicial supremacy in deciding claims of privilege; other phrases suggest ultimate deference to executive determination. But as a whole, Chief Justice Vinson's opinion successfully sidesteps the issue and focuses on the need for a "formula of compro-

25. 192 F.2d 987 (3d Cir. 1951). The court of appeals insisted on in camera examination, since otherwise the "privilege against disclosure might gradually be enlarged by executive determinations until, as is the case in some nations today, it embraced the whole range of governmental activities." Id. at 995.
27. The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect. . . . We find it helpful to draw upon judicial experience in dealing with . . . the privilege against self-incrimination. . . . . . [I]n substance it is agreed that the court must be satisfied from all the evidence and circumstances, and "from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." Hoffman v. United States, 341 U.S. 479, 486-87 (1951).
28. Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers. Yet we will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case. It may be possible to satisfy the court, from all the circumstances of the case, that 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. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.

345 U.S. at 8-9 (footnotes omitted).
mise\textsuperscript{29} to avoid unwelcome clashes between the judiciary and the executive. The majority rejects the plaintiffs' demands by narrowly holding that "[t]here is nothing to suggest that the electronic equipment, in this case, had any causal connection with the accident\textsuperscript{30} and by stressing plaintiffs' opportunity to have obtained the essential facts through examination of the surviving crew members.\textsuperscript{31} The opinion thus avoids having to confront those "constitutional overtones" whose existence it acknowledges,\textsuperscript{32} but which it hopes to minimize through insistence on strict procedures for making a claim of privilege and through warnings against invoking the privilege "lightly."\textsuperscript{33} In a footnote the opinion suggests that the doctrine of separation of powers underlies the privilege for state secrets.\textsuperscript{34} Except for this passing mention, the constitutional substructure is ignored. There is no discussion of the constitutional significance of the article II grants of specific power to the Executive in the sphere of foreign affairs, nor any assessment of the President's powers as Commander-in-Chief; nor is there any discussion of whether the Executive has inherent powers in this area which are constitutionally unique when compared to the sources of his other functions.

In drafting rule 509, the Advisory Committee sought to follow this noncommital approach.\textsuperscript{35} Since it seemed appropriate when codifying rules of evidence to include a privilege whose existence everyone conceded,\textsuperscript{36} the Committee tried to spell out the procedural details which the Supreme Court had specified, without undercutting the flexibility a court would need to resolve the unanswered question—who has the ultimate power to decide a claim of privilege?\textsuperscript{37} The compromising course of the Preliminary Draft was attacked by those who felt the rule should explicitly acknowledge ultimate judicial

\textsuperscript{29} Id. at 9.
\textsuperscript{30} Id. at 11.
\textsuperscript{31} Id.
\textsuperscript{32} Id. at 7-8.
\textsuperscript{33} Id. at 6 n.9.
\textsuperscript{34} The showing required as a condition precedent to claiming the privilege is ... based on Reynolds. It represents a compromise between the complete abdication of judicial control which would result from accepting as final the decision of a departmental officer and the infringement upon security which would attend a requirement of complete disclosure to the judge, even though it be \textit{in camera.} Advisory Committee Notes to rule 509, subdivision (b), at Preliminary Draft 274.
\textsuperscript{35} See text accompanying note 16 \textit{supra.}
\textsuperscript{36} Preliminary Draft.
control and by the Department of Justice, which wished to make executive classification conclusive on the question of privilege. The Advisory Committee's notes to the Preliminary Draft recognized that endorsement of either position lay beyond its mandate since it would be tantamount to a constitutional judgment on the powers of the respective branches of the government, the very issue Reynolds had avoided. Nevertheless, in its Revised Draft of March 1971, the Committee sought to placate those who feared governmental abuse of the privilege by requiring the Government to show that disclosure would be detrimental to the national defense or international relations of the United States. The suggestions of the Justice Department were rejected.

Deputy Attorney General Richard Kleindienst voiced strenuous

40. The Advisory Committee's Notes to rule 509 in the Preliminary Draft, at 243, states, "No attempt is made in these rules to incorporate the constitutional provisions which relate to the admission and exclusion of evidence. . . . Nor is formulating a rule an appropriate means of settling unresolved constitutional questions."
41. The changes between the Preliminary and Revised Drafts of rule 509 are as follows. (Omitted matter is in brackets and new material is in italics.)

[Rule 5-09. SECRET OF STATE]

Rule 509

Military and State Secrets

[(a) Definition. A "secret of state" is information not open or theretofore officially disclosed to the public concerning the national defense or the international relations of the United States.]

[(b)] (a) General Rule of Privilege. The government has a privilege to refuse to give evidence and to prevent any person from giving evidence upon a showing of [substantial] reasonable likelihood of danger that [the evidence will disclose a secret of state] disclosure of the evidence will be detrimental or injurious to the national defense or the international relations of the United States.

[(c)] (b) Procedure. The privilege may be claimed only by the chief officer of the department of government administering the subject matter which the [secret] evidence concerns. The required showing may be made in whole or in part in the form of a written statement. The judge may hear the matter in chambers, but all counsel are entitled to inspect the claim and showing and to be heard thereon. The judge may take any protective measure which the interests of the government and the furtherance of justice may require.

[(d)] (c) Notice to Government. If the circumstances of the case indicate a substantial possibility that a claim of privilege [for a secret of state] would be appropriate but has not been made because of oversight or lack of knowledge, the judge shall give or cause notice to be given to the officer entitled to claim the privilege and shall stay further proceedings a reasonable time to afford opportunity to assert a claim of privilege.
objection to this provision on behalf of the Department of Justice. He attacked the revised draft of rule 509 for not accurately reflecting the *Reynolds* test and for not providing conclusive effect to an executive order classifying information as affecting the national security. The Department of Justice found a strong ally in Senator John McClellan, Chairman of the Senate Subcommittee on Criminal Law and Procedure. Senator McClellan echoed most of the Department's objections and entered them, together with his own criticisms, in the Congressional Record. It became clear that if the

[(e)] (d) Effect of Sustaining Claim. If a claim of privilege [for a secret of state] is sustained in a proceeding to which the government is a party and it appears that another party is thereby deprived of material evidence, the judge shall make any further orders which the interests of justice require, including striking the testimony of a witness, declaring a mistrial, finding against the government upon an issue as to which the evidence is relevant, or dismissing the action.


43. "[T]he present formulation of the rule raised the possibility that the Government may be required to disclose the very information claimed as privileged, or other sensitive information, in order to sustain its claim. This is precisely the situation which the Supreme Court wisely sought to avoid in *Reynolds*." *Id.* at 33652.

44. It was suggested that the following paragraph be added to the Advisory Committee's Notes:

> Since, by its terms, Executive Order 10501 imposes an obligation on department and agency heads to classify information pursuant to that order as affecting the national security, the fact that the information for which the privilege is sought has been so classified . . . must unless such classification is clearly arbitrary and capricious be given conclusive weight . . . .

*Id.* at 33652-53. The letter continued: "Any other procedure would result in substituting the judgment of the courts for the Executive judgment as to the classification of information, a result that would . . . raise serious questions of the separation of powers doctrine . . . ." *Id.* at 33653.

45. This Senate subcommittee controls appropriations for the Department of Justice and the federal courts.

46. Letter from Senator John L. McClellan, *supra* note 19, at 51-52. In an addendum to the letter, the Senator noted:

> [These] comments were prepared without the benefit of the views of the Department of Justice . . . . I have, however, now examined the Deputy Attorney General's letter . . . . While I cannot say that I concur in or support each of the Department's criticisms, I urge you to give them most careful attention . . . . It would be most unfortunate if the rules were forwarded to the Congress in a form with which the Department of Justice found itself in such substantial disagreement.

*Id.* at 60-61.

47. 117 CONG. REC. 33641-62 (1971).

His remarks on that occasion underscored the Senator's well-known opposi-
Advisory Committee did not accede to his suggestions on this and other rules, the rules of evidence and rulemaking in general would be in grave jeopardy. On the other hand, if the rules became "less controversial," action might be deferred on S. 2432, a bill which the Senator had introduced in August 1971 to amend the enabling acts so as to decrease substantially the role of the Supreme Court and the Judicial Conference in the rulemaking process.

After key members of the Advisory Committee met with the Senator in response to this pressure and expressed a willingness to accommodate his views, rule 509 was once again revised. The newly revised rule incorporated all of Senator McClellan's suggestions and

48. Id. at 33642.
49. Id. at 29894.
50. The chairman of both the standing committee and the Evidence Committee and the reporter for the rules were kind and generous enough to meet with me here in Washington. . . . What they said to me need not bind their colleagues on the standing committee but they did express a willingness to take to the committee a number of additional modifications and clarifications . . . .

Id. at 33642.
51. The final draft of rule 509 was as follows:

Secrets of State and Other Official Information

(a) Definitions.

(1) Secret of State. A "secret of state" is a governmental secret relating to the national defense or the international relations of the United States.

(2) Official information. "Official information" is information within the custody or control of a department or agency of the government the disclosure of which is shown to be contrary to the public interest and which consists of: (A) intragovernmental opinions or recommendations submitted for consideration in the performance of decisional or policymaking functions, or (B) subject to the provisions of 18 U.S.C. § 3500, investigatory files compiled for law enforcement purposes and not otherwise available, or (C) information within the custody or control of a governmental department or agency whether initiated within the department or agency or acquired by it in its exercise of its official responsibilities and not otherwise available to the public pursuant to 5 U.S.C. § 552.

(b) General rule of privilege. The government has a privilege to refuse to give evidence and to prevent any person from giving evidence upon a showing of reasonable likelihood of danger that the evidence will disclose a secret of state or official information, as defined in this rule.

(c) Procedures. The privilege for secrets of state may be
most of those received from the Department of Justice.\textsuperscript{52} Again, as in the Preliminary Draft, the privilege for state secrets became operative upon a showing of danger of disclosure.\textsuperscript{53} In addition, the subdivision dealing with the procedure for making the claim was rewritten to indicate that the Government's showing might be made \textit{in camera}.\textsuperscript{54}

After promulgation of the rules by the Supreme Court, some participants in the hearings conducted by the House Subcommittee construed the final version of rule 509 to mean the privilege had to be allowed without any judicial scrutiny whenever the Government said, "This is a secret."\textsuperscript{55} The Reporter of the Advisory Committee, however, did not agree with this interpretation.\textsuperscript{56} Unfortunately, neither

\begin{itemize}
  \item [(d)] Notice to government. If the circumstances of the case indicate a substantial possibility that a claim of privilege would be appropriate but has not been made because of oversight or lack of knowledge, the judge shall give or cause notice to be given to the officer entitled to claim the privilege and shall stay further proceedings a reasonable time to afford opportunity to assert a claim of privilege.
  \item [(e)] Effect of sustaining claim. If a claim of privilege is sustained in a proceeding to which the government is a party and it appears that another party is thereby deprived of material evidence, the judge shall make any further orders which the interests of justice require, including striking the testimony of a witness, declaring a mistrial, finding against the government upon an issue as to which the evidence is relevant, or dismissing the action.
\end{itemize}

\textit{Final Draft 251-52.}

\textsuperscript{52} The Department of Justice made one last unsuccessful request to have executive classification given conclusive effect in a letter written by Deputy Attorney General Kleindienst to Chief Justice Burger on December 22, 1971. \textit{Hearings on Proposed Rules} 42.

