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## TOO BIG A CANON IN THE PRESIDENT'S ARSENAL: ANOTHER LOOK AT *UNITED STATES V. NIXON*

*Eric Lane, Frederick A.O. Schwarz, Jr., and Emily Berman\**

And liberty cannot be preserved without a general knowledge among the people, who have a right, . . . an indisputable, unalienable, indefeasible, divine right to that most dreaded and envied kind of knowledge—I mean, of the characters and conduct of their rulers.<sup>1</sup>

### INTRODUCTION

On the second day of his presidency, Barack Obama signed two memoranda for the heads of executive departments and agencies, through which he committed his administration “to creating an unprecedented level of openness.”<sup>2</sup> His purpose was to “strengthen our democracy and promote efficiency and effectiveness in Government.”<sup>3</sup> Many presidents, at the start of their terms, have rhetorically committed themselves to openness as a fundamental principle of democracy.<sup>4</sup> Yet again and again these commitments have been broken. In 2000, former Senator Patrick Moynihan described the executive branch’s attraction to secrecy as “the great fear . . . for our democracy,” an “enveloping culture of [governmental] secrecy and the corresponding distrust of government.”<sup>5</sup> Likewise, a 2007 report on governmental secrecy found:

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<sup>1</sup> John Adams, *A Dissertation on the Canon and Feudal Law* (1765), in *THE POLITICAL WRITINGS OF JOHN ADAMS* 3, 13 (George A. Peck, Jr., ed., Hackett Publ’g Co. 2003).

<sup>2</sup> Memorandum for the Heads of Executive Departments and Agencies, Subject: Transparency and Open Government, 74 Fed. Reg. 4,685 (Jan. 21, 2009) [hereinafter *Memorandum on Transparency and Open Government*]; Memorandum for the Heads of Executive Departments and Agencies, Subject: Freedom of Information, 74 Fed. Reg. 4,683 (Jan. 21, 2009).

<sup>3</sup> Memorandum on Transparency and Open Government, *supra* note 2.

<sup>4</sup> See, e.g., Richard Milhous Nixon, First Inaugural Address (Jan. 20, 1969), in *INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES* 335 (2008); Gerald Ford, President of the United States, Inaugural Address (Aug. 9, 1974), available at <http://www.fordlibrarymuseum.gov/library/speeches/740001.htm>.

<sup>5</sup> DANIEL PATRICK MOYNIHAN & RON WYDEN, *SECRECY IN INTERNATIONAL AND DOMESTIC POLICY MAKING: THE CASE FOR MORE SUNSHINE* (2000), <http://www.fas.org/sgp/library/wyden.html>.

In the past six years, the basic principle of openness as the underpinning of democracy has been seriously undermined and distrust of government is on the rise.

The Administration has taken an extreme view of the power of the presidency. In its view, its powers to operate are largely unchecked by the Congress, courts, states, or the public. The number of secrets generated has substantially increased, while release of information has declined.<sup>6</sup>

And even President Obama's recommitment to openness, some watchdog groups contend, has already been compromised.<sup>7</sup>

This expansion of the culture of secrecy has paralleled the expansion of both the jurisdiction and size of the federal government—particularly since the Depression. Modern presidential administrations are entrusted with a far broader array of administrative responsibilities than the Founders ever could have envisioned. More information about government activities than ever before is housed in the executive branch. As the volume and scope of this information has grown, so too have executive efforts to control its dissemination.

A critical element in the legal and rhetorical foundation for the institutionalization of secrecy is *United States v. Nixon*,<sup>8</sup> the Supreme Court decision that recognized executive privilege as an executive prerogative rooted in Article II of the Constitution. The reasoning of the *Nixon* decision contains significant flaws. And, in large part because of these flaws, the Supreme Court's decision in *Nixon*—while nominally addressing only executive privilege—has enabled a culture of executive branch secrecy to take hold.

The *Nixon* case arose when President Nixon declined to comply with a subpoena for tapes of Oval Office conversations between Nixon and his aides. Executive privilege, he claimed, protected him. He wrote: "The independence of the three branches of our government" made it "inadmissible" for the courts to compel any "particular action from the President."<sup>9</sup> The Court found differently. The claim of executive privilege, the Court unanimously held, must yield to the courts' "demonstrated, specific need for evi-

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<sup>6</sup> DAVID BANISAR, GOVERNMENT SECRECY: DECISIONS WITHOUT DEMOCRACY 13 (2007).

<sup>7</sup> See, e.g., Associated Press, *Obama's Mixed Signals on Openness*, BOSTON GLOBE, Dec. 7, 2009, at 9; Editorial, *Mr. Obama's Promise of Transparency*, N.Y. TIMES, Oct. 5, 2009, at A22; Tom Hamburger & Peter Nicholas, *TARP Watchdog Cites Lack of Transparency in Obama Administration*, L.A. TIMES, July 21, 2009, at A10.

<sup>8</sup> 418 U.S. 683 (1974). The events leading up to the case are described in THEODORE H. WHITE, BREACH OF FAITH: THE FALL OF RICHARD NIXON (1975), and ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY (2004).

<sup>9</sup> Letter from Richard Nixon, President of the United States, to John Sirica, Chief Judge, United States Dist. Court for the Dist. of Columbia (July 26, 1973) [hereinafter "Nixon-Sirica Letter"], available at <http://www.presidency.ucsb.edu/ws/index.php?pid=3921>.

dence in a pending criminal trial.”<sup>10</sup> And so President Nixon surrendered the tapes.

The Court was right to reject President Nixon’s claim. It was not the Constitution’s integrity that motivated him. It was political survival. The once-protected tapes revealed that President Nixon was part of a conspiracy to cover up White House participation in the Watergate burglary. One tape even captured the president ordering the Central Intelligence Agency (“CIA”) to obstruct a Federal Bureau of Investigation (“FBI”) investigation into the burglary.<sup>11</sup>

The Court’s decision to require compliance with the subpoena effectively ended the presidency of Richard Nixon.<sup>12</sup> But, ironically, the *Nixon* case enhanced the power of future presidents to hide facts from Congress and the American public. According to the Court:

A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. . . . [Executive] privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.<sup>13</sup>

The decision thus created a presumption of secrecy for presidential communications.<sup>14</sup>

This Article demonstrates that this presumption is wrong; the Court’s reasoning in creating it was flawed. The presumption fails to take account fully of the motivations for government secrecy, which are only partially related to the exploration of valid policy alternatives. It fails to address the dangerous uses to which secrecy is so often put, as well as the natural human tendencies that lead government officials to seek the cover of secrecy. And finally, it disregards the constitutional problems the presumption cre-

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<sup>10</sup> *Nixon*, 418 U.S. at 713.

<sup>11</sup> Transcript of a Recording of a Meeting between the President and H.R. Haldeman in the Oval Office on June 23, 1972 from 10:04 to 11:39 AM, [http://www.nixonlibrary.gov/forresearchers/find-tapes/watergate/trial/exhibit\\_01.pdf](http://www.nixonlibrary.gov/forresearchers/find-tapes/watergate/trial/exhibit_01.pdf).

<sup>12</sup> When the decision was announced on July 24, 1974, impeachment proceedings had already begun and shortly thereafter, on August 9, the president resigned. “[O]ur long national nightmare is over,” declared his successor, Vice President Gerald Ford, on assuming the presidency after the decision. Gerald Ford, President of the United States, Remarks on Taking the Oath of Office as President (Aug. 9, 1974), available at <http://www.fordlibrarymuseum.gov/library/speeches/740001.htm>. And the nation breathed a sigh of relief. “Our Constitution works; our great Republic is a government of laws and not of men.” *Id.*

<sup>13</sup> *Nixon*, 418 U.S. at 708.

<sup>14</sup> *In re Sealed Case (Espy)*, 121 F.3d 729, 744 (D.C. Cir. 1997) (“The *Nixon* cases establish the contours of the presidential communications privilege. The President can invoke the privilege when asked to produce documents or other materials that reflect presidential decisionmaking and deliberations and that the President believes should remain confidential. If the President does so, the documents become presumptively privileged.”).

ates: when secrecy is used to keep information from Congress, it prevents effective application of the Constitution's system of checks and balances.

Of course, sometimes protecting information through secrecy protects our national interests and values. One example is secret military or diplomatic strategies. In 1976, a Senate Select Committee (the Church Committee) noted that "details about military activities, technology, sources of information and particular intelligence methods are secrets that should be carefully protected."<sup>15</sup> This would include such information as the identities of spies, troop movements during wartime, and technological know-how for building a nuclear bomb. In addition, secrecy may serve our constitutional commitment to individual rights by protecting the identities of individuals under investigation or by protecting personal data such as social security numbers.

Frequently, however, secrecy is about empowering the secret-holder at a cost to the national interest. In a 1987 commentary on the government's growing "secrecy system," Arthur Schlesinger, Jr., identified secrecy as "a source of power and an efficient way of covering up the embarrassments, blunders, follies and crimes of the ruling regime."<sup>16</sup> The costs of secrecy thus come from both the general degeneration of the democratic process and the specific damage that a policy cloaked in secrecy can cause.<sup>17</sup>

The *Nixon* Court failed to consider these costs. True, as we describe in Part I of this Article, the Court did check the president's exercise of power, but so reluctantly, almost apologetically, that the decision now is read both judicially and politically as support for expanding claims of executive privilege based on the separation of powers doctrine rather than for the openness on which an effective system of checks and balances depends.

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<sup>15</sup> FINAL REPORT OF THE SENATE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES [hereinafter FINAL REPORT OF THE SENATE SELECT COMMITTEE], BOOK I, S. REP. NO. 94-755, at 13 (2d Sess. 1976).

<sup>16</sup> Arthur Schlesinger, Jr., *Preface to the 1987 Edition of BANISAR*, *supra* note 6, at 5. Ironically, while maintaining a secret may make the secret-holder feel more powerful (more in control), actually revealing it might in fact be more empowering. Nixon, for example, thought he could protect his presidency by covering up (the empowering act) Watergate, but actually might have saved his presidency by immediately revealing White House staff involvement. The same is true about the nightmarishly reluctant revelations by President Clinton of his amorous interests, which led to his impeachment. More significantly, it is true about multiple examples of secret-keeping in the administration of George W. Bush, which has resulted in enormous public skepticism, to say this mildly, about the public value of many of his administration's efforts.

<sup>17</sup> The decision to invade Iraq in 2003 illustrates these points. The president, intent on going to war, misrepresents to Congress and the public information concerning both rationales given for initiating the war: the existence of weapons of mass destruction and the alleged connection between Iraq and al Qaeda. Any and all information tending to undermine these rationales is withheld. *See infra* notes 138-45 and accompanying text. Through this secrecy, the president enhances his power, controlling the debate over the need for war and undermining Congress's constitutional role of deciding whether and when to engage in war. Thousands of people die and billions of dollars are expended; the president's deceptions are eventually revealed; American prestige falls; public skepticism about government rises.

Undoubtedly, in our modern administrative state, the role of the president will continue to grow. Americans, as they have since the Depression, and especially in times of war or crisis—World War II, the Cold War, and in the face of international terrorism—will look to the president to address the many problems they face. But as executive branch responsibilities grow, the executive branch may also grow increasingly impatient with a governing system requiring executive branch officials to submit their policy proposals to the checks and balances of Congress, the public, and the courts.<sup>18</sup> Secrecy, of course, is one way to circumvent these checks. And because the *Nixon* presumption offers a legal and rhetorical justification for this circumvention, any meaningful effort to preserve the proper constitutional balance must challenge the wisdom of this presumption. Our task is therefore to explain why the presumption should be reversed in favor of a presumption of openness.

At the outset, it is also important to note one thing that we do *not* suggest. Not every meeting between the president and his advisors should be open to the media or broadcast live on C-SPAN. Nor should the transcripts of such meetings be posted online at their conclusion. Rather, when Congress has a legitimate need for information about executive branch deliberations or activities, that information should be made available to the legislature.

In Part I, the *Nixon* decision is examined. In Part II, we explain how *Nixon* failed to balance the costs and benefits of secrecy in policy making, overvaluing the benefits of secrecy and discounting its costs. In this part, we undertake the more nuanced look at secrecy eschewed by the *Nixon* Court, exploring both its attraction to policymakers and its potentially harmful consequences. This examination leads, as we explain in Part III, to the inevitable conclusion that *Nixon*'s presumption of secrecy—especially when applied to congressional requests for information—is inconsistent with the constitutional structure envisioned by the Framers. When it threatens to thwart legitimate congressional inquiry, the power that secrecy represents must be amenable to the structural checks embedded in the Constitution. To effectuate this goal, we recommend replacing the *Nixon* presumption with a different one, one that favors openness. This would mean that when Congress determines that it has a legitimate need—either for its legislative or oversight responsibilities—for information generated or shared in the course of executive branch deliberations, Congress should be able to obtain that information. In Part IV, we offer several approaches for effecting this recommendation.

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<sup>18</sup> See generally Eric Lane & Aziz Huq, *May it Please the Country*, DEMOCRACY, Summer 2009, at 86.

## I. *NIXON* AND THE CANON OF SECRECY

It is important to understand two aspects of *United States v. Nixon* in order to appreciate its pernicious effects: first, how its endorsement of executive privilege has enabled the withholding of significant portions of information regarding governmental actions; and second, the ways in which the decision's reasoning fails to grapple meaningfully—or, to be candid, fails to grapple at all—with the factual assumptions it makes about secrecy and the implications of those assumptions. To fully appreciate *Nixon*'s consequences, it is first necessary to examine both the decision itself and the ways in which the reasoning employed in the decision has been adopted in other contexts.

### A. *The Nixon Decision*

On June 17, 1972, five men were arrested for burglarizing the headquarters of the Democratic National Committee in Washington's Watergate Hotel. Their goal was to install electronic hearing devices and to gather other materials. Eventually, it became clear that their efforts that day were just one instance in a large-scale spying and money-laundering scheme carried out on behalf of President Nixon's re-election committee.<sup>19</sup> According to several of the Watergate burglars, their efforts were being directed by both John Dean, counsel to the president of the United States, and John Mitchell, Nixon's former attorney general.<sup>20</sup> But the revelations did not stop there. According to John Dean, the president himself and other top White House staff had been directly involved in attempts to obstruct the Watergate investigation and to cover up the breadth of the campaign's improper efforts to sabotage the Democratic presidential campaign.<sup>21</sup>

Initially, President Nixon adamantly denied these charges. The next revelation thus set the scene for what would become the dramatic constitutional show-down resolved by *United States v. Nixon*. On July 16, 1973, Alexander Butterfield, a former Nixon staff member, told the Senate Select Committee on presidential Campaign Activities that the president maintained tapes of all of his Oval Office conversations.<sup>22</sup>

On the basis of this claim, on July 23, 1973, Chief Judge John Sirica of the U.S. District Court for the District of Columbia signed a subpoena for the production of several Oval Office tapes at the request of the Watergate

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<sup>19</sup> MICHAEL A. GENOVESE, *THE WATERGATE CRISIS* 23 (1999); Carl Bernstein & Bob Woodward, *FBI Finds Nixon Aides Sabotaged Democrats*, WASH. POST, Oct. 10, 1972, at A1.

<sup>20</sup> See, e.g., *THE SENATE WATERGATE REPORT* 44-45 (Carroll & Graf 2005).

<sup>21</sup> See SCHLESINGER, *supra* note 8, at 256-60, 269-70.