\textsuperscript{53} The final draft of rule 509(b) is set out at note 51 \textit{supra}.

\textsuperscript{54} The final draft of rule 509(c) is set out at note 51 \textit{supra}.


\textsuperscript{56} "\ldots it is quite possible to conceive of situations in which the showing
the text nor the accompanying notes were free from ambiguity. The rule did not expressly prohibit judicial in camera inspection of the material for which the privilege was claimed. Yet, its silence on this point had become suspect with the addition of provisions dealing with official information which specifically authorized judicial inspection of the data sought. Furthermore, the sentence which was added to the notes—"Due regard is to be given to executive classifications"—was misunderstood.

The Advisory Committee's intent was to express its rejection of the Justice Department's proposal to make executive classification conclusive. The sentence was designed to express a limitation on executive power: Even if something was classified as secret, the court, after giving due regard to the classification, could nevertheless find that no state secret was involved. However, a number of witnesses at the House Subcommittee hearings read this sentence as authorizing a court to sustain an executive claim of secrecy, even for information not so classified. This misconception, like many others regarding rule 509, had its roots in a failure to understand the relationship between the rule and the Freedom of Information Act.

could not be made without disclosure to the judge. In that kind of situation the Government would be in a position of having to make the disclosure if it wanted to claim the privilege." Id. (remarks of Edward W. Cleary, Reporter). "In situations where the government is willing for the judge to examine or where a showing cannot be made without disclosure, provision for examination in camera is included in the proposed rule." Id. at 567 (Mr. Cleary).

Mr. Hungate. . . . Is 509(a) open enough that the Court can still put content into it through judicial decisions. Is that right?

Mr. Cleary. Yes, I think so.

Mr. Hungate. That is where we are now, isn't it?

Mr. Cleary. Our objective under 509 was really to codify the Reynolds case. I think the committee ought to take a very careful look at Reynolds. You may agree, and you may not agree that we did codify the Reynolds case, but this was the main outline under which we proceeded.

Id. at 543.

57. Id. at 132 (statement of Committee on Federal Courts, Association of the Bar of the City of New York: "The Court may examine claimed official information in camera; by implication, it may not do so for a Secret of State").

58. The text of the final draft of rule 509(c) is set out at note 51 supra.

59. Advisory Committee's Note to rule 509(a), Final Draft 252.

60. Hearings on Proposed Rules 529-30, 566 (comments and statement of Mr. Cleary).

61. Id. at 157 (statement of Justice Arthur J. Goldberg); id. at 163 (testimony of George T. Frampton, Jr.); id. at 184 (statement on behalf of the Washington Council of Lawyers); id. at 424 (testimony of Alan B. Morrison).

which is discussed below.\textsuperscript{63}

B. Official Information

The Department of Justice also objected to the Preliminary and Revised Drafts of rule 509 for their failure to recognize the Government's privilege to withhold information other than state secrets.\textsuperscript{64} This suggestion, which had been rejected in the Revised Draft,\textsuperscript{65} was adopted by the Advisory Committee after it had been endorsed by Senator McClellan,\textsuperscript{66} and new provisions dealing with official information were added to rule 509.\textsuperscript{67}

Although considerable authority supported executive refusal to disclose certain types of information in Government files,\textsuperscript{68} the extent of the right was unclear because federal statutes and regulations had interfered with the development of the privilege to withhold information. Until 1958, the Government, instead of invoking the Constitution or an evidentiary privilege, could usually rely on the Federal Housekeeping Act\textsuperscript{69} to excuse the production of papers and

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A final point has been urged that the proposed rule, unlike the Freedom of Information Act, might deny access to documents which are not classified at all, since the proposed rule contains no requirement that documents must be classified in order to be exempt from production. A short answer is to suggest proceeding under the Act in the most unlikely event of such a case.

\textit{Hearings on Proposed Rules 567} (statement of Mr. Cleary).

63. See text accompanying notes 104-23 infra.


65. The Advisory Committee's Supplementary Note to rule 509 entitled "Executive Privilege, 'Official Information'" stated that the Committee felt that adequate protection was provided by the Freedom of Information Act, the concept of relevancy, and by restrictions imposed on discovery. See Revised Draft 377-78.

66. I cannot say that I am enamored of an "official information" privilege in all its possible ramifications and in light of its many abuses, but it is too deeply imbedded in our history to dismiss it as merely a problem in relevancy, as the Advisory Committee Note does . . . . It deserves a more discriminatory treatment.

Letter from Senator John L. McClellan, \textit{supra} note 19, at 52.


68. See text accompanying notes 81-101 infra.

69. 5 U.S.C. § 22 (1958), as amended 5 U.S.C. § 301 (1970). The Act provided: "The head of each department is authorized to prescribe regulations not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it." C. \textsc{McCormick, Handbook of the Law of Evidence} § 108, at 231 (2d ed. E. Cleary 1972). "While the cases upholding the Act did not
records in the custody of subpoenaed officials.\textsuperscript{70} Even after the Act was amended to clarify that Congress did not intend to create a privilege,\textsuperscript{71} pockets of privilege continued to exist by virtue of specific statutes.\textsuperscript{72}

In addition, there were rumblings about a doctrine of executive privilege mandated by the Constitution. The case of Aaron Burr was described as "bedrock."\textsuperscript{73} The urge to classify the \textit{Burr} opinions as basic interpretations of the Constitution springs from the factual

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\textsuperscript{70} See Touhy v. Ragen, 340 U.S. 462 (1951).

\textsuperscript{71} "This section does not authorize withholding information from the public or limiting the availability of records to the public." \textit{5 U.S.C. § 301} (1970).


\textsuperscript{73} Berger, \textit{Executive Privilege v. Congressional Inquiry}, 12 U.C.L.A. Rev. 1043, 1102 (1965). Clearly, Chief Justice Marshall's opinions in \textit{Burr}, 25 F. Cas. 187 (No. 14,694) (C.C.D. Va. 1807), considered virtually every issue which can arise in conjunction with executive refusal to disclose governmental information to a litigant: who must claim the privilege, what is privileged, what kind of showing of privilege must be made, how is the showing made, who determines the propriety of the claim, does the court have the right to examine the materials for which the claim is made, does the litigant's need for the evidence affect the validity of the claim? The difficulty with the \textit{Burr} case is that since the day it was decided, controversy has raged over the meaning of the Chief Justice's rulings on these various questions. \textit{Compare} Rhodes, \textit{What Really Happened to the Jefferson Subpoenas}, 60 A.B.A.J. 52, 54 (1974) ("It is eminently clear that President Jefferson[']s . . . claim to an exclusive exercise of executive privileges unreviewed and unreviewable by the courts, was upheld by Chief Justice Marshall."), \textit{and Hearings on the Power of the President to withold Information from the Congress Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 84th Cong., 2d Sess. 49, 110 (1958) (Attorney General Rogers' Memorandum: "Judge Marshall held that if the President declared that a letter in his possession ought not to be exhibited in the public, he had a privilege to withhold it.").}, \textit{with} Nixon v. Sirica, 487 F.2d 700, 716 (D.C. Cir. 1973) ("We follow [\textit{Burr}] and hold today that, although the views of the Chief Executive on whether his Executive privilege should obtain are properly given the greatest weight and deference, they cannot be conclusive."), \textit{and} Berger, \textit{The President, Congress, and the Courts}, 83 \textit{Yale L.J.} 1111, 1121 (1974) ("Mr. Rhodes' deduction [supra] . . . boggles the mind.").
context in which they were rendered.⁷⁴ A refusal by the President to produce papers sought by an ex-vice-president accused of treason, in a trial presided over by the Chief Justice, seems to cry out for constitutional resolution, particularly when the Chief Justice in question was John Marshall. But a look at the opinions leaves one wondering whether Marshall viewed himself as the Chief Justice construing the Constitution or as a trial judge—his actual role in the case—who was properly seeking to avoid a "delicate question."⁷⁵

In the years that followed, the desire to avoid constitutional confrontations⁷⁸ between the executive and the judiciary caused the courts to handle executive claims of privilege on a less lofty, evidentiary plane. Without mentioning the Constitution, the courts came to recognize a qualified privilege on the part of the executive to withhold certain categories of governmental information. Not all of these decisions involved persons seeking governmental documents for use in litigation; in recent years many suits grew out of refusals by the Government to produce documents sought by members of the public

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⁷⁴. Even today dispute still rages over the actual circumstances presented in the case; for example, the extent to which the three different letters sought by Burr from President Jefferson were disclosed, partially or entirely, and to whom. Two letters from General Wilkinson to President Jefferson were requested by Burr—one dated October 21, 1806, the other November 12 of the same year—as well as an answer from Jefferson to Wilkinson. Compare id. at 1115 (October 21 letter "had been put in the hands of the clerk") with Nixon v. Sirica, 487 F.2d 700, 787 (D.C. Cir. 1973) (Wilkey, J., dissenting) ("the 21 October letter was never produced"), and id. at 748 n.83 (Mackinnon, J., dissenting) ("There are conflicting claims as to whether President Jefferson ever complied with a subpoena in the earlier treason case against Burr.").

⁷⁵. The second objection is, that the letter contains matter which ought not to be disclosed. . . . What ought to be done under such circumstances presents a delicate question, the discussion of which, it is hoped, will never be rendered necessary to this country. At present it need only be said that the question does not occur at this time.

25 F. Cas. at 37. The opinions note that the objections to "proceed[ing] against the president as against an ordinary individual . . . are so strong and so obvious that all must acknowledge them," id. at 192, but fail to analyze and ascribe a constitutional basis to what has turned out not to be so obvious at all. The discussion is devoid of legal citations. Neither the Constitution, nor Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), then but 4 years old, is mentioned. See generally text accompanying note 179 infra.

⁷⁶. See, e.g., Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (Frankfurter, J., concurring). Justice Frankfurter stated, "It ought to be, but apparently is not, a matter of common understanding that clashes between different branches of the government should be avoided if a legal ground of less explosive potentialities is properly available. Constitutional applications are apt by exposing differences to exacerbate them." Id. at 595.
pursuant to the Freedom of Information Act.\textsuperscript{77}

In 1966, Congress passed the Freedom of Information Act in response to growing dissatisfaction with the Federal Housekeeping Act\textsuperscript{78} and increased demands by the public for information relating to governmental activities.\textsuperscript{79} On its face, the Freedom of Information Act had nothing to do with litigants; it was concerned solely with information any member of the public could obtain without reference to any particularized need. The Act required the Government to disclose all records except those containing information falling into nine exempted categories.\textsuperscript{80}

Prior to enactment of the Freedom of Information Act, two principal categories of information had become judicially protected from complete disclosure: (1) intragovernmental opinions or recommendations revelatory of governmental decisionmaking processes, and (2) investigatory reports prepared by the Government, if disclosure would impede law enforcement proceedings. Exemptions 5 and 7 of the Freedom of Information Act were drafted to codify these judicial protections.


\textsuperscript{79} H.R. Rep. No. 1497, 89th Cong., 2d Sess. 6 (1966): “It is vital to our way of life to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy. The right of the individual to be able to find out how his Government is operating can be just as important to him as his right to privacy and his right to confide in his Government.”

\textsuperscript{80} 5 U.S.C. § 552(b) (1970) provides:

\begin{itemize}
  \item (b) This section does not apply to matters that are—
  \begin{itemize}
    \item (1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;
    \item (2) related solely to the internal personnel rules and practices of an agency;
    \item (3) specifically exempted from disclosure by statute;
    \item (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
    \item (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
    \item (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
    \item (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;
  \end{itemize}
\end{itemize}
GOVERNMENTAL PRIVILEGE 763
cial exceptions. Since the Act incorporates judicial rulings on disclosure to litigants to this extent, cases brought under the Act by members of the public frequently refer to court decisions determining the rights of litigants. Conversely, cases involving litigants frequently look to decisions construing the Act to determine the scope of the privilege.

A privilege for the first category of information—intragovernmental opinions—was usually seen to rest on the same need for uninhibited candor which underlies the traditional testimonial privileges. One court stated, "[G]overnment, no less than the citizen,

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

§ 552(b)(1) has been amended by Freedom of Information Act, Pub. L. No. 93-502, § 2, 88 Stat. 1561 (Nov. 21, 1974), which is discussed at notes 93 and 237 infra.

81. Exemptions 5 and 7 specifically limit disclosure except to the extent the material would be "available by law," which refers to discovery procedures permitted litigants. Cf. Nixon v. Sirica, 487 F.2d 700, 762, 767 (D.C. Cir. 1973) (Wilkey, J., dissenting) ("Freedom of Information Act ... a codification of many categories of information previously swept within the vague penumbra of 'Executive privilege,' and many known to the common law ... "); General Services Administration v. Benson, 415 F.2d 878, 880 (9th Cir. 1969) ("[T]o determine if the requirements of the fifth exemption are met ... the standards for decision are the discovery practices, as regulated by the courts."); Cooney v. Sun Shipbuilding & Drydock Co., 288 F. Supp. 708, 712 (E.D. Pa. 1968) (exemption 7 "merely recognizes and codifies the existing judicially and congressionally created exemptions").


84. See, e.g., Soucie v. David, 448 F.2d 1067, 1080-81 (D.C. Cir. 1971) (Wilkey, J., concurring) ("Historically ... the privilege ... arises from the common sense-common law principle that all public business can be transacted completely in the open, that public officials are entitled to the private advice of their subordinates and to confer among themselves freely and frankly, without fear of disclosure, otherwise the advice received and the exchange of views may not be as frank and honest as the public good requires"); Ackerly v. Ley, 420 F.2d 1336, 1341 (D.C. Cir. 1969) ("free and uninhibited exchange and communication of opinions, ideas and points of view—a process as essential to the functioning of a big government as it is to any organized human effort").
needs open but protected channels for the kind of plain talk that is essential to the quality of its functioning.\textsuperscript{85} Purely factual material, however, does not fall within this rationale because its disclosure would not impede the free flow of advice.\textsuperscript{86} Nor is a conclusion that does not go into the policymaking process immune from disclosure.\textsuperscript{87} Likewise, a final opinion of an executive agency does not require protection so long as disclosure would not reveal the processes by which the decision was reached.\textsuperscript{88} Indeed, it is the decisionmaking process which requires shielding from public scrutiny, not the decision itself.

A few courts suggested that probing the mental processes of an executive might also be improper because it would constitute judicial interference with executive functioning.\textsuperscript{89} This objection was ulti-

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\textsuperscript{85} Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 325 (D.D.C. 1966), aff'd per curiam sub nom. V.E.B. Carl Zeiss, Jena v. Clark, 384 F.2d 979 (D.C. Cir.), cert. denied, 389 U.S. 952 (1967); Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939, 945-46 (Ct. Cl. 1958) ("Free and open comments on the advantages and disadvantages of a proposed course of governmental management would be adversely affected if the civil servant or executive assistant were compelled by publicity to bear the blame for errors or bad judgment properly chargeable to the responsible individual with power to decide and act.").; Letter from Deputy Attorney General Richard G. Kleindienst, supra note 42 ("[p]rivilege . . . is based, of course, on the need to encourage candor in exchanges of views within the Executive branch. Government officials will tend to hedge or blur the substance of their opinions if they know that their opinions may be subject to subsequent disclosure in court.").

\textsuperscript{86} See, e.g., Bristol-Myers Co. v. FTC, 424 F.2d 935, 939 (D.C. Cir.), cert. denied, 400 U.S. 824 (1970) ("Purely factual reports and scientific studies cannot be cloaked in secrecy by an exemption designed to protect only 'those internal working papers in which opinions are expressed and policies formulated and recommended,'" citing Ackerly v. Ley, 420 F.2d 1336, 1341 (D.C. Cir. 1969)); Consumers Union of United States, Inc. v. Veterans Administration, 301 F. Supp. 796, 806 (S.D.N.Y. 1969), dismissed as moot, 436 F.2d 1363 (2d Cir. 1971) (raw scores obtained from testing hearing aids).

\textsuperscript{87} See, e.g., Machin v. Zuckert, 316 F.2d 336, 341 (D.C. Cir.), cert. denied, 375 U.S. 896 (1963) (accident report prepared by Air Force sought by crew member injured in plane crash; privilege attached to conclusions and recommendations as to policies that should be pursued by Air Force, but not to opinions or conclusions expressed by Air Force mechanics about possible defects in propellers attributable to manufacturer).

\textsuperscript{88} American Mail Line, Ltd. v. Gulick, 411 F.2d 696, 703 (D.C. Cir. 1969) (when the agency chose to base its ruling on a staff memorandum, "the memorandum lost its intra-agency status and became a public record . . . .").

\textsuperscript{89} Soucie v. David, 448 F.2d 1067, 1071 n.9 (D.C. Cir. 1971) ("The doctrine of executive privilege is to some degree inherent in the constitutional requirement of separation of powers."); Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 325-26 (D.D.C. 1966), aff'd per curiam sub nom. V.E.B. Carl Zeiss, Jena v. Clark, 384 F.2d 979 (D.C. Cir.), cert. denied, 389 U.S. 952 (1967).\end{flushright}
mately derived from the separation of powers doctrine, but no case had expressly decided a request for information from the Government on constitutional grounds.

The privilege was also applied to the second category, investigatory reports, usually upon the rationale of not jeopardizing presently pending proceedings. A few cases appeared to extend the privilege to any file which could ever fairly have been characterized as investigatory.

As regards both categories of information, the courts assumed, without discussing the source of their power, that the executive's claim of privilege was subject to judicial supervision. In the case of intragovernmental opinions, the courts frequently examined the material for which the privilege was claimed in order to enable the judge to separate fact from opinion, conclusions that did not enter into the decisionmaking process from decisions that did, and material

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The same logic which holds that Congress has the power to investigate so that it may effectively exercise its legislative functions, supports the proposition that the President has the power to withhold information when the use of the power is necessary to exercise his Executive functions effectively, i.e., where it is required . . . generally, for the furtherance of the efficiency and integrity of the Executive branch, such as the safeguarding of frank internal advice and discussion, of information received in confidence, of sources of confidential information, of methods of investigation . . . .

See also Bishop, The Executive's Right of Privacy: An Unresolved Constitutional Question, 66 Yale L.J. 477 (1957); Hardin, Executive Privilege in the Federal Courts, 71 Yale L.J. 879 (1962).

91. Cf. Soucie v. David, 448 F.2d 1067, 1071-72 (D.C. Cir. 1971) (since Government had not expressly invoked executive privilege as a defense to suit under Freedom of Information Act, "the court should avoid the unnecessary decision of those questions.").

92. See, e.g., Bristol-Myers Co. v. FTC, 424 F.2d 935, 939 (D.C. Cir.), cert. denied, 400 U.S. 824 (1970) (agency cannot protect all its files with a "suggestion that enforcement proceedings may be launched at some unspecified future date"); Brown v. Thompson, 430 F.2d 1214, 1215 (5th Cir. 1971) (privilege will expire after "unreasonable length of time"); Cooney v. Sun Shipbuilding & Drydock Co., 288 F. Supp. 709, 711-12 (E.D. Va. 1968) (files classified "investigatory" do not forever after retain that characterization so as to be immune from disclosure).

93. See, e.g., Cowles Communications, Inc. v. Department of Justice, 325 F. Supp. 726, 727 (N.D. Cal. 1971) ("Unthinkable that rights of privacy
that indicated how a decision was reached from the decision itself.\textsuperscript{94} The courts felt equally free to examine investigatory reports for which a privilege was claimed.\textsuperscript{95}

In addition, the courts would uphold the claim of privilege only if disclosure would be contrary to the public interest. Ascertaining the public interest required balancing the public's interest in accurate fact-finding against the public's interest in effective executive functioning;\textsuperscript{96} if the former prevailed, disclosure would be ordered.\textsuperscript{97} In

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\textit{(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel . . . .}
\end{quote}

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\textit{Pub. L. No. 93-502, \S 2, 88 Stat. 1561 (Nov. 21, 1974).}
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\textsuperscript{94} See, e.g., Machin v. Zuckert, 316 F.2d 336, 341 (D.C. Cir.), \textit{cert. denied}, 375 U.S. 896 (1963) ("[W]e cannot accept the notion that the Secretary should himself decide what portions of the reports are or are not privileged."); Boeing Airplane Co. v. Coggeshall, 280 F.2d 654, 662 (D.C. Cir. 1960) (proper for district judge to examine papers \textit{in camera} to "direct exclusions or excisions"); cf. Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 332 (D.D.C. 1966), \textit{aff'd per curiam sub nom.} V.E.B. Carl Zeiss, Jena v. Clark, 384 F.2d 979 (D.C. Cir.), \textit{cert. denied}, 389 U.S. 952 (1967) ("In \textit{camera} inspection . . . may in given instances be indispensable" to determine whether privilege appropriate, but in this case moving party failed to demonstrate need.).


\textsuperscript{96} Black v. Sheraton Corp. of America, 50 F.R.D. 130, 133 (D.D.C. 1970) (Sirica, J.) (must balance "[t]he public interest in maintaining the secrecy of the information against the plaintiff's showing of the necessity of its disclosure . . . ."); Bank of Dearborn v. Saxon, 244 F. Supp. 394, 401-03 (E.D. Mich. 1965), \textit{aff'd}, 377 F.2d 496 (6th Cir. 1967) ("The real public in-
considering whether the government had made an adequate showing of public interest in nondisclosure, the courts balanced such factors as the relevancy of the evidence,\textsuperscript{98} the availability of other evidence,\textsuperscript{99} the status of the litigant,\textsuperscript{100} and the nature of the case\textsuperscript{101} against the adverse impact on those aspects of executive functioning which the privilege is designed to protect.