<sup>22</sup> *SENATE WATERGATE REPORT*, *supra* note 20, at 47.

special prosecutor.<sup>23</sup> President Nixon refused to comply.<sup>24</sup> Separation of powers was his justification. "The independence of the three branches of our government," he wrote, made it "inadmissible" for the court to compel "some particular action from the President."<sup>25</sup> According to the president, all communications with his aides were privileged, and he had absolute discretion to decide when and if to disclose them.<sup>26</sup>

Judge Sirica thought otherwise and refused to quash the subpoena.<sup>27</sup> Both parties then asked the Supreme Court to grant certiorari before review by the D.C. Circuit. On May 31, the Supreme Court agreed "because of the public importance of the issues presented and the need for their prompt resolution."<sup>28</sup>

Two arguments were made on behalf of President Nixon. The first was "a broad claim" that a president's claim of privilege was "absolute" because "the separation of powers doctrine precludes judicial review" of such a claim.<sup>29</sup> The second argument was that if the president did not prevail based upon "the claim of absolute privilege," the Court "should hold as a matter of constitutional law that the privilege prevails over the subpoena."<sup>30</sup> Both arguments failed. On July 24, 1974, the Court unanimously upheld the subpoena.<sup>31</sup>

Lost in the headlines proclaiming victory for rule of law was the Court's determination that executive privilege was critical to the operation of the executive branch, just not in this particular case.<sup>32</sup> For the first time, the Court recognized the existence of "executive privilege," the president's ability to withhold information.<sup>33</sup> But the Court did more than recognize the privilege's existence. It wrote that "[executive] privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution."<sup>34</sup> Thus, the Court concluded, the privilege is a constitutional prerogative of the president that justified the creation of a presumption of secrecy for communications between a president and his

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<sup>23</sup> *Nixon v. Sirica*, 487 F.2d 700, 704-05 (D.C. Cir. 1973).

<sup>24</sup> *Id.* at 705.

<sup>25</sup> *Nixon-Sirica Letter*, *supra* note 9.

<sup>26</sup> *Sirica*, 487 F.2d at 708.

<sup>27</sup> *Id.* at 706.

<sup>28</sup> *United States v. Nixon*, 418 U.S. 683, 686-87 (1974).

<sup>29</sup> *Id.* at 703.

<sup>30</sup> *Id.*

<sup>31</sup> The Court cautioned that "the District Court has a very heavy responsibility to see to it that Presidential conversations, which are either not relevant or not admissible, are accorded that high degree of respect due the President of the United States." *Id.* at 714-15.

<sup>32</sup> *Id.* at 708; Paul L. Montgomery, *The Case Against Richard Nixon: A Catalogue of Charges and His Replies*, N.Y. TIMES, Aug. 9, 1974, at 13.

<sup>33</sup> *Nixon*, 418 U.S. at 705-06.

<sup>34</sup> *Id.* at 708.



close advisors, a presumption that the party seeking access to the information at issue could overcome only by demonstrating a specific need.<sup>35</sup>

Central to the Court's pro-secrecy reasoning was a highly contestable view of human nature, one for which neither the Court nor the president offered any evidence. Wrote the Court: "Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision-making process."<sup>36</sup> This "finding" was repeated in different ways throughout the decision. For example, the Court viewed as "too plain to require further discussion" the claim that "high government officials and those who advise and assist them" need "protection" for their communications.<sup>37</sup> Similarly, it opined that "[t]he President's need for complete candor and objectivity from advisers calls for great deference from the courts."<sup>38</sup> And, it added, "the values to which we accord deference for the privacy of all citizens" includes

the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decision making. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately.<sup>39</sup>

But these pronouncements were an exercise in judicial activism. They were simply unnecessary to the holding of the case, which upheld the power of the courts to subpoena executive materials. The facts of the *Nixon* case did not require the Supreme Court to give a presumptive privilege its imprimatur. The Court simply could have said that, whatever the strengths or weaknesses of a putative executive privilege, it would not prevail in the circumstances of the *Nixon* case. One can only speculate about why the Court did not do this. Neither of the parties before the Court challenged the existence of a privilege. There were no amicus briefs (perhaps because of the "need for . . . prompt resolution"<sup>40</sup>). Perhaps recognition of a presumptive privilege was needed to achieve unanimity, and it was obviously desirable to have a unanimous Court when the fate of the president was at stake. And the Court—like the country—may have been so focused on the result that it

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<sup>35</sup> *Id.* at 713.

<sup>36</sup> *Id.* at 705.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 706.

<sup>39</sup> *Nixon*, 418 U.S. at 708. Having recognized a presumption of privilege based on its assumptions about "human experience," the Court went on to suggest that the presumption of privilege might be absolute if a president made a claim of "need to protect military, diplomatic, or sensitive national security secrets." *Id.* at 706. It gave no basis for this assertion—which has also turned out to be mischievous.

<sup>40</sup> *Id.* at 687. Nor did the Solicitor General file a brief setting forth the views of the executive branch, as opposed to the position of the president himself.

did not think sufficiently hard about what it said along the way to reaching its ultimate judgment requiring the tapes' release.

Whatever the explanation, the Court's reasoning, which we will call the "candor rationale," is, at best, based on unproven assumptions about human nature. Moreover, the decision is surprising, at least in rereading it years later, in the high value it places on secrecy without any attention—at least none referenced in the opinion—to secrecy's vices, and on the needs of one principle of our democracy, separation of powers, without sufficient attention to another fundamental principle, checks and balances.

The Court's decision to require compliance with the subpoena—and the evidence that compliance revealed—effectively ended the presidency of Richard Nixon. But, ironically, the Court's opinion served to greatly enhance the power of future presidents to hide facts from Congress and the American public.

#### B. *The Advance of the Nixon Canon*

Despite the decision of the *Nixon* Court denying the president absolute discretion over executive branch information, the political and legal legacy of the case has been the "candor" canon, that secrecy is justified as a necessary prerequisite for candid—and therefore higher quality—advice. In the executive branch, this canon has not been limited to intimate conversations between presidents and their close advisors, but has been used by other, lower ranking officials and by the federal courts as the basis for withholding large amounts of information. More important than the cases decided under the canon are its wider implications. It gave the Supreme Court's imprimatur to executive branch tendencies toward nondisclosure, it provided a doctrinal basis for claims of secrecy, and it fostered a culture of secrecy.

*Nixon* established the candor canon as part of the constitutional jurisprudence of the Court. The theory, however, had been advanced by the executive branch before. Its initial appearance seems to have come in 1954, when President Dwight Eisenhower sought a justification to assert executive privilege in order to bar his subordinates from providing testimony to Senator Joseph McCarthy in the Army-McCarthy hearings.<sup>41</sup> Eisenhower's advisors indicated that he could do so on the basis of separation of powers rationales, which had been the traditional justification for executive privilege up until that point in time.<sup>42</sup> But Eisenhower instead decided to base the order on the candor rationale. In a letter to the secretary of defense, Eisenhower explained that "it is essential to efficient and effective admini-

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<sup>41</sup> Gerald Wetlaufer, *Justifying Secrecy: An Objection to the General Deliberative Privilege*, 65 IND. L.J. 845, 865 (1990).

<sup>42</sup> *Id.* at 865-66 & n.72.

stration that employees of the Executive Branch be in a position to be completely candid in advising with each other on official matters.”<sup>43</sup>

Once articulated by President Eisenhower in the political arena, the candor canon quickly found its way into the courts. In the 1958 case *Kaiser Aluminum & Chemical Corp. v. United States*,<sup>44</sup> retired Supreme Court Justice Stanley Reed, sitting by designation in the Court of Claims, denied the plaintiff access to certain government documents on the grounds that “[t]here is a public policy involved in this claim of privilege . . . the policy of open, frank discussion between subordinate and chief concerning administrative action.”<sup>45</sup> From this seed, the candor rationale spread, first taking root in other lower federal courts,<sup>46</sup> then spreading to the Supreme Court itself. First, in *EPA v. Mink*,<sup>47</sup> the Court applied the candor rationale to interpret a statutory provision of the Freedom of Information Act (“FOIA”) to preclude disclosure to Congress of information classified as top secret or secret.<sup>48</sup> Then, in *Nixon*, the Court elevated the canon to constitutional dimensions in the context of presidential communications.<sup>49</sup>

At no stage in its development, however, has the validity of the rationale “been the subject of serious examination or inquiry” by the courts (and only rarely by commentators);<sup>50</sup> instead, it has been accepted with “only . . .

<sup>43</sup> *Id.* at 866 (quoting Letter from President Eisenhower to Secretary of Defense, PUB. PAPERS 483 (May 17, 1954)) (internal quotation marks omitted).

<sup>44</sup> 157 F. Supp. 939 (Ct. Cl. 1958). *Kaiser* was an action against the United States for breach of a “most favored purchaser” clause of a contract for the sale of three plants that produced aluminum products. *Id.* at 941-42.

<sup>45</sup> *Id.* at 946.

<sup>46</sup> *E.g.*, *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324 (D.D.C. 1966) (“[T]he privilege subserves a preponderation policy of frank expression and discussion among those upon whom rests the responsibility for making the determinations that enable government to operate . . .”), *aff’d sub nom. V.E.B. Carl Zeiss, Jena v. Clark*, 384 F.2d 979 (D.C. Cir. 1967); *Tennessean Newspapers, Inc. v. Fed. Hous. Admin.*, 464 F.2d 657, 660 (6th Cir. 1972) (“Government policy makers . . . should not be limited in thought or expression to just those preliminary views which they were prepared to defend in the public prints. Many a quick comment—which in itself reveals lack of full consideration and thought—nonetheless may shed continuing and useful illumination on the problem at hand.”).

<sup>47</sup> 410 U.S. 73 (1973), *superseded by statute*, Act of Nov. 21, 1974, Pub. L. No. 93-502, 88 Stat. 1561, *as recognized in* *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978).

<sup>48</sup> *Id.* at 86-87, 92-94. Congress subsequently revised the FOIA to clarify that the exemptions to disclosure contained within it were not intended to allow the executive branch to withhold information from Congress.

<sup>49</sup> *United States v. Nixon*, 418 U.S. 683 (1974).

<sup>50</sup> *Wetlauffer*, *supra* note 41, at 875. Notable exceptions include *Wetlauffer*, *supra* note 41, and *Gia B. Lee*, *The President’s Secrets*, 76 GEO. WASH. L. REV. 197, 231 (2008).

short, conclusory recitations” that disclosure “will diminish the effectiveness of future deliberations and thus do injury to the public interest.”<sup>51</sup>

### 1. The Significance of *Nixon*

Though not the first decision to recognize the candor canon, *Nixon* was the most important for several reasons. First, it provided the central rationale behind the recognition of a new evidentiary privilege—the presidential communications privilege—in the midst of an incredibly high-profile political crisis in which the president was implicated in a criminal conspiracy.<sup>52</sup> It thus placed the candor canon squarely in the mainstream of American jurisprudence. Second, the decision augmented the theory’s pedigree by elevating it to the level of a constitutional command. Finally, it continued the established judicial practice of accepting the empirical question whether secrecy is necessary for candid advice as so self-evident as to not require evidence. Indeed, the *Nixon* Court described the canon as “too plain to require further discussion.”<sup>53</sup> *Nixon* thus gave renewed legitimacy to the candor canon’s invocation in innumerable contexts and became the source cited in support of its use—hence its label as the “*Nixon* canon.”

Presidents ever since have embraced its protections. Nixon himself declared that “in the performance of their duties for the President, those staff members must not be inhibited by the possibility that their advice and assistance will ever become a matter of public debate.”<sup>54</sup> While Presidents Ford and Carter failed to articulate an official policy regarding when the confidentiality of presidential communications should result in a claim of privilege, President Reagan instructed his officials to assert executive privilege over “deliberative communications that form a part of the decision-making process.”<sup>55</sup> And Presidents George H.W. Bush and Clinton followed suit.<sup>56</sup>

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<sup>51</sup> Wetlaufer, *supra* note 41, at 875.

<sup>52</sup> *Nixon*, 418 U.S. at 688, 706-09.

<sup>53</sup> *Id.* at 705.

<sup>54</sup> Richard M. Nixon, Statement About Executive Privilege, AM. PRESIDENCY PROJECT, Mar. 12, 1973, <http://www.presidency.ucsb.edu/ws/index.php?pid=4137>.

<sup>55</sup> Memorandum from Ronald Reagan, President of the United States, to the Heads of Executive Departments and Agencies (Nov. 4, 1982). *See also* Dawn Johnsen, *Executive Privilege Since United States v. Nixon: Issues of Motivation and Accommodation*, 83 MINN. L. REV. 1127, 1128 n.3 (1999) (noting that President Reagan’s policy remained in effect through the Clinton administration); EMILY BERMAN, BRENNAN CTR. FOR JUSTICE, EXECUTIVE PRIVILEGE: A LEGISLATIVE REMEDY 43 & n.237 (2009), [http://brennan.3cdn.net/ed3eb0a4b215da3556\\_fzm6ba8ua.pdf](http://brennan.3cdn.net/ed3eb0a4b215da3556_fzm6ba8ua.pdf).

<sup>56</sup> *See* Johnsen, *supra* note 55, at 1128 n.3 (1999).

For his part, President George W. Bush never published an official executive privilege policy, but his administration espoused an expansive view of executive prerogatives.<sup>57</sup>

Throughout the post-Nixon era, countless memoranda drafted by the Justice Department's Office of Legal Counsel ("OLC") and the attorney general recite the candor rationale and cite the cases that rely upon it to justify withholding information both from Congress<sup>58</sup> and from the public.<sup>59</sup> This rationale has been cited, for example, to resist congressional subpoenas for information concerning the White House's role in the development of EPA policy,<sup>60</sup> the FBI's interaction with the president regarding efforts to combat drug trafficking,<sup>61</sup> and the identity of individuals who influenced decisions regarding which federal prosecutors to hire and fire.<sup>62</sup>

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<sup>57</sup> MORTON ROSENBERG, CONG. RESEARCH SERV., PRESIDENTIAL CLAIMS OF EXECUTIVE PRIVILEGE: HISTORY, LAW, PRACTICE AND RECENT DEVELOPMENTS 12-13 (2008), *available at* <http://www.fas.org/sgp/crs/secretary/RL30319.pdf>.

<sup>58</sup> *E.g.*, Memorandum from John M. Harmon, Acting Assistant Att'y Gen., Office of Legal Counsel, to All Heads of Offices, Divisions, Bureaus and Boards of the Dep't of Justice, Re: Executive Privilege (May 23, 1977) (general principles); Assertion of Executive Privilege in Response to a Congressional Subpoena, 43 Op. Att'y Gen. 327 (1981) (subpoenaed information); Confidentiality of the Attorney General's Communications in Counseling the President, 6 Op. Off. Legal Counsel 481 (1982) [hereinafter Attorney General-President Confidentiality Memorandum] (Attorney General advice); Congressional Requests for Confidential Executive Branch Information, 13 Op. Off. Legal Counsel 153 (1989) (principles governing congressional requests for confidential executive branch information); Assertion of Executive Privilege Regarding White House Counsel's Office Documents, 20 Op. Off. Legal Counsel 2 (1996) (White House Travel Office documents); Immunity of the Council to the President from Compelled Congressional Testimony, 20 Op. Off. Legal Counsel 308 (1996) (pre-decisional White House Counsel's Office documents regarding a claim of executive privilege); Assertion of Executive Privilege for Memorandum to the President Concerning Efforts to Combat Drug Trafficking, Op. Off. Legal Counsel, 1996 WL 33680443 (1996) [hereinafter Drug Trafficking Privilege Memorandum] (memo from FBI director to president regarding anti-drug trafficking efforts), *available at* <http://www.justice.gov/olc/drugs.pot.htm>; Assertion of Executive Privilege with Respect to Clemency Decision, Op. Off. Legal Counsel, 1999 WL 33490208 (1999) (advice to president from Justice Department pardon attorneys); Assertion of Executive Privilege over Communications Regarding EPA's Ozone Air Quality Standards and California's Greenhouse Gas Waiver Request, Op. Off. Legal Counsel, 2008 WL 5506397 (2008) [hereinafter Air Quality Privilege Memorandum] (EPA documents regarding decision to deny state's petition for a waiver from federal preemption to enable it to regulate greenhouse gas emissions).