Of course, neither \textit{in camera} examination nor balancing of interests is compatible with an absolute executive privilege; a qualified privilege is justifiable only if ultimate judicial control is constitutionally sanctioned. In performing these functions the courts were assuming, for the most part without analysis,\textsuperscript{102} that it was for the judiciary to decide whether the privilege applied. Leaving aside claims of state secrets, the courts found no constitutional bar prevented them from inspecting information in the possession of the executive branch, although in deference to the policies underlying the privilege,

\textsuperscript{97} See, e.g., Timken Roller Bearing Co. v. United States, 38 F.R.D. 57 (N.D. Ohio 1964) (action for tax refund; disclosure ordered even though documents would reveal criteria by which commissioner assessed deficiency); Olson Rug Co. v. NLRB, 291 F.2d 655, 661-62 (7th Cir. 1961) (document bearing policy recommendations is subject to disclosure when it relates to defense to unfair labor charge).

\textsuperscript{98} See, e.g., Pilar v. SS Hess Petrol, 55 F.R.D. 159 (D. Md. 1972) (in \textit{in camera} inspection to determine if prior statements made by witness to government inspector were so inconsistent as to require disclosure).

\textsuperscript{99} Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 328 (D.D.C. 1966), aff'd per curiam sub nom. V.E.B. Carl Zeiss, Jena v. Clark, 384 F.2d 979 (D.C. Cir.), cert. denied, 389 U.S. 952 (1967) (“Necessity for production is sharply reduced where an available alternative for obtaining the desired evidence has not been explored.”).

\textsuperscript{100} See, e.g., Freeman v. Seligson, 405 F.2d 1326, 1340 (D.C. Cir. 1968) (court must "weigh . . . the seriousness of this litigation").

\textsuperscript{101} But see Soucie v. David, 448 F.2d 1067, 1072 & n.11 (D.C. Cir. 1971), which involved material sought pursuant to Freedom of Information Act; since no express claim of privilege was made by the Government, the court stated that it need not "consider whether the disclosure provisions of the Act exceed the constitutional power of Congress to control the actions of the executive branch." In a footnote, the court remarked: "If the Government asserts a constitutional privilege on remand, the court will not thereby be deprived of
in camera disclosure was not automatic in every case.103

When the Advisory Committee agreed to add an official information provision to rule 509, it sought to codify this prevailing view of a qualified privilege subject to judicial review.104 Unfortunately, the Committee's intention did not emerge with clarity because of the decision to draft the rule in terms of the Freedom of Information Act, a statute that is itself much criticized for "awkward draftmanship."105 The Committee's decision is understandable: it viewed the Act as "an important expression of congressional policy,"106 requiring special treatment for the nine categories of information recognized as exempt from disclosure to the public. The language selected for rule 509 failed to express clearly the two points the Committee wished to make: (1) Anything available to a member of the public under the Act would be exempt from the privilege in the rule, and (2) even materials not available to a member of the public would be available to a litigant, unless the Government could show that disclosure would be contrary to the public interest.107

Rule 509(a)(2)(C) defined official information as governmental information not otherwise available pursuant to the Freedom of Information Act.108 However, because most acute problems of privilege had arisen in conjunction with the government's decision jurisdiction, for the judicial power extends to resolving the questions of separation of powers raised by the constitutional claim. See Powell v. McCormack, 395 U.S. 486, 512-22, 548-49 (1969); Baker v. Carr, 369 U.S. 186, 198-204, 208-37 (1962) . . . ." Id. at 1072 n.11.


104. Hearings on Proposed Rules. Edward W. Cleary, Reporter of the Advisory Committee testified: "[T]he Government has no privilege under this that it would not have under existing law." Id. at 534.


106. Hearings on Proposed Rules 533 (testimony of Edward W. Cleary); see Advisory Committee Note to subdivision (a)(2)(C) of rule 509, Final Draft 253.


108. See text accompanying note 51 supra.
and enforcement processes, subdivisions A and B of rule 509(a) (2) specifically extended limited protection to "[i]ntergovernmental opinions or recommendations submitted for consideration in the performance of decisional or policy making functions," and to "[i]nvestigatory files compiled for law enforcement purposes and not otherwise available." These subdivisions were unnecessary, however, since they were merely restatements of exemptions 5 and 7 of the Freedom of Information Act and would, therefore, have had evidentiary status by virtue of subdivision C.

Far more troublesome than the redundancy was the circularity of the draftsmanship. Exemptions 5 and 7 of the Act both specifically provided that information available to litigants by discovery would be available to members of the public. Consequently, rule 509 defined the evidentiary privilege for the two most significant categories of official information by reference to an Act which had defined the categories of information which the government could withhold by reference to a preexisting privilege. Furthermore, it had been extremely difficult to use decisions involving litigants in interpreting the Act, because "[t]he Act, by its terms, [does not] permit inquiry into particularized needs of the individual seeking the information, although such an inquiry would ordinarily be made of a private litigant." Therefore, the courts had been forced to proceed by "rough analogies." The incorporation of the Act into the privilege compounded these uncertainties: the decisions construing the Act became germane in interpreting the scope of disclosure under the rule. Some of the outrage vented at rule 509 is undoubtedly due to the headaches incurred in trying to work through this formulation.

109. See text accompanying notes 82-103 supra.

110. The investigatory files category was expressly made subject to the provisions of the Jencks Act, 18 U.S.C. § 3500 (1970), which entitles the defense to certain statements after a prosecution witness has testified on direct examination. The court resolves issues of relevance in camera, and the government's refusal to comply with a ruling thereon permits the court to disregard the witness' testimony. Id.

111. Rule 509(a)(2)(C), set out at note 49 supra.

112. See notes 80 and 81 supra.

113. Environmental Protection Agency v. Mink, 410 U.S. 73, 86 (1973) ("[i]nvestigation rules can only be applied under Exemption 5 by way of rough analogies").

114. Id.

The involuted draftsmanship obscured the fact that the Freedom of Information Act was intended as a limit on the scope of the privilege extended by rule 509—that anything available under the Act was automatically not subject to the privilege. A number of witnesses appearing at the Special Subcommittee Hearings misunderstood and assumed that the rule "withholds even more information than Congress intended to protect through the Freedom of Information Act." The same misconception about limitations in the rule arose in connection with the state secrets privilege.

Critics of the rule foresaw other complications stemming from the interrelation between rule 509 and the Freedom of Information Act. Pursuant to the Act, members of the public must institute suit to obtain information which the government refuses to disclose. Since the Federal Rules of Evidence would apply in all federal courts, it was suggested that rule 509 rather than the Act might now apply, rendering all information presumptively privileged instead of presumptively available. Because of these uncertainties, fear was expressed that the "interrelationship of the Freedom of Information Act and rule 509, if it ever becomes effective, would occupy the bench and bar for years to come, to the serious detriment of the public."

Further confusion was produced by the Committee's use of the phrase, "the disclosure of which is shown to be contrary to the public interest." The Committee intended to make the material sought discoverable unless the judge, balancing the respective needs of government and litigant, found the former's interest to prevail. Though neither the rule nor the Committee's Notes expressly referred to balancing by the judge or enumerated the factors he might consider, the Reporter to the Committee felt that balancing was mandated by the test of "public interest," coupled with the provision in subdivision (c)

(1973). The article presents a strong attack on rule 509 and discusses the enormous technical difficulties posed by the indiscriminate treatment of the Freedom of Information Act. Id. at 79 n.81.

116. Hearings on Proposed Rules 157 (statement of Justice Arthur J. Goldberg). See also testimony of George T. Frampton, Jr.: "[A] lot of information now available to the public won't be available to citizens any more," id. at 163; statement of Alan B. Morrison: "[i]he draftsmen appear to have operated as though the Information Act did not exist . . . ." Id. at 446.

117. See text accompanying notes 60-61 supra.


120. Hearings on Proposed Rules 187 (statement of Charles R. Halpern and George T. Frampton, Jr.).
GOVERNMENTAL PRIVILEGE

requiring the Government to make a showing. Numerous critics of the rule disagreed. At best, they found the public interest standard vague and ambiguous. They questioned whether rule 509 required the court to evaluate the Government's claim and whether the phrase "public interest" embodied those factors the courts had previously considered in assessing the litigant's need.

In an ordinary year, the drafting weaknesses in rule 509 might have been glossed over, corrected, or ignored. But 1973 was not an ordinary year. Rule 509 and the Watergate controversy appeared on the scene at the same time.

III. PROMULGATION OF THE RULES AND THEIR RECEIPT BY CONGRESS

The final draft of the Proposed Federal Rules of Evidence—with its extensive changes in rule 509—was transmitted to the Supreme Court in December 1971 after approval by the Standing Committee on Rules of Practice and Procedure and the Judicial Conference of the United States. By order of the Supreme Court, dated November 20, 1972, the rules were promulgated with an effective date of July 1, 1973, Justice Douglas dissenting, and the Chief Justice was authorized to transmit them to Congress pursuant to the enabling statutes. This he did on February 5, 1973, and on February 7 the House Judiciary Committee's Special Subcommittee on Reform of Federal Criminal Laws began hearings on the rules.

Even before their formal transmission to Congress, Senator Ervin had introduced a bill to postpone the effective date of the proposed

121. Id. at 569 (reply statement of Edward W. Cleary).
122. Id. at 137-39 (statement of Committee on Federal Courts, Association of the Bar of the City of New York); id. at 279 (comments of Rep. Holtzman: "'public interest' [is] . . . highly vague and difficult to interpret.").
123. Id. at 277-80 (Rep. Holtzman questioning attorneys from the Department of Justice); id. at 532-34 (Rep. Holtzman questioning Reporter Cleary).
124. Of all the proposed rules rule 509 underwent the most substantial modification. For a summary of other changes see Hearings on Proposed Rules 179-80.
125. Id. at 71.
127. Justice Douglas questioned whether rules of evidence are rules of "practice and procedure" within the purview of the enabling acts and objected to the rulemaking process which leads the public to assume "that our imprimatur is on the Rules," even though "[t]he Court concededly is a mere conduit." Id. at 185.
129. Despite its name, the Subcommittee's jurisdiction included both the
rules until the end of the current session of Congress unless they received express congressional approval prior to that time. In explanation, Senator Ervin remarked, "[T]he many controversies raised by the proposed Federal rules of evidence simply cannot be resolved properly within 90 days."  

A. Protecting Congress' Constitutional Prerogatives

It was a most inopportune time to expect adoption of the rules through silent congressional acquiescence. Congress, already sensitized to usurpation of its prerogative by the controversies over impoundment and the war powers, received the rules of evidence just as the Watergate crisis accelerated.

Congress reacted to the rules as another attack on its legislative powers. Congressman Podell sounded this note emphatically when he introduced the House version of Senator Ervin's bill postponing the effective date:

In the past the Congress has casually allowed such promulgations of the Court to go into effect without dissent. This time the proposals are too far reaching to allow us this luxury. Close examination of these rules, followed by appropriate congressional action is necessary. We constantly

civil and criminal aspects of the rules. Its name was subsequently changed to the Subcommittee on Criminal Justice.