<sup>59</sup> *E.g.*, Attorney General-President Confidentiality Memorandum, *supra* note 58, at 486 (Attorney General requested through a FOIA request).

<sup>60</sup> Air Quality Privilege Memorandum, *supra* note 58.

<sup>61</sup> See Drug Trafficking Privilege Memorandum, *supra* note 58.

<sup>62</sup> Memorandum from Paul D. Clement, Acting Att'y Gen., to the President (June 27, 2007).

## 2. *In re Sealed Case (Espy)* and the Deliberative Process Privilege

Nor has assertion of the candor rationale been limited to communications in which the president himself took part. In *In re Sealed Case (Espy)*,<sup>63</sup> the D.C. Circuit considered whether communications made or solicited by presidential advisors fall within the scope of the privilege articulated in *Nixon*.<sup>64</sup> As the D.C. Circuit explained, because “the most valuable advisers will investigate the factual context of a problem in detail, obtain input from all others with significant expertise in the area, and perform detailed analyses of several different policy options before” deciding what advice to give the president, the “communications authored or solicited and received by those members of an immediate White House adviser’s staff who have broad and significant responsibility for investigating and formulating the advice to be given the President”<sup>65</sup> must be protected. Otherwise, “the President’s access to candid and informed advice could well be significantly circumscribed.”<sup>66</sup> Thus, the sphere protected by the candor rationale, initially applicable only to the president’s own conversations, has expanded to include presidential advisors as well.

In some ways, *Espy* is the culmination of the post-*Nixon* spread of *Kaiser Aluminum*’s candor rationale. While *Espy* makes plain that the constitutionally based version of the candor rationale applies only to the president and his close advisors, the common law version of that same justification—referred to as the “deliberative process privilege”<sup>67</sup> and first articulated in *Kaiser Aluminum*—governs throughout the executive bureaucracy, permitting government officials at all levels to withhold information based on the candor rationale.

To be sure, there are substantive limits on the protection afforded to deliberative process information that do not apply to presidential communications. For example, the deliberative process privilege shields only communications exchanged before the relevant decision was made. It does not apply to any factual information contained within the relevant communications. And it is easier to overcome than the presidential communications privilege.<sup>68</sup> But, like the justification articulated in *Nixon*, this common law

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<sup>63</sup> 121 F.3d 729 (D.C. Cir. 1997) (per curiam).

<sup>64</sup> *Id.* at 760.

<sup>65</sup> *Id.* at 750, 752.

<sup>66</sup> *Id.* at 750.

<sup>67</sup> See generally Russell L. Weaver & James T.R. Jones, *The Deliberative Process Privilege*, 54 MO. L. REV. 279 (1989).

<sup>68</sup> *Espy*, 121 F.3d at 745-46.

privilege is based on efforts “to prevent injury to the quality of . . . decisions’ by allowing government officials freedom to debate alternative approaches in private.”<sup>69</sup> The privilege, which applies most frequently in discovery disputes that arise in litigation against the government, has been raised in innumerable instances to shield from disclosure information regarding, inter alia, “Vietnam War, Agent Orange, police abuse, draft resisters, aircraft accidents, civil service dismissals, anti-competition proceedings, petroleum price controls, EPA lead control regulations, and customs service investigations.”<sup>70</sup>

### 3. Congress’s Use of the Candor Rationale

The candor rationale also has spread to Congress, making its way into the legislative history of FOIA. Exemption 5 of FOIA provides that FOIA does not apply to “inter-agency or intra-agency memorandums” that the government could withhold based on any of its common law privileges.<sup>71</sup> The legislative history of FOIA indicates that Exemption 5 is justified, in part, by the idea that “‘frank discussion of legal or policy matters’ in writing might be inhibited if the discussion were made public; and that the ‘decisions’ and ‘policies formulated’ would be the poorer as a result.”<sup>72</sup> If all government agencies were “forced to ‘operate in a fishbowl,’”<sup>73</sup> goes the argument, the quality of agency decision making would be adversely affected. The Supreme Court interpreted this exemption to apply to inter- or intra-agency memoranda “reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated” because it believed Congress to have intended such a result.<sup>74</sup> Consequently, the candor rationale is invoked to

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<sup>69</sup> *Id.* at 737 (quoting *NLRB v. Sears*, 421 U.S. 132, 151 (1975)). *See also Sears*, 421 U.S. at 150 (explaining that the deliberative process privilege is based on “the policy of protecting the ‘decision making processes of government agencies.’” (quoting *Tennessean Newspapers, Inc. v. Fed. Hous. Auth.*, 464 F.2d 657, 660 (6th Cir. 1972))).

<sup>70</sup> Weaver & Jones, *supra* note 67, at 280 (footnotes omitted).

<sup>71</sup> 5 U.S.C. § 552(b)(5) (2006).

<sup>72</sup> *Sears*, 421 U.S. at 150 (quoting S. REP. NO. 89-813, at 9 (1965) and citing H.R. REP. 89-1497, at 10 (1966)).

<sup>73</sup> *EPA v. Mink*, 410 U.S. 73, 87 (1973) (quoting S. REP. NO. 89-813, at 9), *superseded by statute*, Act of Nov. 21, 1974, Pub. L. No. 93-502, 88 Stat. 1561, *as recognized in NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978).

<sup>74</sup> *Sears*, 421 U.S. at 150 (quoting *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324 (D.C. Cir. 1966), *aff’d sub nom. V.E.B. Carl Zeiss, Jena v. Clark*, 384 F.2d 979 (D.C. Cir. 1967)).

resist compliance with FOIA requests for documents reflecting pre-decisional agency deliberations throughout the federal bureaucracy. It is this justification that is often used, for example, to resist disclosure of OLC memoranda.<sup>75</sup> According to OLC, “[m]aintaining the confidentiality of OLC opinions is often necessary to preserve the deliberative process of decision making within the Executive Branch.”<sup>76</sup>

The federal government is not the only place that the candor rationale has taken hold. While the state courts have not uniformly and reflexively adopted the rationale in the way that the federal government seems to have done, several states have incorporated the deliberative process privilege into their jurisprudence for state agencies.<sup>77</sup> As a result, much information regarding what the government is doing in the name of the people is shielded from the public’s view.

To be sure, not all government secrecy is officially justified by the presidential communications or the deliberative process privilege. But the presumption established by the *Nixon* Court endorsed and furthered a particular perception of the nature of government decision making—that it is a process whose details should remain hidden behind a veil of secrecy. So while the presumption itself is a legal one that applies only in particular circumstances, it contributes to the broader political and policymaking environment in which government officials operate. It gives presidents and their advisors reason to believe that secrecy is standard operating procedure.

Dismantling the *Nixon* canon—as this Article advocates—would instead foster a culture where the expectations were reversed, where ideas about what is appropriate for public discussion is expanded, and where secrecy must be justified by a risk of significant harm—not harm to the political prospects of the incumbent officials, but to the interests of the nation as a whole. The rapid and pervasive spread of the *Nixon* canon throughout the executive decision-making environment becomes all the more troubling when it becomes clear just how flawed and superficial the *Nixon* Court’s reasoning actually was. It is to this issue that we now turn.

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<sup>75</sup> These memos are not always trivial. They include key documents of tremendous public interest such as letters showing alleged “secret detention” of criminals relating to national security and anti-terrorism efforts. *Amnesty Int’l USA v. CIA*, No. 07 Civ. 5435(LAP), 2008 WL 2519908, at \*2-3, \*10 (S.D.N.Y. June 19, 2008).

<sup>76</sup> Memorandum for Attorneys of the Office Re: Best Practices for OLC Opinions (May 16, 2005), available at <http://www.justice.gov/olc/best-practices-memo.pdf>.

<sup>77</sup> See Michael N. Kennedy, Comment, *Escaping the Fishbowl: A Proposal to Fortify the Deliberative Process Privilege*, 99 NW. U. L. REV. 1769, 1778 nn.63-64 (2005).



## II. THE CRACKS IN THE CANON'S CARRIAGE

Despite its broad application and nearly universal acceptance, a closer inspection of the *Nixon* canon reveals two overarching flaws in its reasoning. As an initial matter, the posited relationship between candor and secrecy is unproven and likely mistaken. More importantly, a presumption that favors secrecy fails to appreciate the inevitable use of secrecy to gain and maintain power and the corresponding threat this use poses to democratic governance. This Part discusses each of these flaws in turn.

Recall, however, that in discussing our concerns about the *Nixon* canon we are not equating a rejection of the presumption of secrecy with placing a television camera or a reporter at every presidential or executive branch meeting. Our goal is reasonable openness depending on context.

### A. *Nixon Misunderstood the Relationship Between Secrecy & Candor*

In discussing the relationship between secrecy and candor, the *Nixon* canon postulates two uncertain propositions as true. The first is that candor leads to good decision making; the second is that candor requires secrecy. Though offered by its proponents as indubitable, the validity of both claims, particularly the second, is dubious. Candor, in fact, does not always lead to good decision making, and there is no evidence that secrecy is necessary for candor. In fact, the opposite may be true.

#### 1. Candor Does Not Necessarily Lead to Good Decision Making

The claim that the president, and for that matter any decision maker, needs the frank opinions of his or her advisors to improve decision making seems incontestable. To be sure, the law should be structured so as to encourage appropriate candor. But frankness itself should have its limits. Sometimes frank advice may go beyond appropriate boundaries, such as when it suggests unlawful or untoward conduct. The law should not protect an advisor's ability to provide such advice in secret, and any presumption of secrecy that gives license to advisors to suggest outrageous, offensive, wasteful, ill-advised, or illegal policy choices disserves the public interest. Impulse controls can be as valuable in providing policy advice to the president or other officials as it is in our everyday communications. When advisors fear public scrutiny of the counsel they provide, it should be a signal to them that the counsel itself may be inappropriate. "Candid advice," writes

Professor Gia Lee, in her thoughtful look at the secrecy-candor relationship, “does not necessarily mean better or sound advice,” and, in some cases, less-than-candid advice leads to better decisions.<sup>78</sup>

*Nixon* provides an example of too much candor. While candor may have allowed the president to explore the possibility of engaging the CIA to interfere with an FBI investigation, surely such candor should not be encouraged by the promise of secrecy. Drawing from more recent claims of privilege, should secrecy encourage (and protect) conversations about withholding from Congress or the public information raising doubts about the need for war, or should information about the use of harsh interrogation tactics be presumptively privileged and thus kept from the Congress and the American people?

Even when policymakers’ preference for confidentiality stems from lawful and appropriate motivations, those motivations may not be of the sort that we want to protect from scrutiny and public debate. Consider, for example, candid discussions about the political or electoral implications of a particular policy. Candid advice regarding those potential political repercussions might serve the president’s interests, but do they serve the public good? Or do the Congress and the American public deserve to know that particular choices might have been made pursuant to electoral considerations, rather than in an effort to best serve the country?

No matter how “better” decision making is defined, it must incorporate some broad sense of the public good, of contributing to the consensus-building that is necessary for policymaking in our constitutional system. And none of the decisions mentioned above fit any such definition. In the above instances, “candid” advice resulted in decisions that, no matter how well-intended, sidestepped the proper democratic decision-making process and detracted from the public good. Professor Lee argues that “there is no necessary relationship between frank advice and better advice.”<sup>79</sup> We would agree with her conclusion but would state the premise somewhat differently. In our constitutional democracy, there is no relationship between frank advice that counsels unlawfulness and better advice.

In many of the contexts in which candor is used as a justification for secrecy, the candor that is being shielded is candor that disserves the public interest. The New York State legislature provides a powerful example of

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<sup>78</sup> Lee, *supra* note 50, at 231-32. According to Professor Lee, “better decisions” are those that serve the public interest, respect human dignity and liberty, and are based on accurate and sufficient information. *Id.* at 231.

<sup>79</sup> *Id.* at 234.

this phenomenon. Called the most dysfunctional legislature in America,<sup>80</sup> one of the main criticisms of the legislature is the absence of any open meetings. There are neither committee nor floor deliberations. The only debates over legislation take place in closed, unreported political party conferences.<sup>81</sup> The reason offered for this closed door policy is, as expected, candor. According to the New York State legislature, political conferences require secrecy to guarantee the “candid exchange of ideas and points of view among members of each political party concerning the public business to come before legislative bodies.”<sup>82</sup> Candor in this case is a synonym for political discussion. What secrecy protects is a candid discussion not on the substantive value of a particular bill, but on its political value.<sup>83</sup> And this—the elevation of the politics of a particular piece of legislation over its substance—is, understandably, what the members want to keep secret.

A realistic look at the relationship between secrecy and candor suggests that government officials, acting under the cover of a presumption of secrecy, often feel licensed to advocate for policies of questionable value, and to justify those policies with flawed or incomplete reasoning and analysis. But this type of candor, which fails to advance the public good, is not something the law should protect.

## 2. Secrecy Is Not Necessary for Candor

The virtue of candor, of wise and full counsel, employed in pursuit of the public interest is incontestable. But does it necessarily require secrecy? In other words, is the presumption of secrecy always required for the “comprehensive and exhaustive views of the matters under consideration”?<sup>84</sup> For example, are presidential advisors—or advisors to other elected or appointed officials—usually reluctant to give appropriate, frank advice, or to discuss an issue candidly without the promise of lasting secrecy? The

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<sup>80</sup> See JEREMY M. CREELAN & LAURA M. MOULTON, BRENNAN CTR. FOR JUSTICE, *THE NEW YORK STATE LEGISLATIVE PROCESS: AN EVALUATION AND BLUEPRINT FOR REFORM* (2004), [http://brennan.3cdn.net/1f4d5e4fa546eaa9cd\\_fxm6iyde5.pdf](http://brennan.3cdn.net/1f4d5e4fa546eaa9cd_fxm6iyde5.pdf).

<sup>81</sup> *Id.* at 25; see also ABNER J. MIKVA & ERIC LANE, *LEGISLATIVE PROCESS* 667 (2d ed. 2002).

<sup>82</sup> MIKVA & LANE, *supra* note 81, at 671.

<sup>83</sup> CREELAN & MOULTON, *supra* note 80, at 37-38; MIKVA & LANE, *supra* note 81, at 667.

<sup>84</sup> Lee, *supra* note 50, at 234.

Court's untested affirmative conclusion is the foundation for the *Nixon* presumption.<sup>85</sup>

Yet even a cursory evaluation of this proposition renders it suspect. It does not seem a stretch to assume that the vast majority of government officials at every level act in good faith and seek to provide the best advice that they can. This is so not only because they have the best interests of the nation at heart, but also because it is in their own best interests to participate in successful policymaking. And policymaking is much more likely to be successful when it is developed through a process whereby everyone involved provides the best advice that they can. If an official has a legitimate, appropriate argument to make with respect to policy development or implementation, we see no reason that, as a general rule, she would offer that opinion candidly under a presumption of lasting secrecy, but refrain from offering it without one.

Few empirical studies have been conducted to test this point, and none explore the types of executive discussions that are the focus of this Article. There are, however, several studies on a related point—the quality of deliberations in closed versus open public assemblies.<sup>86</sup> These studies indicate that closed public assemblies provide fuller deliberations than open ones. Particularly interesting is Professor Jon Elster's comparison of the American Constitutional Convention and the French Assembly of 1789-1791.<sup>87</sup> Professor Elster conjectures that the secrecy of the Constitutional Convention, along with other procedural differences (e.g., committee structures and procedures, voting methods) made for higher quality and more rational de-

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<sup>85</sup> We note that in discussing our concerns about the *Nixon* canon we are not equating openness with a television camera or even a reporter present at every meeting of the president. Although as explained below that may not be as problematic as it sounds, our goal is reasonable openness depending on context. We do not on the other hand ever favor perpetual secrecy.

<sup>86</sup> Lee, *supra* note 50, at 219-21. Professor Lee also cites, as illustrative of her point about contemporaneous publicity curtailing candor, studies of open meetings laws and sunshine laws that conclude that public attendance effectively intimidates commissioners from fully and meaningfully exploring the matters before them. From these she concludes that contemporaneous disclosures "[n]ot surprisingly . . . have a profound chilling effect." *Id.* at 219. Although we are not here advocating public attendance at any and every executive meeting, Lee's conclusion on this point requires some comment. In our view, what is far more likely to be chilled by contemporaneous disclosures is not good debate, but incivility and the expression of views that would embarrass or shame the speaker. The history of great congressional debates (e.g., debates over civil rights legislation) and the multitude of open debates in state and local governments throughout the country undermine arguments that secrecy is necessary for frank deliberation to take place.

<sup>87</sup> Jon Elster, *Arguing and Bargaining in Two Constituent Assemblies*, 2 U. PA. J. CONST. L. 345 (2000).

bate.<sup>88</sup> Elster's brief discussion of the role of secrecy concludes that "[i]f the proceedings had been held in public, [the delegates] might have been forced to pull their punches."<sup>89</sup> "Might" seems a good choice of words, for the picture Elster paints of the uniqueness of each of the assemblies and their distinct social and political contexts underscores the unreliability of concluding that secrecy alone was the determining factor between a rational (good) U.S. convention and a crowd-pleasing (presumably bad) French convention.

Elster's reference to the Constitutional Convention does draw us back, at least for a moment, to *Nixon*. In a footnote, the Court observes that "there is nothing novel about governmental confidentiality," remarking that the Constitutional Convention of 1787 was "conducted in complete privacy," adding that all the Convention's records were sealed for more than thirty years, and that "most of the Framers acknowledge that without secrecy no constitution of the kind that was developed could have been written."<sup>90</sup> James Madison, the father of the Constitution, apparently agreed. His concern, as reported in 1830, was that contemporaneous reporting of convention debate would have frozen the initial "crude" opinions of the delegates and denied the "yielding and accommodating spirit" from which learning and compromise might spring.<sup>91</sup>

Perhaps there are times during which closed doors might result in more careful, thoughtful, and compromising deliberations among an assemblage of delegates representing various opinions and interests. Of course, this finding is not incompatible with a view that the presumption favoring

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<sup>88</sup> *Id.* at 411.

<sup>89</sup> *Id.* at 412.

<sup>90</sup> *United States v. Nixon*, 418 U.S. 683, 705 n.15 (1974) (citing CHARLES WARREN, *THE MAKING OF THE CONSTITUTION* 134-39 (1937)). The fact that some (there is no evidence for the Court's "most") of the Framers thought secrecy necessary for their deliberation does not, of course, answer the question of whether it was. Nor does it answer the question of whether a closed convention produced a better outcome than an open one might have produced. Note that here better can mean both substantively better (e.g., an earlier end to the slave trade) or better simply because the deliberations were public. Some of those involved advocated for such public deliberations. See Letter from Thomas Jefferson to John Adams (Aug. 30, 1787), in 3 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 76 (Max Farrand ed., 1911) (opposing the decision to have closed deliberations). Some have argued that the fact that the proposed constitution—the policy proscriptions that emerged from the secret meetings—was subjected to an immediate and intensely public battle over its ratification is "a form of a retrospective accountability for the process as well as for its results." AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 115 (1996).

<sup>91</sup> WARREN, *supra* note 90, at 135-136 (quoting Jared Sparks, *Journal Entry of April 19, 1830*, in 1 *THE LIFE AND WRITINGS OF JARED SPARKS* 560 (Herbert Baxter Adams ed., Boston, Houghton, Mifflin & Co. 1893)) (internal quotation marks omitted).

secrecy should be reversed. As we noted above, such a reversal does not mean real-time broadcasting of every meeting within the executive branch. Rather, it means that executive branch officials should not be entitled to a presumption that their deliberations will remain private. Instead, disclosure for legitimate reasons should be presumed valid.

Specifically with respect to Congress, when Congress determines that it has a legitimate need—either for its legislative or oversight responsibilities—for advice or information generated or shared in the course of executive-branch deliberations, Congress should usually be able to obtain that information. In other words, reversing the presumption to one of openness will not require executive branch officials to operate in a fishbowl. Rather, whether executive branch deliberations or actions are subsequently disclosed should depend on the party seeking that information and their justifications for doing so. Here, we simply point out what we perceive as a series of erroneous assumptions in the *Nixon* decision—that secrecy leads to candid (and thus better) advice.

Anecdotal evidence suggests that when deliberations are made public—either because they are contemporaneously open or because they are subsequently disseminated—they still can be candid and productive. For example, both the federal Senate and the House of Representatives act under a presumption of openness (although in its early years the Senate did meet in secret<sup>92</sup> and their rules still allow them to hold secret sessions under

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<sup>92</sup> TED GUP, *NATION OF SECRETS: THE THREAT TO DEMOCRACY AND THE AMERICAN WAY OF LIFE* 14 (2007). The governmental experience of two of the authors (Schwarz and Lane) also supports this view. One example comes from their work as chairman and chief of staff/counsel respectively to the 1989 fifteen-member New York City Charter Revision Commission. The commission undertook the broadest changes to the City's governing institutions and processes since its first charters in 1898 and 1900. Frederick A.O. Schwarz, Jr. & Eric Lane, *The Policy and Politics of Charter Making: The Story of New York City's 1989 Charter*, 42 N.Y.L. SCH. L. REV. 723, 729 & n.1 (1998). Since the 1989 Charter, Mayors Giuliani and Bloomberg each appointed two Charter Commissions. None proposed major changes. And two (one from each mayor's administration) were defeated. The chair's agenda was radical: a fundamental restructuring of city government. Success required both the support of a majority of the commissioners, and then a majority of the public. Members of the commission reflected multiple diverse backgrounds, some with high-level government experience. Bargaining and compromise would clearly be part of the progress. While there was some disagreement over whether New York State's Open Meetings Law, N.Y. PUB. OFF. LAW § 103 (McKinney 2000), applied to the Commission's deliberation, Schwarz & Lane, *supra*, at 755 ("Lane did not believe that openness was required . . . , a view not fully shared by Schwarz."), both Schwarz and Lane agreed that the efforts of the Commission would be best served by holding only open meetings. "Allowing and encouraging public observation of our efforts would demystify what we were doing and diminish any sense that we were 'acting upon' rather than 'acting for' the public. Also, public debate makes narrow-minded views more difficult to express." *Id.* Some commissioners objected, voicing both the candor point and concern about a public airing of

certain circumstances<sup>93</sup>). The process receives constitutional support through Article I, Section 5, which provides: “Each House shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy.” But secrecy is truly the exception. In fact, between 1825 and 2008, the House met only six times in secret, and in all but one instance the topic related to foreign affairs and national security.<sup>94</sup> The Senate, on the other hand, has met in secret fifty-four times since 1925, almost always in sessions related to the Senate’s powers dealing with treaties and impeachment.

And the Constitutional Convention, which was relied upon by the *Nixon* Court to support a presumption of secrecy, was held in secret but its work subsequently was debated vigorously and broadly. Of course, the secrecy that shrouded the Convention could be justified based on the exceptional circumstances surrounding it. The Convention’s charge from the Continental Congress had been to repair the weaknesses of the Articles of Confederation, not to create a radical new centralized government.<sup>95</sup> As Guttmann and Thompson observe “the legal status of the convention was already in doubt, and under the circumstances approval after the fact may have been the only course available.”<sup>96</sup> Or at least that was the view of some of the delegates. Maryland’s Luther Martin, who had opposed con-

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disputes among members. But in the end, all of the members acceded. And it worked. Despite the open meetings, debate was not restrained. In fact it may have been “sharpened.” *Id.* “Nothing that ought to have been said in private could not have been said in public.” *Id.* Despite the highly political nature of the endeavor “no one ever criticized us for making secret deals.” *Id.* And the ultimate result of the process was a success as well: the Commission’s proposed charter was publicly ratified.

<sup>93</sup> STANDING RULES OF THE SENATE, Rule XXI, S. DOC. NO. 110-9 (2007).

<sup>94</sup> MILDRED AMER, CONG. RESEARCH SERV., SECRET SESSIONS OF THE HOUSE AND SENATE (2008), available at <http://www.fas.org/sgp/crs/secrecy/98-718.pdf>; MILDRED AMER, CONG. RESEARCH SERV., SECRET SESSIONS OF CONGRESS: A BRIEF HISTORICAL OVERVIEW 6 tbl. 2 (2007), available at [www.rules.house.gov/Archives/RS20145.pdf](http://www.rules.house.gov/Archives/RS20145.pdf). Congress’s commitment to openness is not universally shared by state and local legislative bodies. This is clearly true in New York where both houses of the state legislature too often avoid any public debate on legislation by confining their deliberations to closed political conferences. As noted above, the argument they offer is that candor requires secrecy, but the deliberation they seek to hide is about the politics of various pieces of legislation, not its substance or its public value. See MIKVA & LANE, *supra* note 81, at 670-71. And why not discuss the politics of legislation in public? The answer is simply that the public might disapprove of the discussion.

<sup>95</sup> 1 JOHN R. VILE, THE CONSTITUTIONAL CONVENTION OF 1787: A COMPREHENSIVE ENCYCLOPEDIA OF AMERICA’S FOUNDING 13 (2005).

<sup>96</sup> GUTTMANN & THOMPSON, *supra* note 90, at 115.

vention secrecy, later characterized the proceedings as a conspiracy.<sup>97</sup> In the end, he walked out of the Convention and campaigned against ratification. His view of a “conspiratorial” Convention became so significant in the ratification campaign that Madison dedicated an entire essay in *The Federalist Papers* to its refutation.<sup>98</sup> So the shroud of secrecy draped over the Convention may have had more to do with the delegates’ fears that they were acting inappropriately than with safeguarding the quality and integrity of the deliberations themselves. But the very nature of the Constitution and its need for ratification ensured that the delegates’ secrecy was not perpetual.

### 3. Secrecy Sometimes Discourages Candor

Above we have argued that candor itself does not always advance the public good. We have also challenged the claim that secrecy is required for candor. Moreover, secrecy can discourage candor. When policy deliberations are deemed likely to remain secret, dissenters from the majority view might be more reluctant to give voice to their concerns. If an advisor feels that her position is not going to win the day, she may decide that the risk of annoying or alienating colleagues and superiors by arguing against their preferences is too costly. And decision makers themselves might feel freer to silence dissenters when they do not expect their decision-making processes to be subject to scrutiny. On the other hand, if policy deliberations might later be disseminated, an advisor sitting in a meeting where others are advocating foolish or unlawful policies may want to go on record in opposition so as to preserve her reputation in case the deliberations (or the unlawful or foolish policies that result) become public.

A recent example of discouraging opposing viewpoints can be found in accounts of the Bush administration. President Bush’s one-time press secretary, Scott McClellan, reports that in the face of the president’s “head-strong style of leadership,” his “foreign policy advisers played right into his thinking, doing little to question it or to cause him to pause long enough to fully consider the consequences before moving forward. And once Bush set a course of action, it was rarely questioned.”<sup>99</sup> A number of other insiders

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<sup>97</sup> See Letter from Luther Martin, IV, to the Citizens of Maryland (Mar. 21, 1788), in *ESSAYS ON THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788*, at 360, 366 (Paul Leicester Ford ed., Brooklyn, Historical Printing Club 1892).

<sup>98</sup> *THE FEDERALIST* NO. 40, at 259 (James Madison) (Isaac Kramnick ed., 1987).

<sup>99</sup> SCOTT MCCLELLAN, *WHAT HAPPENED: INSIDE THE BUSH WHITE HOUSE AND WASHINGTON’S CULTURE OF DECEPTION* 128 (2008); see also Lee, *supra* note 50, at 229.



from various fields “report that the President and his innermost circle of advisors were uninterested in considering views or perspectives different from their own.”<sup>100</sup> Professor Goldsmith describes the effort’s of the vice president’s counsel, David Addington, to intimidate him into agreement regarding the legality of the National Security Agency’s warrantless wire-tapping program.<sup>101</sup>

Secrecy and the potential risks of candor are tied even more closely together through the manner in which deliberative secrecy is enforced in the governmental setting. The privilege to protect the secrecy of presidential communications belongs to the president; deliberative process privilege belongs to the head of an agency. “Hence, rather than encourage their independence, the privilege will encourage bureaucrats to cling to the trousers of bureaucratic Big Daddies.”<sup>102</sup> Thus, knowing that the decision whether to assert privilege will not be theirs to make, advisors may be less likely to voice unpopular opinions, in the fear that privilege will not be asserted over such statements.

#### B. *Nixon Overlooked the Dark Side of Secrecy*

Until now we have only explored the strengths and weaknesses of the case for the *Nixon* canon, asking whether the Court was correct in assuming that candor is needed, and, if so, whether it requires secrecy. We have argued that sometimes candor is harmful and pointed to the absence of evidence supporting the claim that candor is unlikely without the promise of secrecy. As Professor Wetlauffer has rightly noted, “[t]he proponents of this privilege have never offered any kind of formal empirical evidence in support of its assertion. Nor do the cases or the literature contain so much as a single specific and verifiable anecdote.”<sup>103</sup> We have also pointed to the danger of discouraging dissent posed by secrecy.

But despite both the absence of empirical evidence in support of the canon and the importance of openness to the preservation of democracy, the continued and expanding use of the canon demonstrates its intrinsic appeal. People seem to accept reflexively the validity of claims of secrecy. Even

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<sup>100</sup> Lee, *supra* note 50, at 228-29.

<sup>101</sup> JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 71, 76-79 (2007).

<sup>102</sup> 26 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE* § 5663, at 599 (3d ed. 1992 & Supp. 2009).

<sup>103</sup> Wetlauffer, *supra* note 41, at 887.

Professor Lee, despite her strong exposition of the canon's weaknesses and dangers, writes that the presumption favoring secrecy "resonates strongly with commonsense assumptions and is quite persuasive as a general matter."<sup>104</sup> Indeed, there is something very attractive about secrecy. But, we argue, it is not the promotion of candor. In this Part of the Article, we first explore the source of that attraction and then go on to show the consequences that can flow from governmental secrecy. These consequences militate against a presumption of secrecy. In *Nixon*, despite recognizing that the costs of secrecy were too high in the case before the Court, the Court failed to anticipate the costs of the presumption going forward. Indeed, we believe that the costs associated with secrecy often far surpass the benefits conferred by any incremental increase in candid advice that results from a secrecy presumption.

### 1. The Attraction of Secrecy

The attraction of secrecy lies in the sense of empowerment it promises. Secrecy provides a sense of control, safety, and comfort. We are comfortable with our many unchallenged views, feelings, self-deceptions, and, yes, fantasies. We are fearful of their revelation. Through secrecy, we can protect our grandiose, conspiratorial, and self-deceptive thoughts and views. Through secrecy, we hide what we regard as shameful or undesirable.<sup>105</sup> And we exert a form of power over those who do not share in our knowledge.

The same motivations inform governmental secrecy. According to Erwin N. Griswold, the former dean of Harvard Law School and former solicitor general of the United States under both the Johnson and Nixon administrations, the primary purpose of secrecy in government is "not . . . national security," but hiding "governmental embarrassment of one sort or another."<sup>106</sup> In general, observed Professor (and later President) Woodrow Wilson: "[S]ecrecy means impropriety."<sup>107</sup> Or, as observed by Wright and Graham:

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<sup>104</sup> Lee, *supra* note 50, at 214.

<sup>105</sup> SISSELA BOK, *SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION* 8 (1982).

<sup>106</sup> Erwin N. Griswold, Editorial, *Secrets Not Worth Keeping*, WASH. POST, Feb. 15, 1989, at A25.

<sup>107</sup> WOODROW WILSON, *THE NEW FREEDOM: A CALL FOR THE EMANCIPATION OF THE GENEROUS ENERGIES OF A PEOPLE* 114 (1913).