131. Id. at 2396. See text accompanying note 10 supra.


On February 2, 1973, 3 days before transmission of the rules to Congress, Judge Sirica had concluded that the recent proceedings in his courtroom had failed to get to the bottom of the Watergate break-in. NEW YORK TIMES, THE END OF A PRESIDENCY 168 (1974). On February 7, the very day the Special House Subcommittee began hearings on the rules, the Senate established a Select Committee, 119 CONG. REC. S2317 (daily ed. Feb. 7, 1973), of which Senator Ervin was subsequently named chairman, to Investigate and Study Certain
hear that our prerogatives are being threatened by the expansion of Executive power. The encroachment of the judiciary upon the Congress is equally dangerous . . . .

We must not abdicate our responsibility.138

Their opponents argued that the rules usurped Congress’ prerogative in two ways: (1) Rules of evidence so substantially effect the rights of litigants that they are the equivalent of legislation, which requires enactment, rather than acquiescence by Congress, followed by Presidential approval; and (2) rules of evidence are not rules of practice and procedure within the scope of the authority granted the Supreme Court by the enabling acts.134 Although both arguments have considerable merit, they had not proved persuasive in the past. Not only Justice Douglas, who dissented on the Rules of Evidence, but also Justice Black had consistently maintained that the enabling acts “which provide for giving transmitted rules the effect of law as though they had been properly enacted by Congress are unconstitutional.”135 Nevertheless, particularly in the area of civil procedure,
Congress continued to defer to the judgment of the Advisory Committees and silently acquiesced in the rules and amendments placed before it without questioning judicial rulemaking subject to congressional veto.\textsuperscript{136}

The suggestion advanced by some\textsuperscript{137} that these rules of evidence are somehow different from the rules of civil and criminal procedure is not very persuasive.\textsuperscript{138} Certain of the civil and criminal rules have as much potential effect on the substantive rights of litigants as any of the evidentiary rules.\textsuperscript{139} In any event, numerous evidentiary provisions appear in the civil and criminal rules.\textsuperscript{140} To be sure, logic and good sense may be on the side of those\textsuperscript{141} who argue that privileges are substantive in nature, both as regards the enabling acts\textsuperscript{142} and the requirements of \textit{Erie R.R. v. Tompkins}.\textsuperscript{143} Nevertheless,

\begin{itemize}
\item 136. 4 C. WRIGHT & A. MILLER, \textit{supra} note 100, § 1001, at 31: “Since the advent of the [civil] rules, despite many proposals for change, Congress has withstood all attempts to obtain passage of procedural statutes of any consequence. Chairmen of congressional committees have routinely referred to the Supreme Court or to the appropriate Advisory Committee all such proposals.”
\item 137. Goldberg, \textit{The Supreme Court, Congress, and Rules of Evidence, 5 SETON HALL L. REV. 667 (1974)}.
\item 139. \textit{See} Hearings on Proposed Rules 215 (Statement of a Committee of New York Trial Lawyers: “[O]ur committee was well aware of the substantive changes that had been wrought in Congressional statutes by the so-called procedural Rule 23 relating to Class Actions and we were determined that if the same type of substantive changes were accomplished by the Rules of Evidence, then they should be done knowingly . . . .”).
\item 140. The Federal Rules of Civil and Criminal Procedure each contained two rules that specifically dealt with evidence (rules 43 and 44 and rules 26 and 27 respectively). These rules were transmitted to Congress with notes by the Advisory Committee discussing their evidentiary implications. Congress silently allowed both sets of rules to take effect. Other rules also had evidentiary impact. \textit{See COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, JUDICIAL CONFERENCE OF THE UNITED STATES, A PRELIMINARY REPORT ON THE ADVISABILITY AND FEASIBILITY OF DEVELOPING UNIFORM RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS, reprinted in 30 F.R.D. 73 (1962).}
\item 143. 304 U.S. 64 (1938). \textit{But see} Ladd, \textit{supra} note 141, at 559-74.
\end{itemize}
Congress had been willing to acquiesce silently in rule 35 of the Federal Rules of Civil Procedure, which eliminated the doctor-patient privilege in a large number of cases.144

Congress was also disturbed by some of the individual rules, particularly by those in the article on privileges,145 and especially by rule 509.146 According to Congressman Moorhead, "[T]he prospect of this rule being adopted is in my opinion sufficient reason to disapprove of the entire document."147

B. Congressional Reaction to Rule 509

Congressional uneasiness over rule 509 was understandable because the rule dealt with a problem very similar to one in the forefront of Congressional concern: the extent to which the executive branch, in its unreviewable discretion, may withhold information sought by Congress. The Nixon administration had already met Congress' requests for information with the assertion of executive privilege more frequently than any of its predecessors.148 Even as rule 509 and the rules of evidence were being considered by Congress, the question of executive privilege was assuming ever greater importance because of the Watergate affair.149

Of course, rule 509 dealt only with judicial access to govern-
mental information, not congressional access. However, at the time the rules were being debated it was not at all clear whether the judiciary's power to compel disclosure and Congress' power to demand information (or to regulate the demand for information) from the executive rested on identical or different constitutional grounds.\textsuperscript{150} Congress, though claiming a constitutional right to information, had never attempted to submit the executive's refusal to comply with its requests to judicial determination.\textsuperscript{151} Nor had the boundaries of Congress' power to legislate in this area—as by passing the Freedom of Information Act—been judicially tested; the decisions construing the Act had proceeded on nonconstitutional grounds.\textsuperscript{152}

Since there were no actual precedents on which to rely, many commentators concerned with Congress' constitutional powers reasoned by analogy from the judicial decisions which discussed obtaining information in the control of the executive.\textsuperscript{153} This line of reasoning was followed even though the courts had avoided constitu-

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\textit{at a news conference on March 8, 1973, that he would invoke executive privilege if the Senate Judiciary Committee sought the appearance of John W. Dean III in regard to the nomination of L. Patrick Gray III to be the Director of the FBI. 1 Hearings Before the Senate Subcomm. on Intergovernmental Relations of the Comm. on Government Operations and the Subcomm. on Separation of Powers and Administrative Practice and Procedure of the Comm. on the Judiciary, 93d Cong., 1st Sess., at 6-7 (1973) [hereinafter cited as \textit{Hearings on Executive Privilege}].}
\end{flushright}

\begin{flushright}
\textit{On March 14, 1973, the same day the House passed S. 583 requiring affirmative approval of Congress before the rules of evidence could go into effect, John Dean formally refused to appear at the hearings on the nomination of Mr. Gray on the ground of executive privilege. 9 \textit{Weekly Compilation of Presidential Documents} 255 (1973).}
\end{flushright}


151. Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973) (Wilkey, J., dissenting): "Never in 184 years, until Senator Ervin's committee filed the pending action in Judge Sirica's court for these same Watergate tapes, has the Congress desired to take the Constitutional separation of powers issue to a court for adjudication." \textit{Id.} at 770; Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971): "Courts have never been asked to rule on the scope of executive privilege in the context of a Congressional command to disclose information." \textit{Id.} at 1071 n.22.

152. \textit{See} note 91 \textit{supra} and accompanying text; text accompanying notes 200-04 \textit{infra}.

153. \textit{See}, e.g., Bishop, \textit{The Executive's Right of Privacy: An Unresolved Constitutional Question}, 66 \textit{Yale L.J.} 477, 484-85 (1957) (After discussing the issue of congressional power to demand executive information, and finding that the courts are not likely to decide this question, Professor Bishop stated, "It is, however, conceivable that the Supreme Court may yet be called upon to face the closely related and logically indistinguishable question of the executive's power to reject a judicial subpoena.") \textit{Hearings on the Power of the
tional analysis, and despite the fact that Congress' need for information in order to legislate, a litigant's need for relevant evidence, and a citizen's right to be informed might entail different constitutional considerations. After all, the cases that found a qualified evidentiary privilege in the Executive were the only available ammunition, other than quotes from the Federalist, with which to argue for a limited power in the executive vis à vis Congress.

Consequently, when confronted with rule 509, Congress could reasonably fear that a rule which would affect executive power in a somewhat different sphere might have repercussions on the balance of power between the executive and legislative branches as well. Congress was afraid not only that litigants might have more difficulty in obtaining information from executive files, but more immediately that Congress' own struggle to obtain information from the executive branch would be adversely affected by approval of rule 509.

The uncertainties stemming from the ambiguities in the draftsmanship of the rule made this prospect even more troublesome, particularly because testimony before the House Subcommittee clearly revealed the role of the Justice Department in revising the state secrets privilege and adding the privilege for official information. That the changes were in large measure attributable to Senator McClellan's endorsement of the views of the Department and

President to Withhold Information from the Congress, supra note 74; Berger, Executive Privilege v. Congressional Inquiry, 12 U.C.L.A. L. Rev. 1287 (1965). Professor Berger wrote: "The treatment of evidentiary privilege... should illuminate the claimed privilege of nondisclosure to Congress." Id. at 1294.

154. See text accompanying note 91 supra.

155. For instance, Congress' article I powers to conduct investigations and to declare war would not be involved when a litigant is seeking information. Nevertheless, even Senator Ervin, who understood very clearly that "[t]he question of congressional access to information is a somewhat different issue than judicial access," Ervin, Executive Privilege: The Need for Congressional Action, 62 Ill. B.J. 66, 72 (1973), cited the Burr case, which had nothing to do with Congress, in protesting President Nixon's invocation of executive privilege to prevent members of the White House staff from testifying before the Senator's Watergate Committee. Hearings on Executive Privilege 3 (opening statement of Senator Ervin: "I would suggest that the staff put in the record... U.S. v. Burr, which is... particularly appropriate now because we have had recent claims by the Executive that White House aides cannot be required to appear before a Congressional Committee and testify even in matters that are related to legislative functions.").

156. See text accompanying notes 55-62, 112-23 supra.

157. Hearings on Proposed Rules 69-71 (exchange between Rep. Holtzman, Judge Maris, and Reporter Cleary); id. at 105-08 (testimony of Joseph T. McLaughlin and Alvin K. Hellerstein on behalf of the Association of the Bar of
his pressure on the Advisory Committee—an fact that the Senator had sought to make abundantly clear—was almost completely overlooked. Instead, numerous witnesses before the Subcommittee stressed the input of the Department of Justice and adverted to how the final draft of rule 509 had never been publicly circulated before transmission to the Supreme Court. Representative Holtzman, a member of the Special Subcommittee, was particularly irate over the drafting process. On the final House debate of the bill deferring adoption of the rules, she stated:

[M]ajor changes in the rules were made virtually at the the last minute, essentially as a result of the intervention of the Justice Department and without the opportunity for any public comment . . . . If we fail to adopt the bill before us we would be delegating the law-make [sic] function to an unholy alliance of congressional inaction, executive intervention and judicial fiat.