There can be little doubt that a desire for secrecy has deep psychological roots . . . . [S]ecrecy can seem desirable to the power-wielder as a method of concealing one's power or to avoid honest debate about how it should be employed, to escape public responsibility for legal actions or to cover-up wrongdoing.<sup>108</sup>

The failure of the *Nixon* decision to grapple with the darker motives behind executive secrecy and the dangers such secrecy poses to the constitutionally created responsibility of Congress to create laws, to declare war, and to check the president through oversight is examined next.

## 2. Secrecy and Presidential Improprieties in the Modern Age

Modern presidents are entrusted with a far broader array of responsibilities than the Founders ever could have envisioned. At least from Franklin Delano Roosevelt onward,<sup>109</sup> American presidents have been faced with public desire for the resolution of an extraordinary array of problems too complex or far-reaching for state or local governments to address. As the scope and complexity of the issues that the federal government is expected to address has expanded, so too has the size, the power, and the reach of the executive branch. This, of course, is part of the story behind the growth of the national regulatory system, with Congress's delegation of huge swaths of responsibility to executive agencies, established to address national economic and other social problems.<sup>110</sup> In the face of problems stemming from the global economy, global technology, a global environment, and borderless terrorism, the appeal of what Alexander Hamilton called "energy in the executive"<sup>111</sup> to thwart the perceived inertia of our constitutionally imposed separation of powers has become even more apparent in the modern era than it was at the founding. In short, as Arthur Schlesinger found, "[t]he necessities of governing an increasingly complex society" spurred "the growth of presidential initiative."<sup>112</sup> Tasked with broad responsibilities and faced with high expectations that they will devise effective policies, modern

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<sup>108</sup> 26 WRIGHT & GRAHAM, *supra* note 102, § 5663, at 540 (footnotes omitted).

<sup>109</sup> See generally William E. Leuchtenberg, *Franklin D. Roosevelt: The First Modern President*, in LEADERSHIP IN THE MODERN PRESIDENCY 7, 7-40 (Fred I. Greenstein ed., 1988) (describing FDR as the first modern president).

<sup>110</sup> See generally DWIGHT WALDO, *THE ADMINISTRATIVE STATE: A STUDY OF THE POLITICAL THEORY OF AMERICAN PUBLIC ADMINISTRATION* (2007).

<sup>111</sup> THE FEDERALIST NO. 70, at 402 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

<sup>112</sup> SCHLESINGER, *supra* note 8, at 431.

presidents are thus impelled to act with a robustness that they may not have been in the era before the rise of the administrative state.

Because the executive branch is so active in so many areas affecting the lives of ordinary Americans, it is all the more imperative that those actions remain transparent. Recall Senator John Taylor of South Carolina's question of two hundred years ago: "How can national self government exist without a knowledge of national affairs? or how can legislatures be wise or independent, who legislate in the dark upon the recommendation of one man?"<sup>113</sup> This question remains even more pressing now that the executive branch is expected to lead in areas ranging from environmental policy to national security to financial regulation.

But presidents do not often see things this way—which brings us to the dark side of the need for a robust presidency.<sup>114</sup> Saddled with significant and important policy agendas, vigorous leaders may grow impatient with a system of constitutional governance in which they are checked and counterbalanced; a system established, as Justice Louis Brandeis wrote, "not to promote efficiency, but to preclude the exercise of arbitrary power."<sup>115</sup>

"Congress's separate power is an obstacle to modern policy making," wrote then Nixonian philosopher Kevin Phillips.<sup>116</sup> Lloyd Cutler, President Jimmy Carter's counsel, expanded on this view in his call for replacing Congress with a parliamentary form of government.<sup>117</sup> In 1987, then congressman Richard Cheney expressed his frustration with the view that Congress was permitted to check the president's "substantial discretionary power to act."<sup>118</sup> So, while modern presidents are faced with a citizenry that

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<sup>113</sup> *Id.* at 450.

<sup>114</sup> It is this dark side that spurred Arthur Schlesinger's seminal study of the risks of unchecked presidential power, *The Imperial Presidency*, in 1973. *See id.* For a modern discussion of the persistence of the dangers Schlesinger identified, see generally FREDERICK A.O. SCHWARZ, JR. & AZIZ HUQ, *UNCHECKED AND UNBALANCED* (2007).

<sup>115</sup> *Meyers v. United States*, 272 U.S. 52, 293 (1926).

<sup>116</sup> SCHLESINGER, *supra* note 8, at 253 (quoting Kevin Phillips, *Our Obsolete System*, *NEWSWEEK*, Apr. 23, 1973, at 13).

<sup>117</sup> Lloyd N. Cutler, *To Form a Government*, 59 *FOREIGN AFF.* 126, 132 (1980).

<sup>118</sup> REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, H.R. REP. NO. 100-433, S. REP. NO. 100-216, at 450 (1987). In fact, according to Cheney, the president "will on occasion feel duty bound to assert monarchical notions of prerogative that will permit him to exceed the law." *Id.* at 465. This statement was made as part of the Minority Views regarding Congress's investigation into the Iran-Contra scandal. Cheney and his fellow members of the minority disputed the majority's conclusion that the executive branch had acted unlawfully, instead asserting that Congress lacks the constitutional power to restrain presidential action in the context of foreign policy. *Id.* at 465; *see also* SCHWARZ & HUQ, *supra* note 114, at 56-58. Cheney endorsed this view as recently as 2005. Charlie Savage, *Cheney Aide is Screening Legislation, Adviser Seeks to Protect Bush Power*,

expects unprecedented results, they see themselves shackled by a constitutional system designed to rein in any one branch's ability to act efficiently, or to act at all independently of the others. Secrecy has been one tool that presidents use to bypass these constitutional checks. President Nixon, writes Schlesinger,

aimed at reducing the power of Congress at every point along the line and moving toward rule by presidential decrees. To perfect his design he had to control the use of information by Congress and the flow of information to Congress. To do this his administration mounted an unprecedented attack on the legislative privilege [Speech and Debate Clause] and made unprecedented claims of executive privilege.<sup>119</sup>

The power to make unilateral decisions, the power to act according to one's own preferences without interference from others with differing views, the power to hide the means (whether appropriate or inappropriate) used to reach either proper or improper ends—these are the powers which secrecy offers each of us. And Nixon, like presidents both before and since, used secrecy and the powers that it confers to aggrandize his own power.

“Knowledge is the key to control.”<sup>120</sup> So reported the Church Committee after its exhaustive inquiry into the practices of America's foreign and domestic secret intelligence agencies from the presidencies of Franklin Delano Roosevelt to Richard Nixon.<sup>121</sup> That inquiry produced fourteen reports on the U.S. intelligence community and its constituent agencies, their operations, and the abuses of law and power that they had committed under the cloak of secrecy. Among the most troubling activities uncovered were attempts to assassinate foreign leaders, including President John F. Kennedy's plan to use the Mafia to kill Fidel Castro of Cuba; widespread surveillance of Americans' communications; and extensive efforts to “harass, disrupt, and even destroy law-abiding domestic groups and citizens.”<sup>122</sup> This last group included an FBI misinformation campaign against Dr. Martin Luther King, Jr., designed to render him ineffective as a civil rights

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BOSTON GLOBE, May 28, 2006, at A1 (“If you want reference to an obscure text, go look at the minority views that were filed with the Iran-Contra Committee,” Cheney said. “Nobody has ever read them, but . . . I think [they] are very good in laying out a robust view of the president's prerogatives with respect to the conduct of especially foreign policy and national security matters.”).

<sup>119</sup> SCHLESINGER, *supra* note 8, at 246.

<sup>120</sup> CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY 89 (2007) (quoting FINAL REPORT OF THE SENATE SELECT COMMITTEE, *supra* note 15, BOOK II, at 292).

<sup>121</sup> SCHWARZ & HUQ, *supra* note 114, at 23-24.

<sup>122</sup> *Id.*

leader and carried out through subjecting him to surveillance and wiretaps, attempting to cause his marriage to fail, and even allegedly endeavoring to induce King's suicide.<sup>123</sup> On the basis of this and other disturbing evidence, the Committee concluded: "Secrecy should no longer be allowed to shield the existence of constitutional, legal and moral problems from the scrutiny of all three branches of government or from the American people themselves."<sup>124</sup>

The Church Committee exposed to the public, perhaps for the first time, the very real dangers posed by excessive executive secrecy. And the reforms that flowed from the Committee's work<sup>125</sup> represented a serious effort by Congress to see that such behavior was exposed and, as a consequence, halted. Notwithstanding the Church Committee's conclusions, which covered all presidential administrations from Roosevelt through Nixon, and the devastating results that the Nixon administration's use of secrecy had on that administration, presidents have continued to use secrecy to increase their power. Although the consideration of these dangers is second nature to today's media, advocates, government watchdog groups, and the public at large, that was not the case during the time period in which the *Nixon* Court was operating. The decision was rendered before the full extent of President Nixon's misdeeds had seeped into the public consciousness.<sup>126</sup> Similarly, the depth of executive branch misconduct unearthed by the Church Committee had yet to be revealed. Indeed, Watergate and its aftermath remains the great watershed event that precipitated the modern era of skepticism of government exercises of power.<sup>127</sup>

The vision of presidential policymaking relied upon by the *Nixon* Court—a vision in which unimpeachable advisors provide only sound, earnest advice behind closed doors to a president committed to the rule of law—seems to our modern sensibilities unrealistic, even naïve. Had the Court realized that President Nixon's transgressions were not merely isolated instances of one administration gone astray, but instead an (albeit ex-

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<sup>123</sup> *Id.* at 22; see also generally *id.* at 21-49 (summarizing the findings of the Church Committee).

<sup>124</sup> FINAL REPORT OF THE SENATE SELECT COMMITTEE, *supra* note 15, BOOK II, at 292.

<sup>125</sup> The Church Committee's work prompted, for example, the passage of the Foreign Intelligence Surveillance Act, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended in scattered sections of 50 U.S.C.), the development of the attorney general's guidelines for domestic security investigation by the FBI, as well as the creation of the Senate and House permanent committees on intelligence. Ira S. Shapiro, *The Foreign Intelligence Surveillance Act: Legislative Balancing of National Security and the Fourth Amendment*, 15 HARV. J. ON LEGIS. 119, 120-21 (1977).

<sup>126</sup> The Watergate decision came in July 1974. It was not until after that decision, however, that the damning contents of the oval office tapes were revealed, ultimately forcing the president's resignation in August. The criminal proceedings against those involved in the Watergate break-in continued into 1977. Lesley Oelsner, *Supreme Court Bars Plea by Ehrlichman, Haldeman, Mitchell: Justices Refuse to Hear Case*, N.Y. TIMES, May 24, 1977, at A1.

<sup>127</sup> Erwin Chemerinsky, *The Supreme Court, Public Opinion, and the Role of the Academic Commentator*, 40 S. TEX. L. REV. 943, 944 (1999).

treme) indication of the powerful lure of secrecy, perhaps it would have been more cautious in its endorsement of what has now become the *Nixon* canon. And subsequent history shows that the Court, in uncritically accepting candor as an appropriate motive for secrecy, without considering all of the potentially improper motives, seriously underestimated the costs of a presumption of secrecy.

Consider a few examples of this subsequent history. Just as Nixon's efforts to employ secrecy to wield unchecked power resulted in his ultimate downfall, President Reagan—who once again brought front and center the vision of an imperial president employing secrecy to protect his power—was very nearly knocked to the mats by secrecy. According to Schlesinger, “[t]he second test of the imperial Presidency is the secrecy system.”<sup>128</sup> And Reagan devoted particular energy “to rebuilding that fortress of the imperial Presidency.”<sup>129</sup> In the basement of the White House, operating in secret, perhaps even from the president, and certainly from Congress and the public, was “the Enterprise.”<sup>130</sup> Under the direction of Colonel Oliver North, this organization was committed—in direct violation of the Boland Amendments, laws barring U.S. government assistance to the rebel guerilla group known as the Contras in Nicaragua—to helping the Contras undermine the Nicaraguan government.<sup>131</sup> As with Watergate, the secret did not remain so forever. And the ensuing scandal, which came to be known as Iran-Contra, led to resignations, indictments, legislative hearings, and an investigation by a presidential commission.<sup>132</sup> The public outcry over the scandal once again quieted the aggressive power-aggregating efforts of executive branch secrecy, as President Reagan survived politically by claiming ignorance, cooperating with congressional and prosecutorial investigations, and cleaning house.<sup>133</sup>

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<sup>128</sup> SCHLESINGER, *supra* note 8, at 445. The first test is war-making power and the third is using emergency authority intended to be used against enemies against Americans.

<sup>129</sup> *Id.*

<sup>130</sup> 1 LAWRENCE E. WALSH, FINAL REPORT OF THE INDEPENDENT COUNSEL FOR IRAN/CONTRA MATTERS 159-73 (1993), <http://www.fas.org/irp/offdocs/walsh>.

<sup>131</sup> *Id.* at 4-6. The scheme involved selling arms to Iran and diverting the proceeds to the rebels in an effort to circumvent the Boland Amendment's restrictions. *Id.*

<sup>132</sup> See generally MICHAEL LYNCH & DAVID BOGEN, THE SPECTACLE OF HISTORY: SPEECH, TEXT, AND MEMORY AT THE IRAN-CONTRA HEARINGS (1996) (detailing the proceedings of the Iran-Contra congressional hearings); Lou Cannon, *Ex-Sen. Baker Replaces Reagan at White House, President Tries to Repair Damage; Ousted Aide Walks Out*, WASH. POST, Feb. 28, 1987, at A1 (addressing the forced resignation of White House Chief of Staff Donald T. Regan); Susan F. Rasky, *Tower Commission Finishing Report*, N.Y. TIMES, Feb. 23, 1987, at A8 (announcing the decision of the presidential commission to release a chronology along with the commission report); Philip Shenon, *North, Poindexter and 2 Others Indicted on Iran-Contra Fraud and Theft Charges*, N.Y. TIMES, Mar. 17, 1988, at A1 (noting indictments of Iran-Contra mastermind Oliver North and National Security Advisor John Poindexter).

<sup>133</sup> LYNCH & BOGEN, *supra* note 132, at 3-4. Yet even in the wreckage of Iran-Contra lay the seeds of renewed commitment on the part of some to the notion of an imperial presidency. Particularly disap-

But the tendency of secrets to find the light of day eventually, of course, is not an argument in the canon's favor. Discovering damaging, shameful, or unlawful government conduct only after the fact does not prevent or ameliorate the harm that such conduct already has caused. Nor does it avoid the inevitable increase in popular distrust of government and government officials. It is difficult to summon a starker example of destructive policies enabled through the power of secrecy than those implemented by the administration of George W. Bush. After 9/11, according to Pulitzer Prize-winning reporter Charlie Savage, the administration took the opportunity to make secrecy one of its hallmarks. "It broke the ice by seizing greater secrecy powers in matters directly related to terrorism investigations. Later, however, the clamp down moved into areas that . . . had nothing to do with national security."<sup>134</sup> Former Justice Department official Jack Goldsmith notes the administration's "unusual conception of presidential prerogatives influenced everything [it] did to meet the post 9/11 threat."<sup>135</sup> And part of that "unusual conception" was to ensure that no presidentially unauthorized information would reach Congress.<sup>136</sup>

In the Bush administration, secrecy—justified by a legal theory that claimed it as a right of presidents—was employed to enable the administration to pursue its desired policies, when disclosure to the Congress or the

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pointed with President Reagan's retreat from power, former Nixon administration staffer and then congressman Richard Cheney, ranking member of the House select committee investigating the Iran-Contra scandal, wrote in his minority report: "The Chief Executive will on occasion feel duty bound to assert monarchical notions of prerogatives that will permit him to exceed the laws." IRAN-CONTRA INVESTIGATION REPORT, *supra* note 118, at 465. See generally ERIC LANE & MICHAEL ORESKES, THE GENIUS OF AMERICA: HOW THE CONSTITUTION SAVED OUR COUNTRY AND WHY IT CAN AGAIN 188-191 (2007); SCHWARZ & HUQ, *supra* note 114, at 1, 56-58. As we see time and again, secrecy is often a crucial element of the assertion of such prerogatives, which both Congress and the public might resist if they knew of them.

<sup>134</sup> SAVAGE, *supra* note 120, at 93. "Bush himself," writes his former press secretary Scott McClellan, "did not embrace openness or government in sunshine. His belief in secrecy and compartmentalization was activated when controversy began to stir." MCCLELLAN, *supra* note 99, at 118.

<sup>135</sup> GOLDSMITH, *supra* note 101, at 90.

<sup>136</sup> According to a report by the Congressional Research Service, the administration adopted a legal theory that, if fully applied, would have halted normal congressional inquiries, even overriding various "whistle blower" statutes. ROSENBERG, *supra* note 57, at 12-13 ("The George W. Bush Administration, through presidential signing statements, executive orders, and opinions of the Department of Justice's Office of Legal Counsel (OLC) has articulated a legal view of the breadth and reach of presidential constitutional prerogatives that if applied to information and documents often sought by congressional committees, would stymie such inquiries. In OLC's view, under the precepts of executive privilege and the unitary executive, Congress may not bypass the procedures the President establishes to authorize disclosure to Congress of classified, privileged, or even non-privileged information by vesting lower-level officers or employees with a right to disclose such information without presidential authorization. Thus, OLC has declared that 'right of disclosure' statutes 'unconstitutionally limit the ability of the President and his appointees to supervise and control the work of subordinate officers and employees of the Executive Branch.' The OLC assertions of these broad notions of presidential prerogatives are unaccompanied by any authoritative judicial citations." (footnotes omitted)).



public would make it impossible to implement those policies.<sup>137</sup> The most significant example of Bush-era use of secrecy to enhance power came in the decision to go to war in Iraq. It is clear that President Bush, probably from the beginning of the administration, and certainly after September 11, wanted to effect regime change in Iraq.<sup>138</sup> Since such action could not be undertaken either politically or constitutionally without congressional—and hence public—approval, the question for the administration became “how to justify initiating a preemptive (or more accurately preventive) war to Congress, the American public, and, if possible, the international community.”<sup>139</sup> So they conducted a marketing campaign to convince Congress and the public that Iraq presented a real, immediate threat to America.<sup>140</sup> “From a marketing point of view,” the president’s chief of Staff Andrew Card observed, “you don’t introduce new products in August.”<sup>141</sup>

In the course of this campaign, administration officials concealed both the paucity of evidence in support of their claims and any evidence that contradicted them. They touted questionable information regarding the existence of weapons of mass destruction and a connection to the 9/11 attacks, and minimized concerns over potential problems in the post-invasion phase.<sup>142</sup> A congressional inquiry found, for example, that “[m]ost of the

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<sup>137</sup> See MINORITY STAFF SPECIAL INVESTIGATIONS DIVISION, U.S. HOUSE OF REPRESENTATIVES COMM. ON GOV’T REFORM, *SECRECY IN THE BUSH ADMINISTRATION* (2004) (describing the administration’s systematic claims to the right to secrecy).

<sup>138</sup> The president expressed this belief in his second inaugural address: “[E]very man and woman on this earth has rights, and dignity, and matchless value, because they bear the image of the Maker of Heaven and earth. . . . So it is the policy of the United States to seek and support the growth of democratic movements and institutions in every nation and culture, with the ultimate goal of ending tyranny in our world.” George W. Bush, Second Inaugural Address (Jan. 20, 2005), in *‘I DO SOLEMNLY SWEAR’: PRESIDENTIAL INAUGURATIONS FROM GEORGE WASHINGTON TO GEORGE W. BUSH* 268, 269 (Phillip J. Morledge ed., 2008). The president “believed strongly that removing Saddam and his regime was both important to American national security and morally justified by the regime’s treatment of Iraq’s people and neighbors.” GARY C. JACOBSON, *A DIVIDER, NOT A UNITER: GEORGE W. BUSH AND THE AMERICAN PEOPLE* 99 (2007). Or perhaps more accurately, as stated by his onetime Press Secretary Scott McClellan: “Intoxicated by the influence and power of America, Bush believed that a successful transformation of Iraq could be the linchpin of realizing his dream of a free Middle East.” MCCLELLAN, *supra* note 99, at 131.

<sup>139</sup> JACOBSON, *supra* note 138, at 99.

<sup>140</sup> See Michael R. Gordon, *Bush Enlarges Case for War by Linking Iraq with Terrorists*, N.Y. TIMES, Jan. 29, 2003, at A1; Walter Pincus & Dana Milbank, *Al Qaeda-Hussein Link is Dismissed*, WASH. POST, June 17, 2004, at A1.

<sup>141</sup> Barton Gellman & Walter Pincus, *Depiction of Threat Outgrew Supporting Evidence*, WASH. POST, Aug. 10, 2003, at A1. The aim, as Jacobson describes it, was “not to explain the product, but to sell it.” JACOBSON, *supra* note 138, at 74. Approaching a war like a marketing campaign, writes Jacobson, breeds “a cavalier approach to truth: dishonesty not by lying, but by a deceptive selection of truthful but misleading statements.” *Id.* at 75.

<sup>142</sup> Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 IOWA L. REV. 489, 537-38 (2007). When it comes to the planning for post-invasion administration of Iraqi territory, the entire array of emotions that motivates our desire for secrecy—self-deception, grandiosity, self-

major key judgments in the Intelligence Community's October 2002 National Intelligence Estimate (NIE), *Iraq's Continuing Programs for Weapons of Mass Destruction*, either overstated, or were not supported by, the underlying intelligence reporting,"<sup>143</sup> and public statements by administration officials failed to reflect "the intelligence agencies' uncertainties about the evidence."<sup>144</sup>

The administration then asked Congress for a resolution authorizing the president "to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to . . . defend the national security of the United States against the continuing threat posed by Iraq."<sup>145</sup> And Congress acquiesced. As a result, Americans were led to war based on a targeted marketing campaign that revealed only information that supported the need for war and none that contradicted it.<sup>146</sup> Would Congress have authorized the Iraq war if the president had removed the screen of secrecy to reveal the weaknesses of the evidence for war?

Another George W. Bush-era example bears mentioning. This example had nothing to do with national security, or military operations, or other

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importance, fear of contradictory opinions, etc.—is on display. Writes Charles Duelfer about the eager, but inexperienced decision makers: "Their ideals, combined with ignorance and power, could result in substantial damage." CHARLES DUELFER, *HIDE AND SEEK: THE SEARCH FOR TRUTH IN IRAQ* 473 (2009). They knew nothing, but, despite the stakes, none of them were willing to suffer the loss of power that an admission of their inexperience might encompass. So no one stood up and said "I have absolutely no clue about what needs to be done and I do not know anything about Iraq. And I have never run anything, much less a country." *Id.* at 473-74. Additionally, planning was undermined by conflicts between agencies, each clear about correctness of their own views and the incorrectness of other views, which they took no time to consider. And finally, consistent with the psychology of secrecy, inconvenient facts were not welcome. "[T]he CIA's postwar advice had been deliberately shut out." *Id.* at 473. The result of all of this, Duelfer concludes, is that many Iraqi and American lives were lost. *Id.* at 478-79.

<sup>143</sup> REPORT OF THE SELECT COMMITTEE ON INTELLIGENCE ON THE U.S. INTELLIGENCE COMMUNITY'S PREWAR INTELLIGENCE ASSESSMENTS ON IRAQ, S. REP. NO. 108-301, at 14 (2004).

<sup>144</sup> Mark Mazzetti & Scott Shane, *Bush Overstated Iraq Evidence, Senators Report*, N.Y. TIMES, June 6, 2008, at A1.

<sup>145</sup> Authorization for Use of Military Force Against Iraq Resolution, H.R.J. Res. 114, 107th Cong. (2002).

<sup>146</sup> Like the Iraq war decision, most, if not all, of the counterterrorism policies developed by the Bush administration were designed and implemented with little or no congressional or public input, and often with limited intra-executive vetting as well. Examples include the rendering of detainees to foreign nations for interrogation, U.S. interrogation policy, and the president's so-called "terrorist surveillance program." This lack of input from Congress, from the American public, and sometimes even from experts at agencies such as the National Security Agency or the State Department, was not mere oversight. Instead, it was an effort "to return the presidency to what [Vice President Cheney and others] viewed as its rightful constitutional place." GOLDSMITH, *supra* note 101, at 89; *see also infra* note 167 and accompanying text. They feared that soliciting external input might lead to the imposition of constraints on presidential action, constraints that would interfere with the plan to "hand off a much more powerful presidency" to George W. Bush's successors. *Id.* (quoting Vice President Cheney) (internal quotation marks omitted).

areas where the argument could be made that much sensitive information is involved and must remain classified. Instead it was, like Watergate itself, a scandal born of efforts to manufacture a political advantage for the incumbent administration and then to cover up evidence of these efforts.<sup>147</sup> In late 2006, several U.S. attorneys were forced to resign.<sup>148</sup> In the course of seeking to determine why these prosecutors were forced out en masse, Congress uncovered evidence that individuals within the Department of Justice—possibly at the direction of the White House—had been attempting to manipulate prosecutorial decisions in an effort to entrench their political allies. Prosecutors reluctant to initiate prosecutions damaging to Democratic candidates were dismissed; prosecutors willing to do so were retained.<sup>149</sup> The White House, of course, denied any involvement.<sup>150</sup>

In an effort to discover the truth of these allegations and the extent of White House involvement, Congress subpoenaed former White House aides Karl Rove and Harriet Miers to testify about the matter. In response, the president ordered Rove and Miers to disregard Congress's subpoenas, claiming executive privilege and immunity for his aides.<sup>151</sup> After extended litigation over their obligation to appear before Congress,<sup>152</sup> and after the departure of the Bush administration, the House Judiciary Committee secured a settlement with the White House whereby Rove and Miers would submit to depositions and provide relevant documents to Congress.<sup>153</sup> Unsurprisingly, this new information revealed that "Karl Rove and other senior aides in the Bush White House played an earlier and more active role" in the 2006 firings than they had led Congress or the public to believe.<sup>154</sup> So the most contentious, most aggressively defended assertion of executive

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<sup>147</sup> Schlesinger makes the point that, had Richard Nixon attempted to enhance presidential powers only in areas such as war-making and treaty powers, impoundment, and executive privilege, he might have succeeded in significantly expanding presidential power. But it was his importing of those theories of presidential prerogative into the realm of domestic politics that was his undoing. SCHLESINGER, *supra* note 8, at 266-67.

<sup>148</sup> David Johnston, *House Democrats Push Gonzales on Attorney Dismissals but Gain No Details on Prosecutors*, N.Y. TIMES, May 11, 2007, at A1; H.R. REP. NO. 110-423, at 15 (2007).

<sup>149</sup> H.R. REP. NO. 110-423, at 15 (2007).

<sup>150</sup> David Johnston, *No. 2 in Justice Dept. Says He Testified Truthfully on Removals of Prosecutors*, N.Y. TIMES, June 22, 2007, at A14.

<sup>151</sup> Comm. on the Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53, 55-56 (D.D.C. 2008); Carrie Johnson, *House Panel Subpoenas Rove Over Role in Justice Dept. Actions*, WASH. POST, May 23, 2008, at A3; Paul Kane, *Senate Panel Approves Subpoenas for 3 Top Bush Aides*, WASH. POST, Mar. 23, 2007, at A4.

<sup>152</sup> In a thoughtful and well-reasoned decision, the district court ordered Bush's aides to comply with the subpoenas and appear before Congress. *Miers*, 558 F. Supp. 2d at 108. The case settled before the appeals court weighed in on the question.

<sup>153</sup> David Johnston, *Top Bush Aides to Testify in Attorneys' Firings*, N.Y. TIMES, Mar. 5, 2009, at A19.

<sup>154</sup> Eric Lichtblau & Eric Lipton, *E-Mail Reveals Rove's Key Role in '06 Dismissals*, N.Y. TIMES, Aug. 12, 2009, at A1.

privilege in twenty-five years turned out to be employed, not in the service of maintaining the confidentiality of legitimate advice, but instead to cloak presidential advisors' politicization of the American criminal justice system.

As we hope this discussion has made plain, the damage that secrecy can cause is far from an academic issue. The most obvious risk that excessive secrecy poses is that government officials will hide malfeasance behind the veil that secrecy provides. Such improper use of secrecy can range from President Clinton's efforts to cloak his amorous interests,<sup>155</sup> to President Bush's efforts to conceal the uncertainty of intelligence information in marketing the invasion of Iraq. Indeed, history is littered with examples of presidents and bureaucrats of every political stripe who, believing their work immune from oversight, became "work-shy, careless, corrupt, or otherwise willing to abuse the power afforded by their positions."<sup>156</sup>

### 3. Secrecy's Policy-Distorting Effects

Secrecy indeed "breed[s] corruption," as Sissela Bok observes,<sup>157</sup> but the corruption that secrecy breeds is not limited to foolish or illicit behavior. Instead, it extends to the much broader and more dangerous corruption of the very democratic process itself. As Congress observed when enacting FOIA, "[a] democratic society requires an informed, intelligent electorate, and the intelligence of the electorate varies as the quantity and quality of its information varies."<sup>158</sup> In other words, for our system of governance to perform effectively, the legislature and the citizenry must receive sufficient information regarding the actions, policies, and intentions of government officials. The absence of sufficient information undermines accountability, impedes rational decision making, and lays a foundation for misconduct, corruption, and waste.

Restricted information flow can lead to policies that are poorly vetted or based on distorted justifications or both. Conversely, informed debate enables rational choice by individuals as well as informed debate among the citizenry as a collective.<sup>159</sup> Transparency allows "input, review, and criti-

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<sup>155</sup> See Mark J. Rozell, *Executive Privilege in the Lewinsky Scandal: Giving a Good Doctrine a Bad Name*, 28 PRES. STUD. Q. 816, 816-20 (1998) (discussing President Clinton's efforts to shield conversations with White House staff from investigators in the Monica Lewinsky investigation by signaling an intention to claim executive privilege).

<sup>156</sup> Adam M. Samaha, *Government Secrets, Constitutional Law, and Platforms for Judicial Intervention*, 53 UCLA L. REV. 909, 918-19 (2006).

<sup>157</sup> BOK, *supra* note 105, at 110.

<sup>158</sup> H.R. REP. NO. 89-1497, at 11 (1966).

<sup>159</sup> Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 895-96 (2005) (citing the work of philosophers Jeremy Bentham & John Rawls).

cism of government action, and thereby increases the quality of governance.”<sup>160</sup>

When government officials fail to share information appropriately—either with colleagues or with the public—resulting policies are more likely to be fundamentally flawed. According to the late Senator Daniel Patrick Moynihan, secrecy within the military and intelligence communities significantly distorted policy decisions and spending priorities during the Cold War because they failed to recognize the growing weakness of the Soviet Union.<sup>161</sup> Similarly, when the Bush administration was developing and implementing its “Terrorist Surveillance Program,” a small cadre of White House and Justice Department officials took action without input from experts from the military, intelligence, or diplomatic communities.<sup>162</sup> Not even the attorneys within the National Security Agency—the agency implementing the policy—were notified of the program’s existence.<sup>163</sup> The same is true for other post-9/11 policies—such as the methods used to interrogate terror suspects—that were later revealed to be based on shaky legal foundations, as well as harmful to U.S. diplomatic relations and contrary to fundamental American values.