Finally, some members of Congress may also have been uneasy about the effect rule 509 would have on the news media's right to inform the public. The second Ellsberg-Russo trial was in progress, and much of the record in the Pentagon Papers case was still

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the City of New York); \text{id. at 161-66} (testimony of Charles R. Halpern and George T. Frampton, Jr., on behalf of the Washington Council of Lawyers); \text{id. at 372} (testimony of Daniel Rezneck); \text{id. at 486} (testimony of Stuart H. Johnson, Jr.); \text{id. at 535} (comments of Rep. Holtzman).

158. \text{See text accompanying notes 46-51 supra.}

159. Senator McClellan had requested that documents detailing his part in the development of the rules be incorporated in the record. \text{Hearings on Proposed Rules 311.} He subsequently pointed out that his letter of August 12, 1971, and a few other items had been inadvertently omitted. These were included in the Supplemental Record. \text{Id. at 46-63 (Supp.).}

160. \text{Id. at 69-71} (exchange between Rep. Holtzman, Judge Maris, and Reporter Cleary); \text{id. at 132} (statement of the Committee on Federal Courts, the Association of the Bar of the City of New York); \text{id. at 161-66} (testimony of Charles R. Halpern and George T. Frampton, Jr., on behalf of the Washington Council of Lawyers).

161. 119 \text{CONG. REC. 7648} (1973).

162. The newsman's privilege was being debated concurrently at hearings before House and Senate subcommittees. The Senate Subcommittee on Constitutional Rights of the Committee on the Judiciary met on February 20, 21, 22, and 27, and on March 13 and 14. (\text{See Hearings on Newsmen's Privilege Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 93rd Cong., 1st Sess. (1973)}). The House Subcommittee No. 3 of the Committee on the Judiciary met on February 5, 7, 8, and 26, and March 1, 5, 7, 12, 14, and 20. (\text{See Hearings on Newsmen's Privilege Before Subcomm. No. 3 of the House Comm. on the Judiciary, 93d Cong., 1st Sess. (1973)}).
Moreover, just before the rules were transmitted to Congress, Judge Byrne had ordered the Government to turn over to the defense secret analyses in its files. Witnesses before the House Subcommittee intimated that had rule 509 been in effect, the judge's decision might have been different, and that rule 509 would undercut the newsman's privilege then being debated in Congress.

Rule 509 became the villain of the Federal Rules of Evidence, portrayed in newspaper reports as creating a new secrets of state classification for keeping government papers private. Perhaps Congress, in its heightened concern over its constitutional prerogatives, would not have silently acquiesced in the Federal Rules of Evidence even if they had not contained a privilege for governmental information. Certainly, the presence of rule 509 at the particular moment in history when Congress was anticipating a confrontation with the Executive could only have reinforced congressional determination to assert its powers, lest the executive branch fill the vacuum.

By the end of March 1973, both houses of Congress had approved a bill requiring express congressional approval for any code of evidence. Ultimately, Congress agreed to rules of evidence, but the subject matter of rule 509 nowhere appears. Although there were substantial reasons for leaving the development of other privileges to case law—as was done—these reasons do not apply to

164. See note 135 supra.
168. Shortly thereafter, on April 10, 1973, two subcommittees of the Senate Judiciary Committee began hearings on the related area of amending the Freedom of Information Act so as to make executive information more available. Senator Ervin opened the hearings by commenting that "if Congress does not assert its power in this field, the executive undoubtedly will occupy it." Hearings on Executive Privilege 2.
169. See note 130 supra.
171. Article V of the final draft affected certain privileges that traditionally were wholly matters of state interest: lawyer-client relationship (rule 503), psychotherapist-patient (rule 504), husband-wife (rule 505), clergyman-communicant (rule 506). Final Draft 235-49. In examining Article V Congress applied the considerations of the Erie decision, premised as it was on diversity jurisdiction, and left these privileges to be implemented through the case-by-case adjudication embodied in rule 501. See Moore & Bendix, Congress,
the privilege for governmental information, which does not raise issues of state interest or problems intertwined with substantive rights. Perhaps Congress thought it less dangerous to maintain the status quo than to redraft a rule 509 free of ambiguities. And, besides, Congress was working on a revision of the Freedom of Information Act aimed at increasing the scope of disclosure of governmental information, which would in turn affect the ambit of the evidentiary privilege.\textsuperscript{172} Into this vacuum caused by the absence of rule 509 strode not the Executive but the Supreme Court with its decision in \textit{United States v. Nixon}.\textsuperscript{173}

IV. \textbf{UNITED STATES V. NIXON}

In \textit{United States v. Nixon}, the Supreme Court dealt head-on with what previous courts had always avoided. The Court considered on express constitutional grounds whether the President could justify, on the basis of executive privilege, his refusal to produce tape recordings and documents sought by the Special Prosecutor for use in the Watergate cover-up trial. Unlike the decisions in \textit{United States v. Burr}\textsuperscript{174} and \textit{United States v. Reynolds},\textsuperscript{175} which side-stepped constitutional holdings and avoided analyzing the constitutional source for executive claims of privilege, the decision in the \textit{Nixon} case explicitly fo-

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\begin{quote}
Rule 501.

\textbf{GENERAL RULE}

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.
\end{quote}

172. The goals of the recent amendments to the Freedom of Information Act were "[t]o strengthen the procedural aspects of the . . . Act, . . . clarify certain provisions of the Act, improve its administration, and expedite the handling of requests for information from Federal agencies in order to contribute to the fuller and faster release of information, which is the basic objective of the Act." H.R. Rep. No. 93-876, 93d Cong., 2d Sess. (1974), 3 U.S. Code Cong. & Ad. News 6267 (1974).


175. 345 U.S. 1 (1952). \textit{See} notes 23-34 \textit{supra} and accompanying text.
The Court begins its analysis by affirming its constitutional power to "construe and delineate" claims of privilege made by the executive branch, including the President himself. Without hedging on whether final authority in this sphere lies with the courts, the decision squarely places the doctrine of executive privilege within the scope of judicial review. Whereas Chief Justice Marshall failed to cite his own opinion in *Marbury v. Madison* in the opinions delivered in the *Burr* trials, the Supreme Court in *Nixon* twice quotes Marshall's statement in *Marbury* that "it is emphatically the province and duty of the judicial department to say what the law is."

The Court then proceeds to examine the two grounds on which the President had based his claim of absolute privilege: (1) The constitutional independence of the executive branch to operate within its own sphere, and (2) a constitutionally grounded governmental need to have communications between high officials kept confidential. In the absence of a showing of the presence of military or diplomatic secrets, the Court finds that neither of these arguments provides the President with an absolute privilege; but it concedes that each argument is rooted in the separation of powers doctrine.

The first basis—the independence of the executive—does not suffice to make the President's privilege absolute because "the separate powers were not intended to operate with an absolute independence." In a criminal prosecution, an unqualified privilege would conflict with the article III duties laid upon "the Judicial Branch to do justice."

As to the second claimed basis for a presidential privilege, the Court finds "too plain for further discussion . . . the valid need for protection of communications between high government officials and those who advise and assist them in the performance of their manifold duties." Although the Court acknowledges that a privilege of confidentiality is not explicitly mentioned in the Constitution, "yet to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based," because it is

177. 5 U.S. (1 Cranch) 137 (1803).
179. 418 U.S. at 703, citing 5 U.S. at 177.
180. *Id.* at 707.
181. *Id.*
182. *Id.* at 705.
183. *Id.* at 711.
"[f]undamental to the operation of government and inextricably rooted in the separation of powers under the Constitution."\textsuperscript{184}

The Court then finds, in the factual context of the case before it, that this "presumptive privilege" does not absolutely bar production of the information sought because on balance it "must yield to the demonstrated, specific need for evidence in a pending criminal trial."\textsuperscript{185} The Court suggests that its decision will impinge but little on the rationale for the privilege—the need to encourage candor in governmental advisers—because of the infrequency with which such confidential conversations are relevant in a criminal prosecution. In the Watergate trial, where the evidence sought was "demonstrably relevant,"\textsuperscript{186} upholding the claim of privilege "would cut deeply into the guarantees of due process and gravely impair the basic functions of the courts."\textsuperscript{187}

In a footnote, the Court indicates a caveat governing the scope of its decision:

We are not here concerned with the balance between the President's generalized interest in confidentiality and the need for relevant evidence in civil litigation, nor with that between the confidentiality interest and congressional demands for information, nor with the President's interest in preserving state secrets. We address only the conflict between the President's assertion of a generalized privilege of confidentiality against the constitutional need for relevant evidence in criminal trials.\textsuperscript{188}

According to the Court, the proper procedure to be employed once a President makes a claim of privilege, is to treat the material sought as "presumptively privileged."\textsuperscript{189} Thus, the Court casts upon the Special Prosecutor the burden of demonstrating its indispensability to the pending criminal case. Only after such a showing is made could the District Judge properly order an \textit{in camera} examination of the subpoenaed information. While inspecting the documents, the trial judge must accord a "high degree of deference"\textsuperscript{190} to the President's records. Because of "the singularly unique role under Art. II of a President's communications and activities,"\textsuperscript{191} which "encom-
pass a vastly wider range of sensitive material than would be true of any 'ordinary individual,'”192 it is necessary “to afford presidential confidentiality the greatest protection consistent with the fair administration of justice.”193

V. WHAT WOULD THE DECISION IN United States v. Nixon HAVE BEEN HAD RULE 509 BEEN IN EFFECT?

Would the Supreme Court have needed to resort to the reasoning it employed in United States v. Nixon to reach the same result if rule 509 had been in effect? Of course, reconstructions are suspect, and, because of the privilege for intrajudicial communications,194 we will never know to what extent the unanimous decision represents the only basis on which the present, ideologically split, Court could achieve a consensus. I suggest, however, that rule 509 would have supported a narrower decision—a decision less filled with dicta that may yet plague Congress and the courts for years to come.

In the discussion which ensues, I am positing a rule 509 in which the drafting ambiguities discussed above195 have been resolved in favor of the Advisory Committee’s stated intentions: The rule is inconclusive as to who decides questions of state secret privilege, but expressly makes information that is obtainable pursuant to the Freedom of Information Act immune from claims of privilege. The rule authorizes privileged status for other official information only if on balance the public interest in secrecy outweighs the litigant’s interest in disclosure, taking into account those factors which the courts have already recognized.

Such a rule—whether adopted through congressional acquiescence or enactment—would have been an accurate expression of congressional will on a question properly within Congress’ constitutionally granted legislative powers. Had such a rule been in effect when the Special Prosecutor sought the Watergate tapes, the Court would

192. Id.
193. Id.
   "No statute gives this Court express power to establish and enforce the utmost security measures for the secrecy of our deliberations and records. Yet I have little doubt as to the inherent power of the Court to protect the confidentiality of its internal operations by whatever judicial measure may be required.
1975"

195. See text accompanying notes 105-23 supra.
not have been able to determine the issue of the tapes' production without considering the powers of Congress, as well as the powers of the executive and judicial branches.