Actions taken after a vetting process based on incomplete information can be as problematic as actions taken based on no information at all. Partial disclosure can often be merely a tool for government self-promotion.<sup>164</sup> This phenomenon did not originate with the run up to the Iraq war in 2003. During the Vietnam War, for example, the executive disclosed victories in the Tet offensive, but withheld information—most famously the Pentagon Papers—regarding the true extent of casualties and strategic blunders, information that would have significantly altered the public’s perception of the administration’s portrayal of events.<sup>165</sup>

The problem of incomplete information can stem not only from conscious efforts to emphasize selectively certain information, but also from the dangerous phenomenon known as groupthink, which is enabled by secrecy. Professor Lee contends:

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<sup>160</sup> *Id.* at 900.

<sup>161</sup> DANIEL PATRICK MOYNIHAN, *SECRECY: THE AMERICAN EXPERIENCE* 154-201, 221-22 (1998).

<sup>162</sup> *See, e.g.,* Josh Meyer, *Bush-era Surveillance Went Beyond Wiretaps*, L.A. TIMES, July 11, 2009, at A1.

<sup>163</sup> GOLDSMITH, *supra* note 101, at 182; *see also* OFFICE OF THE INSPECTORS GEN. OF THE DEP’T OF DEF., DEP’T OF JUSTICE, CENT. INTELLIGENCE AGENCY, NAT’L SEC. AGENCY, OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, UNCLASSIFIED REPORT ON THE PRESIDENT’S SURVEILLANCE PROGRAM 1-2 (2009), [http://www.dni.gov/reports/report\\_071309.pdf](http://www.dni.gov/reports/report_071309.pdf) (listing those involved with the program).

<sup>164</sup> Samaha, *supra* note 156, at 918-19 (“[W]e might expect them to disclose information that makes the administration look public spirited, effective, and efficient, but withhold information to the contrary.”).

<sup>165</sup> *Id.* at 918-19; *see also* RAOUL BERGER, *EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH* 265-283 (1974).

With an expectation of confidentiality, advisors feel less pressure to consult outside information or individuals with a variety of perspectives. Confidentiality during deliberations forecloses outsiders from contributing to discussions or counteracting any tendencies towards groupthink. . . . As confidentiality renders advisors' contributions invisible to outsiders, but not to the President and his other advisors, internal consensus-seeking norms become more salient and forceful, while external, potentially critical self-reflective norms subside.<sup>166</sup>

The result is a cadre of advisors who agree with one another and reinforce one another's (sometimes erroneous or unwise) opinions regarding policy decisions. A poignant example is found in the writing of Professor Jack Goldsmith, former head of the OLC in the Bush administration. Goldsmith addresses the crafting of legal opinions addressing detainee treatment:

On the theory that expert criticism improves the quality of opinions, OLC normally circulates its draft opinions to government agencies with relevant expertise. . . . But the August 2002 opinion [analyzing the legality of certain interrogation techniques], though it contained no classified information, was treated as an unusually "close hold" within the administration. . . . And so, under directions from the White House, OLC did not show the opinion to the State Department, which would have strenuously objected. This was ostensibly done to prevent leaks. But in this and other contexts, I eventually came to believe that it was done to control outcomes in the opinions and minimize resistance to them.<sup>167</sup>

Secrecy also breeds public cynicism about the government when, inevitably, some parts of the "candid" conversation leak. Consider the implementation of the White House's desired "harsh" interrogation policy.<sup>168</sup> To be sure, the individuals who implemented these policies may have believed themselves to be acting in pursuit of the public good. But the secrecy accompanying their actions permitted them to advise courses of action that were at best ill-advised, at worst illegal, without being required to subject those actions to the scrutiny of public debate. A robust *ex ante* debate could have illuminated flaws in the policies that subsequently have come to light. The result has been—like Watergate—an increase in disrespect for and distrust of the government and government officials.<sup>169</sup> H.R. Haldeman, President Nixon's chief of staff, captured the problem nicely when he discussed the problem of frank advice being revealed:

[T]o the ordinary guy, all this is a bunch of gobbledygook[.] But out of the gobbledygook comes a very clear thing: . . . [Y]ou can't trust the government; you can't believe what they

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<sup>166</sup> Lee, *supra* note 50, at 236.

<sup>167</sup> GOLDSMITH, *supra* note 101, at 166-67.

<sup>168</sup> The development of post-9/11 interrogation policy was notoriously secretive. *See supra* note 167 and accompanying text.

<sup>169</sup> ALASDAIR ROBERTS, *THE COLLAPSE OF FORTRESS BUSH: THE CRISIS OF AUTHORITY IN AMERICAN GOVERNMENT* 23, 34 (2008); Associated Press, *Bush, GOP Hit New Lows in Public Opinion*, *USATODAY.COM*, Apr. 10, 2006 (reporting that, according to the latest AP survey, just "40% of the public approves of Bush's performance on foreign policy and the war on terror, another low-water mark for his presidency").

say; and you can't rely on their judgment; and the—the implicit infallibility of presidents, which has been an accepted thing in America, is badly hurt by this, because it shows that people do things the president wants to do even though it's wrong, and the President can be wrong[.]”<sup>170</sup>

The American people took exactly this lesson from the Watergate era, and we are reminded of it with each subsequent revelation of inappropriate activities by government officials.

Executive secrecy undermines the accountability of executive branch officials and, consequently, the very legitimacy of their actions. The unique role of public debate in promoting the confidence of the governed in their governors is a cornerstone of liberal democratic philosophy.<sup>171</sup> After all, the very premise of a representative democracy is that it is accountable to the popular will.<sup>172</sup> When a president fails to govern in a satisfactory manner, the electorate can “vote the bum out.” Thus any lack of transparency eliminates “the public’s . . . ability to monitor government activity and hold officials, particularly incompetent and corrupt ones, accountable for their actions.”<sup>173</sup> When information regarding how elected officials are governing is withheld from the electorate, the ballot box is no longer a tool of accountability. Too much secrecy thus not only endangers the public’s ability to determine rationally which policies and public officials to support, but also the public’s faith in the government itself.

Effective accountability also requires Congress to have access to information regarding executive branch actions so that it can perform its constitutional functions. The legislative branch can hold the executive accountable for any abuses only when such abuses are discovered. As one commentator notes, “[t]here can be no public outcry and congressional pressure over abuse of secret [Foreign Intelligence Surveillance Act] warrants if targets are unaware of the surveillance; there can be no habeas corpus proceedings for immigrants secretly detained.”<sup>174</sup>

Admittedly, not all of these possible harms involve explicit claims of executive privilege. Nor do they all involve unmet (appropriate) congressional demands for information, which we consider a particularly dangerous type of secret because it threatens our very constitutional structure. Instead, we have presented in this Part the broadest illustration of secrecy’s dangers. And, in fact, it poses such dangers in many contexts, all of which are en-

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<sup>170</sup> Transcript of Oval Office Meeting with H.R. Haldeman, 3:09 PM (June 14, 1971), <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB48/oval.pdf>.

<sup>171</sup> Stephen Elstub, *A Double-Edged Sword: The Increasing Diversity of Deliberative Democracy*, 12 CONTEMP. POL. 301, 305 (2006).

<sup>172</sup> Samaha, *supra* note 156, at 916.

<sup>173</sup> Fenster, *supra* note 159, at 899 (citing *Common Cause v. Nuclear Regulatory Comm’n*, 674 F.2d 921, 928 (D.C. Cir. 1982)).

<sup>174</sup> Michael T. McCarthy, *Recent Developments: USA Patriot Act*, 39 HARV. J. ON LEGIS. 435, 452 (2002).

couraged—and often explicitly justified<sup>175</sup>—by the widespread acceptance of the *Nixon* canon. These illustrations are presented to make the larger point: too often, secrecy is used not to ensure the quality of advice that a president receives but instead to consolidate his (or his subordinates') power, to permit policies to go forward that could not withstand the light of day, and to undermine the participatory process essential to democratic governance. The *Nixon* Court failed in its duty by not considering this dark side of secrecy. Had it done so, it would have eschewed the creation of a presumption of secrecy.

We turn now to a more specific discussion of *Nixon's* implications for our constitutional structure. Because Congress's duties to legislate and perform oversight are constitutionally mandated, the presumption of secrecy is especially troubling when it results in keeping secrets from Congress. We thus conclude that, when Congress determines that it has a legitimate need—either for its legislative or oversight responsibilities—for advice or information generated or shared in the course of executive branch deliberations, Congress should usually be able to obtain that information.

### III. THE *NIXON* COURT, THE FRAMERS, THE CONSTITUTION, AND THE DANGERS OF SECRECY

What is most striking about rereading *United States v. Nixon* today is the Court's failure to explore at all any other motivation for or consequences of secrecy before forging secrecy and candor together into the *Nixon* canon. Perhaps the explanation lies in the rush to unanimous decision. Or perhaps the motives evident in the history we have recounted above were simply dismissed as too improbable to require careful consideration, when no comparable scandals or long-term pattern of government misdeeds would have been on the Court's radar. Perhaps a modern Court, one made up of individuals who had witnessed the misuses of government secrecy over the last several decades, would choose to create a different canon, one favoring openness, were they deciding the issue for the first time. And, in fact, the subsequent cases involving executive privilege, especially the cases concerning Congress's right to information, have evidenced greater skepticism of secrecy's merits.<sup>176</sup>

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<sup>175</sup> See *supra* Part I.B.

<sup>176</sup> In the mid-1970s, the D.C. Circuit Court of Appeals explicitly recognized the executive's obligation to share certain types of information with Congress in a series of cases concerning a congressional subpoena to AT&T. See, e.g., *United States v. AT&T*, 567 F.2d 121 (D.C. Cir. 1977). And more recently, the D.C. District Court rejected President Bush's efforts to prevent advisors from responding to duly issued congressional subpoenas. *Comm. on the Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53, 96 (D.D.C. 2008).



Nevertheless, the historical moment of the decision offers a poor excuse for the deference to executive secrecy. What the justices in *Nixon* failed to appreciate would clearly have been understood by the Framers. In fact, it is the very self-aggrandizing aspect of human nature that secrecy promotes that motivated the Framers to design our Constitution as they did.<sup>177</sup> On the basis of their understanding of the frailty of human nature, they conjoined separation of powers with checks and balances, knowing that both were necessary to protect Americans' freedoms.

The story is History 101. The social, economic, and political chaos that marked the eleven years following independence from England brought the Framers to Philadelphia with a very skeptical view of human nature.<sup>178</sup> "[W]e have probably had too good an opinion of human nature in forming our confederation. . . . We must take human nature as we find it; perfection falls not to the share of mortals," Washington wrote to John Jay in 1786.<sup>179</sup> By 1787—the year the Convention began—that “too good opinion” had been replaced by a far more skeptical, realistic one. “Men love power,” noted Alexander Hamilton at the Convention.<sup>180</sup> No one spoke out in disagreement.

This love of power, the tendency to seek out and protect it through any available means was, according to Madison, “sown in the nature of man.”<sup>181</sup> This bent toward aggregation of power was one cause of factionalism—groups of individuals overly sure of their shared, often shallow, views of what was right (their views) and what was wrong (the views of others).<sup>182</sup> And it was factional battles that jeopardized the American experiment in the eleven years between Independence and the Constitutional Convention.<sup>183</sup> Majority factions felt entitled to get their way. And in state after state, they did. As a result, the nation almost imploded.<sup>184</sup> As Madison observed in defense of the newly proposed constitution in *Federalist No. 10*, “[s]o strong is this propensity of mankind to fall into mutual animosities, that where no substantial occasion presents itself, the most frivolous and

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<sup>177</sup> As noted above, while the Constitutional Convention itself was held in secret, the ratification campaign that followed was a model of public debate.

<sup>178</sup> See generally LANE & ORESKES, *supra* note 133.

<sup>179</sup> DAVID RAMSAY, THE LIFE OF GEORGE WASHINGTON, COMMANDER IN CHIEF OF THE UNITED STATES OF AMERICA, THROUGHOUT THE WAR WHICH ESTABLISHED THEIR INDEPENDENCE, AND FIRST PRESIDENT OF THE UNITED STATES 161 (Balt., Joseph Jewett, and Cushing & Sons 1832).

<sup>180</sup> Alexander Hamilton, Speech at the Federal Convention (June 18, 1787), in 1 THE WORKS OF ALEXANDER HAMILTON 383 (Henry Cabot Lodge ed., 1904).

<sup>181</sup> THE FEDERALIST NO. 10, at 124 (James Madison) (Isaac Kramnick ed., 1987).

<sup>182</sup> *Id.*

<sup>183</sup> See LANE & ORESKES, *supra* note 133, at 38-42, for a discussion of the eleven years of political and social strife between Independence and the Convention.

<sup>184</sup> See *id.* at 42.

fanciful distinctions have been sufficient to kindle their unfriendly passions and excite their most violent conflicts.”<sup>185</sup>

What to do to combat human nature was the question the Framers confronted in Philadelphia. The task was to find “a republican remedy for the diseases most incident to republican government.”<sup>186</sup> The Framers hit upon two answers: (1) representation; and (2) structural protections in the form of separation of powers and checks and balances. The powers of government would be divided among its three branches—legislative, executive, judicial. And each branch would have the ability to check the exercise of power by the others.<sup>187</sup>

But the Framers took care not to effect a complete separation of powers. While their immediate attention was on restraining legislative power—noting that “[i]n republican government, the legislative authority necessarily predominates”<sup>188</sup>—their deeper worry was the aggregation of too much power in any one branch of government.<sup>189</sup> And to prevent it they not only divided the powers of the federal government among its three branches, but did so in a way that requires them to act in concert with one another. In the oft quoted words of Justice Jackson: “While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.”<sup>190</sup> The design, in other words, was not to disconnect each branch from the other entirely, but, as Madison observed, to connect and blend them to avoid “those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands.”<sup>191</sup> As constitutional scholar Louis Fisher wrote, “[i]t is said that powers are separated to preserve liberties. But separation can also destroy liberties.”<sup>192</sup>

This structural design means that the Constitution grants to each branch its particular roles and powers, while simultaneously through checks and balances ensuring their interdependence. The *Nixon* Court, remarkably, ignored this limitation on and blending of constitutional powers, which is

<sup>185</sup> THE FEDERALIST NO. 10, at 124 (James Madison) (Isaac Kramnick ed., 1987).

<sup>186</sup> *Id.* at 128.

<sup>187</sup> THE FEDERALIST NO. 47, at 302 (James Madison) (Isaac Kramnick ed., 1987).

<sup>188</sup> THE FEDERALIST NO. 51, at 320 (James Madison) (Isaac Kramnick ed., 1987).

<sup>189</sup> *Id.*

<sup>190</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

<sup>191</sup> THE FEDERALIST NO. 48, at 312 (James Madison) (Isaac Kramnick ed., 1987).

<sup>192</sup> Hugh Sidey, *Fragmentation of Powers*, TIME, July 6, 1987, at 36 (quoting Louis Fisher); see also, e.g., *Buckley v. Valeo*, 424 U.S. 1, 121 (1976) (“[T]he Constitution by no means contemplates total separation of each of these three essential branches of Government. . . . The men who met in Philadelphia in the summer of 1787 were practical statesmen, experienced in politics, who viewed the principle of separation of powers as a vital check against tyranny. But they likewise saw that a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively.”).

aimed at both protecting freedom and assuring a workable government. We say "remarkably" for two reasons. First, as we have shown, secrecy is just as likely to be used to hide impropriety as to assure candor. Second, under the inter-branch interdependence created by the Constitution, the president has an obligation to provide information the other branches need to make decisions with which they are charged.<sup>193</sup> In *Nixon*, while the Court did exert a check on one particular president by forcing him to divulge the information he sought to hide, it simultaneously granted the presumption of secrecy to future presidents, providing considerable freedom from checks going forward. Indeed, it justified the presumption itself on separation of powers grounds, opining that a president's interest in confidential communications "relates to the effective discharge of a President's powers."<sup>194</sup> But the ways in which such a presumption would excuse the executive from effective constitutional checks going forward was not considered.