The case, at least at the outset, would have presented much the same posture of Environmental Protection Agency v. Mink. In Mink, 33 members of Congress in their individual capacities brought suit under the Freedom of Information Act to obtain information bearing on the advisability of a scheduled underground nuclear test. Since all but three of the documents sought had been classified as Top Secret or Secret pursuant to Executive Order, and since the agency claimed that all the documents had been "prepared and used solely for transmittal to the President as advice and recommendations," the Government argued that all the information was specifically exempt from disclosure pursuant to subsections (b)(1) and (b)(5) of the Freedom of Information Act. The case, therefore, revolved around the two types of information with which rule 509 dealt—state secrets and official information.

A. State Secrets

The court of appeals in Mink had ordered in camera discovery to determine whether nonsecret components of the classified documents were separable. The Supreme Court reversed stating that Exemption 1 of the Freedom of Information Act precludes disclosure or in camera examination, but emphasized that this determination was not based on constitutional grounds but rather on the language of the Act: "Congress could certainly have provided that the Executive Branch adopt new procedures or it could have established its own procedures—subject only to whatever limitations the Executive privilege may be held to impose upon such congressional ordering. Cf. United States v. Reynolds, 345 U.S. 1 (1953)."

Three Justices, in concurring and dissenting opinions, would have affirmed the court of appeals' order authorizing in camera disclosure of the documents to segregate nonsecret components. They apparently saw no constitutional barrier to such an order and did

198. 410 U.S. at 77.
199. See note 80 supra.
200. 410 U.S. at 83.
202. 410 U.S. at 95-111.
not mention the decision in Reynolds. Justice Stewart, concurring, emphasized even more strongly than the majority that "Congress has conspicuously failed to attack the problem. . . . Instead, it has built into the Freedom of Information Act an exemption that provides no means to question an Executive decision to stamp a document 'secret.'"203 Justice Stewart did not discuss whether a statutory scheme authorizing in camera disclosure would be constitutional; his opinion begins with the explicit statement that "[t]his case presents no constitutional claims, and no issues regarding . . . 'Executive privilege.'"204

Adding up the eight Justices' opinions—Justice Rehnquist did not participate—reveals the following posture of the Court: Three members saw no constitutional bar to immediate in camera disclosure of Top Secret information dealing with nuclear tests. On the other hand, four, or possibly five, Justices indicated that Congress could have authorized such disclosure subject to limitations that might apply because of the underlying constitutional considerations mentioned, but not analyzed, in Reynolds.

In United States v. Nixon, the same eight Justices, who less than 17 months previously had decided Mink, join in a unanimous opinion in which the dicta about the state secrets privilege differs markedly in tone from the approach of the earlier case. The Nixon opinion at three separate points takes occasion to note that the President is not claiming that the tapes contain military or diplomatic secrets.205 Nevertheless, despite the conceded irrelevance of a state secrets privilege to the case at hand,206 the Court continues by noting that "[a]s to these areas of Art. II duties the courts have traditionally shown the utmost deference to presidential responsibilities."207 Reynolds, to the very limited extent it considered the "underpinnings" of the constitutional problem it was seeking to avoid, referred in one footnote to the "inherent executive power which is protected in the constitutional system of separation of powers."208 Nixon, by referring "to these areas of Art. II duties," seems to imply that the privilege for state secrets is unlike the privilege for nonmilitary or nondiplomatic secrets. The implication is that the latter privilege

203. Id. at 95.
204. Id. at 94.
205. 418 U.S. at 706, 707, and 710.
206. In a footnote, the Court further notes, "We are not concerned here . . . with the President's interest in preserving state secrets." Id. at 712 n.19.
207. Id. at 710.
208. 345 U.S. at 6 n.9 (1952).
hinges on the separation of powers, whereas the former is an incident of the constitutional powers the President has with respect to foreign and military affairs. The quotation from the Waterman Steamship\textsuperscript{209} case which immediately follows the Nixon Court's reference to article II duties suggests the Court is thinking of the President's powers "as Commander-in-Chief and as the Nation's organ for foreign affairs."\textsuperscript{210}

The difference in approach is significant. To say that the state secrets privilege, like the privilege for official information, stems from the separation of powers, but that Congress and the courts must be particularly careful in this sensitive area to prevent disclosure which would harm the nation, is not the same as to acknowledge the Executive's unique powers in the foreign and military sphere. What are the consequences of the Court's seeming shift from the separation of powers approach intimated by Reynolds to apparent reliance on the President's special article II duties?\textsuperscript{211} Would the Court's power to decide a claim of privilege, the question Reynolds and rule 509 sought to sidestep, be affected? At a first reading, the Nixon decision seems to imply that the Executive's claim of state secrets must be given conclusive effect. The Court's quotation from Waterman Steamship,\textsuperscript{212} when read in conjunction with its preceding comment that courts "have traditionally shown the utmost deference to presidential responsibilities,"\textsuperscript{213} conveys the initial impression that in camera examination of Executive claims would be impermissible.

\textsuperscript{209}. C. & S. Air Lines v. Waterman Steamship Corp., 333 U.S. 103 (1948). The Waterman case, however, had nothing to do with obtaining information from the executive branch. Rather, the case concerned the propriety of judicial review of an executive determination bearing on foreign and military matters.

\textsuperscript{210}. The full excerpt from Waterman which the Court quotes in Nixon is as follows:

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    The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret.
\end{quote}

418 U.S. at 710.

\textsuperscript{211}. The new mode of analysis would have no affect on the availability of information to litigants—the actual question being litigated in Nixon—since under no theory would genuinely secret military and/or diplomatic information be publicly released. See notes 16-18 supra and accompanying text.

\textsuperscript{212}. See note 210 supra.

\textsuperscript{213}. 418 U.S. at 710.
However, other statements in the Nixon opinion clearly militate against this conclusion. In the first place, the disclaimers by the Court to the effect that the case does not involve state secrets occur only in those portions of the opinion dealing with the basis and scope of the President's privilege. No mention of not dealing with state secrets occurs in that portion of the opinion discussing judicial review, where the court reaffirms Marbury v. Madison and emphasizes its “authority to interpret claims with respect to powers alleged to derive from enumerated powers.” Furthermore, the passage the Court quotes from Reynolds is one which merely urges the courts to be careful not to order disclosure unnecessarily when the occasion for the privilege is clear. Finally, the last footnote of the opinion appears to contemplate in camera review even had state secrets been involved. Thus, the Nixon opinion seems perfectly consistent with the view the Reporter of the Advisory Committee expressed before the House Subcommittee with reference to rule 509: great deference to the Executive but final control by the courts.

What, then, is the significance of the “utmost deference” which is paid to the President's activities in military and foreign spheres? If the Court adheres to this dictum in the future, the repercussions will be felt by Congress, not the litigant. The Court's singling out of the President's role in regard to military and foreign affairs and its allusion to Waterman Steamship suggest its willingness to import the reasoning of United States v. Curtiss-Wright Export Corp., a case on which Waterman Steamship relies for the statement quoted in Nixon, into the debate over obtaining information from the Executive. In Curtiss-Wright, Mr. Justice Sutherland speaking for the Court recognized sweeping inherent powers in the President in the

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214. See note 205 supra and accompanying text.
215. See text accompanying note 179 supra.
216. 418 U.S. at 704.
217. Id. at 710-11. See text accompanying note 27 supra.
218. When the subpoenaed material is delivered to the District Judge in camera questions may arise as to the excising of parts and it lies within the discretion of that court to seek the aid of the Special Prosecutor and the President's counsel for in camera consideration of the validity of particular excisions, whether the basis of excision is relevancy or admissibility or under such cases as ... Reynolds . . . or . . . Waterman Steamship . . .
Id. at 715 n.21.
219. See note 56 supra.
220. 299 U.S. 304 (1936).
221. 333 U.S. at 111.
field of foreign affairs—powers which Congress does not possess.\textsuperscript{222} The opinion itself suggests in dictum that this power may authorize Executive withholding of information pertaining to foreign affairs from Congress.\textsuperscript{223} Although Justice Sutherland's analysis has recently come under attack,\textsuperscript{224} the dictum in \textit{Nixon}, which appears to endorse the \textit{Curtiss-Wright} conception of the President's special role in foreign affairs, is ominous for Congress. The \textit{Nixon} dictum suggests that the Court may view all of Congress' constitutionally granted powers in the foreign and military spheres—to advise the President in making treaties,\textsuperscript{225} to declare war,\textsuperscript{226} and to appropriate military funds\textsuperscript{227}—as subordinate to the President's authority. If this is so, an Executive refusal to turn over military or diplomatic information sought by Congress would not be overturned by the Court.\textsuperscript{228}

More troublesome because of its immediacy is the question whether Congress has the power to legislate in matters relating to

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\item \textsuperscript{222} In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. . . . He alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it. . . . He, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries . . . . He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results. Indeed, so clearly is this true that the first President refused to accede to a request to lay before the House of Representatives the instructions, correspondence and documents relating to the negotiation of the Jay Treaty—a refusal the wisdom of which was recognized by the House itself and has never since been doubted. 299 U.S. at 319-20.
\item \textsuperscript{223} See also id. at 321, where the Court stated:
The marked difference between foreign affairs and domestic affairs . . . is recognized by both houses of Congress in the very form of their requisitions for information from the executive departments. In the case of every department except the Department of State, the resolution \textit{directs} the official to furnish the information. In the case of the State Department, dealing with foreign affairs, the President is \textit{requested} to furnish the information "if not incompatible with the public interest." A statement that to furnish the information is not compatible with the public interest rarely, if ever, is questioned.
\item \textsuperscript{225} U.S. \textit{Const.} art. II, § 2, cl. 2.
\item \textsuperscript{226} \textit{Id.} art. I, § 8, cl. 11.
\item \textsuperscript{227} \textit{Id.} art. I, § 8, cl. 12.
\item \textsuperscript{228} This, of course, assumes that such a request by Congress would be jus-
\end{itemize}
GOVERNMENTAL PRIVILEGE

foreign affairs and military information if the President’s power in these areas is unique. If Congress does not have the power to secure military or diplomatic information through congressional subpoena, does it have the power through legislation to require the Executive to produce information classified as secret by executive order? At the time of the Mink case, the subdivision (b)(1) exemption in the Freedom of Information Act made executive classification conclusive in precluding public disclosure of information pertaining to foreign or military affairs. Congress has now, over President Ford’s veto, amended this subdivision to provide for judicial examination and reclassification, if merited, when a member of the public seeks the classified material. What will be the effect of the dictum in Nixon when these new provisions are challenged? The discussion in Nixon of the nature of the President’s power may yet haunt Congress.

Had rule 509 been in effect, would the Supreme Court have been as likely to sprinkle its opinion with dicta about state secrets? Probably not. In the first place, rule 509 would itself have been an ex-

ticiable, a question which the Court has never needed to decide. Cf. 418 U.S. 683, 692-97 (1974).

229. Cf. Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971). "Obviously, Congress could not surmount Constitutional barriers—if such exist in this or any other given case—by conferring upon any member of the general public a right which Congress, neither individually nor collectively, possesses. Water does not naturally rise higher than its source." Id. at 1081 (Wilkey, J., concurring). The majority opinion agreed with this statement: "As the concurring opinion points out, the power of Congress to compel disclosure of agency records to the public is no greater than the power to compel disclosure to Congress itself." Id. at 1071-72 & n.9.

230. See text accompanying note 200 supra.

231. President Ford did not object to legislation in this area or to judicial in camera examination of the classified materials sought, but vetoed the bill because “[a] determination by the Secretary of Defense that disclosure . . . would endanger our national security would, even though reasonable, have to be overturned by a district judge who thought the plaintiff's position just as reasonable. Such a provision would violate constitutional principles . . . .” 11 U.S. Code Cong. & Ad. News 5243 (1974).

232. Compare subsection (b)(1) of the Freedom of Information Act, which now reads: "(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." Pub. L. 93-502; 88 Stat. 1561 (1974), with note 80 supra. The Act was amended "to override the Supreme Court’s holding in the case of E.P.A. v. Mink . . . with respect to in camera review of classified documents." 120 Cong. Rec. H9528 (daily ed. Sept. 25, 1974) (Conference Report on H.R. 12,471).
ample of congressional legislation dealing with the disclosure of military and foreign information. Surely the Court would have avoided dicta reflecting on the constitutionality of the state secret aspect of rule 509 in a case not dealing with state secrets. Secondly, since the Court must have been aware that the Advisory Committee and the Department of Justice disagreed over the permissible scope of judicial review of an executive claim of state secret privilege, the Court would have been loath to open this question. Consequently, it seems likely that had rule 509 been in effect, the Court would simply have found no need to consider the implications of its decision for state secrets. Instead the Court could easily have focused on the rule's impact on the privilege for official information.

B. Official Information

Had rule 509 been in effect at the time the Nixon tapes and documents were subpoenaed, the first question confronting the Nixon Court would have been whether the rule applied. Certainly the information was being sought in conjunction with a proceeding in a court of the United States. Was this, however, "official information," that is "information within the custody or control of a department or agency of the government..."? In interpreting the Freedom of Information Act, the Court of Appeals for the District of Columbia Circuit had suggested that the President might not be included in the Act's definition of "agency." However, in Environmental Protection Agency v. Mink the Supreme Court, in holding that the District Court might appropriately examine a disputed item in camera, did not discuss the point even though the documents sought had been "prepared and used solely for transmittal to the President as advice and recommendations..." Arguably, reports

234. See note 52 supra and accompanying text.
We need not determine whether Congress intended the APA to apply to the President, and whether the Constitution would permit Congress to require disclosure of his records, for we have concluded that the OST is a separate agency, subject to the requirements of the... Act, and that the... Report is a record of that agency.
238. Id. at 77.
prepared by "a departmental under-secretary committee" as in Mink, are not the equivalent of material prepared by "the President's immediate personal staff or units in the Executive office whose sole function is to advise and assist the President" as was the case in Nixon. Nevertheless, there is no indication in the history of rule 509 that such a distinction was contemplated or that it was intended for the President and his immediate advisory staff to be exempt from the rule.

Thus, the only reason not to follow the rule would be if it were unconstitutional for Congress to require disclosure of this type of Presidential record even when the public interest so warranted. What would the courts hearing the Nixon tapes case have done if the former President claimed that his constitutionally based executive privilege was incompatible with rule 509, and that rule 509 was, therefore, unconstitutional?

Judge Sirica, the trial judge, would undoubtedly have upheld the rule. Even in the absence of express congressional legislation, his response to an earlier request for tapes and documents made by then Special Prosecutor Cox had been to analyze the problem in terms of an "evidentiary privilege." His conclusions are compatible with rule 509: "The availability of evidence including the validity and scope of privileges, is a judicial decision;" "[t]he important factors are the relevance and materiality of the evidence;" and the court has the power to order an in camera examination in order to decide the question of privilege. In applying the rule Judge Sirica would have required "examination in camera of the information itself," so that he could determine whether disclosure would be contrary to the public interest.

239. *Id.* at 75.

240. This formulation comes from the Conference Report on H.R. 12,471, the bill which amended the Freedom of Information Act, see note 232 supra. The conferees stated that in amending the term "agency," to include "the Executive Office of the President," they did not intend to include such personal staff or units. 120 CONG. REC. H9529 (daily ed. Sept. 25, 1974). However, the Freedom of Information Act does not permit inquiry into the particularized needs of the individual seeking the information, so that a narrower scope of disclosure is appropriate. See text accompanying note 109 supra.


242. *Id.* at 5.

243. *Id.*

244. *Id.* at 6.

245. *Id.*

246. *See rule 509(c), quoted at note 51 supra.* In any event, this is the
A majority of the Court of Appeals for the District of Columbia Circuit would undoubtedly have affirmed his decision, as it did in the earlier case. This majority would have had no difficulty either applying the rule or upholding its constitutionality. The court's earlier decision clearly considered the President part of the executive branch for purposes of applying a qualified executive privilege. In its per curiam decision, the court relied precisely on that line of cases which rule 509 had sought to codify:

We of course acknowledge the longstanding judicial recognition of Executive privilege. Courts have . . . responded to Executive pleas to protect from the light of litigation "intra-governmental documents reflecting . . . deliberations comprising part of a process by which governmental decisions and policies are formulated." In so doing, the Judiciary has been sensitive to the considerations upon which the President seems to rest his claim of absolute privilege: the candor of Executive aides and functionaries would be impaired if they were persistently worried that their advice and deliberations were later to be made public. However, counsel for the President can point to no case in which a court has accepted the Executive's mere assertion of privilege as sufficient to overcome the need of the party subpoenaing the documents. To the contrary, the courts have repeatedly asserted that the applicability of the privilege is in the end for them and not the Executive to decide. They have, moreover, frequently ordered in camera inspection of documents for which a privilege was asserted in order to determine the privilege's applicability.

What would the Supreme Court have done? At the outset it would have been presented squarely with the issue over which it equivocates in Nixon—whether there is a distinction between the office of the President and the other departments and agencies that comprise the executive branch. While acknowledging that the President is not above the law, throughout the opinion the Court stresses the "President's powers," the "President's need," the "President's interest," and the "President's unique role."

procedure actually adopted by the judge in enforcing the Special Prosecutor's subpoena. 360 F. Supp. at 13-14.
248. Id. at 713-14.
249. 418 U.S. at 715.
250. Id. at 711.
251. Id. at 706.
252. Id. at 712 n.19.
253. Id. at 715.
Had rule 509 been in effect, however, the Court would have been faced with explicit congressional legislation dealing with the privilege the President was attempting to claim. Justice Jackson in his concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*\(^\text{254}\) distinguished three different situations in which a President's powers may be challenged: "1. When the President acts pursuant to an express or implied authorization of Congress . . . . 2. When the President acts in absence of either a congressional grant or denial of authority . . . and 3. When the President takes measures incompatible with the expressed or implied will of Congress . . . ."\(^\text{255}\)

In the third situation, the situation which would have been involved in *Nixon* had rule 509 been in effect, Justice Jackson found the President's power to be

at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.\(^\text{256}\)

Given express legislation and the absence of any intention to treat the President separately from the rest of the executive branch, it is difficult to see how the Court could have avoided applying rule 509 to the President. A contrary finding would have required an initial determination by the Court that the Constitution vests the President with such exclusive control over the information sought that Congress may not act upon the subject. Even in the absence of congressional action, the *Nixon* Court had no difficulty in acting consistently with rule 509 since it held the President's power qualified rather than absolute. If the President's privilege must yield to the needs of a criminal litigant and be subject to interpretation by the courts, surely it is also subject to the legislative power of Congress. Because of the absence of rule 509, the *Nixon* opinion, in lieu of deciding this issue, leaves us with glowing tributes to the President's unique powers.

The result and much of the analysis in *Nixon* would have been the same had rule 509 been in effect, but the Court would have had

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254. 343 U.S. 579, 634 (1952).
255. Id. at 635, 637.
256. Id. at 637-38.
to narrow its generalizations. The decision is in accord with the rule in its recognition of the rationale underlying the privilege, in its finding that the privilege may be overcome by particular circumstances, and in agreeing that in camera inspection is permissible. However, instead of broadly holding that the President's generalized privilege of confidentiality "must yield to the demonstrated, specific need for evidence in a pending criminal trial,"257 the Court would have been forced to apply the rule. Necessarily, then, the Court would have focused on the specific factors which lower courts had previously employed in assessing governmental claims of privilege,258 which had been codified by rule 509, instead of relying solely on relevancy and need.259 In future cases involving claims of executive secrecy, the relevance and importance of the information sought may not be so clear.260 Of more utility as a precedent would have been a decision which articulated the factors which a court should consider in deciding whether disclosure is in or contrary to the public interest.261 Furthermore, if rule 509 had applied, there would have been no need for the dicta concerning the President's unique role and functional requirements in our constitutional scheme. The status of the President and his need for confidentiality would simply have been factors for the Court to weigh in deciding whether in camera disclosure followed by public disclosure would be required.

Instead, the Nixon opinion reverberates with statements about the President's powers and the judiciary's authority to restrain such powers. Congress is lost in the shuffle. Although the Court expressly forgoes any conclusion on how the President's generalized interest in confidentiality would be balanced against the need of Congress,262 the deference shown the Presidency suggests that Congress' general need to investigate, inherent in its legislative function, may not be enough to overcome the President's presumptive privilege

257. 418 U.S. at 713.
258. See text accompanying notes 96-101 supra.
261. Cf. id. The court reviews such factors as the President's disavowal of executive privilege in connection with Watergate, the public interest in the functioning of the grand jury, the fact that conversations pertaining to Watergate had already been disclosed, and that in this particular case even policy and decisional discussions would be subject to disclosure if they related to the Watergate cover-up. Id. at 717-20.
262. 418 U.S. at 712 n.19.
should Congress seek information from the executive branch.

VI. CONCLUSION

The adoption of the Federal Rules of Evidence was delayed by Watergate because Congress felt its prerogatives threatened by the concept of silent acquiescence. Congressional uneasiness over unresolved questions of executive privilege, which was enhanced by the Watergate atmosphere, caused rule 509 to be dropped from inclusion in the rules altogether. Had rule 509 been in effect at the time the Supreme Court decided *United States v. Nixon*, the Court could have rendered a much more narrow opinion on an evidentiary basis, without referring to the President's unique powers in regard to military and foreign affairs, and without extolling the President's unique need for confidentiality. Though the result would have been the same, the emphasis on the powers of the presidency might have been reduced, and Congress' power would have been judicially acknowledged.

One of the most debated questions about executive privilege does appear to have been settled as a result of the Watergate litigation. The question of who decides questions of privilege has been roundly decided by the Court in favor of the judiciary. The ultimate consequence of the elimination of rule 509 may be that the President's powers have decreased vis à vis the courts at the expense of Congress. Accordingly, perhaps Congress should reconsider the advisability of having deleted a privilege dealing with governmental information from the new Federal Rules of Evidence.