Take, for example, Congress's most momentous responsibility, that of declaring war. Under the Constitution, Congress—and Congress alone—is given the power "[t]o declare War."<sup>195</sup> This assignment of responsibility was not the product of chance, but a reasoned response to the Framers' view of history. As Madison wrote: "The constitution supposes, what the History of all governments demonstrates, that the Executive is the branch of power most interested in war, and most prone to it. It has, accordingly, with studied care, vested the question of war in the Legislature."<sup>196</sup> From this perspective, does it not stand to reason that a president seeking a declaration of war, or even a resolution authorizing the use of force, is constitutionally bound to provide Congress with a full and accurate picture of the information on which his decision to seek war is based?

Of course, not every decision Congress makes is so potentially calamitous, but the point remains. In the modern administrative state, the executive branch generates and controls access to enormous amounts of information relevant to congressional decision making. And Congress has both the right and the duty to ask for or compel the production of such information, information it needs to complete its constitutional duties of legislation and

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<sup>193</sup> As noted earlier, this obligation need not extend to the provision of information whose disclosure would be detrimental to the national interest. See *United States v. AT&T*, 567 F.2d 121, 127 (D.C. Cir. 1977); 5 Op. Off. Legal Counsel 27, 31 (1981) ("[C]ourts have referred to the obligation of each Branch to accommodate the legitimate needs of the other. . . . It is an obligation of each Branch to make a principled effort to acknowledge, and if possible to meet, the legitimate needs of the other Branch."); Memorandum from John M. Harmon, Acting Assistant Att'y Gen., Office of Legal Counsel, to All Heads of Offices, Divisions, Bureaus and Boards of the Dep't of Justice, Re: Executive Privilege, at 5 (May 23, 1977); Johnsen, *supra* note 55, at 1133 & n.17.

<sup>194</sup> *United States v. Nixon*, 418 U.S. 683, 711 (1974).

<sup>195</sup> U.S. CONST. art I, § 8, cl. 11.

<sup>196</sup> Letter from James Madison to Thomas Jefferson (Apr. 2, 1798), in 2 LETTERS AND OTHER WRITINGS OF JAMES MADISON: 1794-1815, at 131-32 (Phila., J.B. Lippincott & Co. 1865).

oversight.<sup>197</sup> Only with such information can Congress perform these duties responsibly. Naturally, this right to require disclosure of information from the executive has greatest force in areas where the Constitution has enumerated the Congress's powers, such as appropriations, military funding, and interstate and foreign commerce.<sup>198</sup> Some leading constitutional scholars go even further. Professor Laurence Tribe, for one, writes that even where Congress seems to be operating outside of its enumerated powers, "a showing that the investigation is rationally related to some legitimate congressional goal is sufficient"<sup>199</sup> to require disclosure. For example, in the modern, post-New Deal administrative state, agencies perform a number of functions which, while nominally under the control of the executive branch, actually serve to implement congressionally enacted programs. Given the blending of legislative and executive powers in these agencies, secrecy is hard to justify on separation of powers grounds. Rather, here too the presumption should be that Congress has the right to ask for, or indeed compel, the production of information to responsibly carry out its constitutional obligations of legislation and oversight.

More often than not, the executive branch accedes to Congress's requests.<sup>200</sup> Candor with Congress is, after all, often in an administration's immediate interests.<sup>201</sup> Congress, for example, might reject presidentially

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197 BERMAN, *supra* note 55, at 13-14 (explaining that the Supreme Court has recognized that Congress's power to acquire information is inherent in its power to legislate, and that its oversight powers authorize investigations into executive branch activity).

198 See U.S. CONST. art. I, § 8.

199 I LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 377 (2d ed. 1988).

200 These accessions often come in the form of some sort of compromise. Sometimes Congress agrees to limit the scope of its request. Or the executive might agree to make certain documents that it considers privileged available either on a limited basis or to a limited group of members of Congress. MARK J. ROZELL, *EXECUTIVE PRIVILEGE: PRESIDENTIAL POWER, SECRECY, AND ACCOUNTABILITY* 102-03 (2d ed. 2002) (describing negotiations over President Reagan's assertion of executive privilege over documents drafted by then nominee for the Supreme Court William H. Rehnquist and requested by the Senate Judiciary Committee as part of its preparation for confirmation hearings, which led to a deal where the president waived his assertion of executive privilege and certain requested documents, but not others, were provided to the Committee); *id.* at 126-27 (describing a deal between the Clinton White House and the House of Representatives whereby requested documents related to the firing of several employees of the White House travel office would be made available to committee members and staff for review and note-taking, but not photocopying); Peter M. Shane, *Legal Disagreement and Negotiation in a Government of Laws: The Case of Executive Privilege Claims Against Congress*, 71 MINN. L. REV. 461, 505 (1987) (documents relating to the Interior Secretary's exercise of statutorily-granted discretion regarding treatment of Canadian investors in mineral leases on U.S. public lands were made available to committee members for four hours during which they could take notes, but no staff personnel could review the documents and they could not be photocopied); LOUIS FISHER, *THE POLITICS OF EXECUTIVE PRIVILEGE* 116-17 (2004) (request for documents relating to State Department recommendations for covert actions resulted in an oral briefing on the contents of the documents for three committee members).

201 See generally ROZELL, *supra* note 200, at 102-03.

advocated legislation if information is withheld.<sup>202</sup> Similarly, the Senate might reject treaties or presidential nominees if it does not get the information it requests.<sup>203</sup> Of course, the president's duties and obligations extend beyond the satisfaction of his self-interest.

Notwithstanding the Constitution's intentional joinder of separation of powers and checks and balances, which was done for important structural and psychological reasons, the *Nixon* decision cuts the link. Although rejecting a claim of absolute privilege, the Court found a "presumptive privilege," which it said was "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution."<sup>204</sup> That reasoning—perhaps rightly—confirms the existence of executive constitutional prerogatives, but fails to recognize that those prerogatives, like all constitutional powers, must be subjected to the limits envisioned by the Framers. A presumption in favor of nondisclosure defies that constitutional mandate. And on the flawed foundation of this presumption stands the modern culture of secrecy.

#### IV. RECOMMENDATIONS FOR REFORM

We have argued that the use of executive and deliberative privilege specifically, and secrecy generally, does not encourage candor and, in fact, might discourage it. We have also argued that the motivation behind the use of these secrecy privileges usually is not the protection of secrets whose nondisclosure is in the national interest, but the protection of information that would embarrass the president, his aides, his cabinet members, or his administration. And we have argued the *Nixon* canon undermines the constitutional right and obligation of Congress to exercise its legislative role "to obtain the facts needed for intelligent legislative action."<sup>205</sup> While we have focused on the relationship with Congress, the culture of secrecy runs more deeply, leading to widespread resistance to disclosure within the executive branch. We therefore conclude that claims of privilege should be received with skepticism, not deference.

Reaching such a conclusion is one task, establishing a canon favoring openness is quite another. Although each branch of government has the power to effectively establish such a presumption of openness—and we will

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<sup>202</sup> Congressional Democrats, for example, demanded the Office of Legal Counsel memoranda asserting the legality of an executive surveillance program before they would agree to enact amendments the White House wanted to the Foreign Intelligence Surveillance Act. Letter from Patrick Leahy, Chairman, Senate Judiciary Comm. & Arlen Specter, Ranking Member, Senate Judiciary Comm., to Alberto Gonzales, Att'y Gen. (May 21, 2007).

<sup>203</sup> *TRIBE*, *supra* note 199, at 285-89; *see also* *ROZELL*, *supra* note 200, at 91; *FISHER*, *supra* note 200, at 156.

<sup>204</sup> *United States v. Nixon*, 418 U.S. 683, 708 (1974).

<sup>205</sup> *Watkins v. United States*, 354 U.S. 178, 187 (1957).

discuss each of them—Congress, at least at this time, is the branch most likely to have both the incentive and the power to undo this restraint on its exercise of its constitutional powers.

### A. *The Judiciary*

The Supreme Court itself could revisit the canon. Although precedent would argue against any change, a new canon would not require the complete reversal of the earlier decision. The presumption established in *Nixon* was not necessary to *Nixon*'s holding.<sup>206</sup> The determination that the need for disclosure of the Oval Office tapes outweighed any possible presidential interest in maintaining their secrecy rendered the Court's discussion of the existence of executive privilege as a constitutional prerogative entirely unnecessary. A court following the doctrine of constitutional avoidance might have written an opinion that said simply: "Even if we were to hold that the president is entitled to claim executive privilege over his communications with his staff, such a claim of privilege would be outweighed in this case by the judiciary's need for the tapes. We therefore need not reach the important constitutional question whether the president is entitled to make such a claim, or if he is, its weight." Instead, of course, the Court wrote a far less judicially conservative, minimalist opinion.

Despite its ability to interpret *Nixon*'s holding narrowly and thus reject its secrecy presumption, it is doubtful that the Supreme Court will be given an opportunity to recast the *Nixon* canon or that the current Court would be willing to recast it. No cases are pending, and, for several reasons, it is unlikely any will arise in the near future. First, a Democratic Congress and a Democratic president are unlikely to allow a controversy over executive or deliberative privilege to end in court. Political considerations would compel the president and Congress to compromise. Second, putting aside political considerations, the inefficiencies and risks of bringing such a case would caution against its initiation. As a district court judge recently noted:

Resort to the judicial process is, after all, not a particularly expedient way to obtain prompt access to sought-after information, especially if a full House or Senate resolution is a necessary part of the process. The lengthy delays in the history of this case are a testament to the inefficiency of resort to the judicial process.<sup>207</sup>

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<sup>206</sup> It is impossible to discern whether the presumption was necessary to the decision in the handful of executive privilege cases that the Supreme Court has considered since *Nixon* because the Court never explains whether it would have reached a different decision absent the presumption. See, e.g., *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380-91 (2004).

<sup>207</sup> Comm. on the Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53, 96 (D.D.C. 2008).

Third, and more important than the efficiencies of litigation, is the question of outcome. Are the costs of litigation worth Congress's efforts? How important is the issue and what is the likelihood of success? From this perspective, the Democratic House of Representatives' recent decision to sue the Republican Bush administration is understandable. The president had asserted an unprecedented claim to absolute immunity from congressional testimony for his close aides in the congressional inquiry into the termination of the U.S. attorneys.<sup>208</sup> Given the *Nixon* decision and subsequent cases involving executive branch immunity,<sup>209</sup> there was little likelihood that courts would sustain such an expansive claim. Additionally, a failure to challenge the executive could have set a troubling precedent limiting the ability of Congress to gather information from the executive branch. To be sure, bringing the case and losing would have had a devastating effect on Congress's ability to demand information from the executive branch.<sup>210</sup> The message of that loss would have been that there are no consequences for refusing to comply with congressional information requests. But the House Judiciary Committee was unwilling to let the executive's intransigence go unanswered, and its victory in *Committee on the Judiciary, U.S. House of Representatives v. Harriet Miers*<sup>211</sup> ensured its access to the necessary information.

But congressional success in *Miers* does not guarantee success in a case in which the president asserts a more narrowly tailored executive privilege claim against requests for particular executive communications. For example, how would the district court have decided a challenge to the president's instruction to Miers to refuse to answer on the basis of executive privilege a specific question concerning a particular conversation with the president and his chief political strategist, Karl Rove? As the district court noted in reaffirming the *Nixon* canon, its ruling is applicable only to claims of absolute immunity from testifying before Congress, not specific claims of executive privilege over particular communications.<sup>212</sup> And, given the number of justices on the current Supreme Court who support an expansive interpretation of executive power,<sup>213</sup> the chances of the current Supreme

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<sup>208</sup> *Id.* at 100.

<sup>209</sup> *See id.* at 99-107 (discussing how the development of Supreme Court case law effectively forecloses the claims to absolute immunity advanced by the Bush aides); BERMAN, *supra* note 55, at 12-16 (same).

<sup>210</sup> While the state of the law favored Congress on the merits, there were significant procedural hurdles that Congress was less assured of overcoming. *See Miers*, 558 F. Supp. 2d at 64-99 (discussing question whether the House had standing or a cause of action).

<sup>211</sup> 558 F. Supp. 2d 53, 106-07 (D.D.C. 2008).

<sup>212</sup> *Id.* at 105-06.

<sup>213</sup> *See Boumediene v. Bush*, 128 S. Ct. 2229, 2293-2307 (2008) (Scalia, J., dissenting,) (arguing for greater judicial deference to executive branch counterterrorism decisions); *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951-54 (2009) (dismissing on the pleadings a damages action against executive branch officials for discriminatory treatment); *El-Masri v. United States*, 552 U.S. 947, 947 (2007) (mem.) (deny-

Court cabining this pro-executive branch presumption are slim. It is just as likely that the current Court might expand the scope of executive privilege were it to consider the issue today. Thus, efforts to reverse the presumption are best begun elsewhere.

### B. *The President*

While a president cannot change the judicially created presumption favoring secrecy, he could refuse to rely on it. He could choose to operate under a presumption of openness. Even better, the president could institutionalize that choice through an official policy or executive order. Although neither of these options would be binding on future presidents, they would require conformity while they remain in effect and might establish a value or executive branch culture of greater openness that future presidents might be reluctant to change. Many presidents have, in fact, adopted official executive privilege policies governing the procedures through which any executive privilege claims may be asserted.<sup>214</sup> None of these have rejected the *Nixon* presumption of confidentiality, however, and any such policy is unlikely to be forthcoming. Moreover, even if such a policy were put in place, history shows that executive officials have found the means to resist disclosure of embarrassing information, even when the rules governing dissemination would seem inconsistent with continued secrecy. Bad secrets, as we have shown, are only reluctantly revealed.

On January 21, 2009,<sup>215</sup> President Obama revoked an executive order issued by President Bush authorizing former presidents to assert executive privilege against the publication of materials archived pursuant to the Presidential Records Act of 1978.<sup>216</sup> In its place, President Obama substituted a less protective protocol modeled on one established by President Reagan in 1989.<sup>217</sup> Under this protocol, records cannot be protected by former presidents in their sole discretion; any claims of executive privilege asserted by former presidents must be submitted to the archivist for a determination, made in consultation with the attorney general, the White House counsel, and “such other executive agencies as the Archivist deems appropriate,” whether to honor the claim.<sup>218</sup> While this order was applauded by openness advocates, it does little to limit the current president’s powers, except per-

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ing writ of certiorari to review dismissal on state secrets grounds the claim of a petitioner who alleges extraordinary rendition and torture at the U.S. government’s behest).

<sup>214</sup> See BERMAN, *supra* note 55, at 21.

<sup>215</sup> Exec. Order No. 13,489, 74 Fed. Reg. 4669 (2009).

<sup>216</sup> 44 U.S.C. §§ 2201-07 (2006).

<sup>217</sup> See Exec. Order No. 12,667, 54 Fed. Reg. 3402 (1989).

<sup>218</sup> Exec. Order No. 13,489, 74 Fed. Reg. 4669, § 4, at 4670.



haps to chasten him that his authority to assert privilege claims may not survive his administration.<sup>219</sup>

Finally, the president could work with Congress to develop the type of legislation we discuss below. Such legislation would work in similar ways to an executive order or executive policy, establishing appropriate procedures and shaping the culture within the executive branch. But it would represent a more significant commitment to those principles on the part of a president, a sort of lashing himself (and his successors) to the mast. This sort of pre-commitment, designed without any particular information dispute in mind, would make it more difficult to stray from its principles when a dispute inevitably arises.

### C. *The Congress*

Although the president has the above-described means at his disposal to help rein in the *Nixon* canon, the reality is that presidents, like all of their fellow human beings, are reluctant to willingly give away power. As such, any legislation would likely have to pass over a presidential veto.<sup>220</sup> Congress has the most incentive and the most power to mitigate the effects of the *Nixon* canon, at least with respect to congressional requests for information. They also have the constitutional authority to do so. Congress has a long unchallenged history of enacting such legislation.<sup>221</sup>

Congress already regulates the executive's use and dissemination of information—including sensitive or even classified information—in numerous contexts.<sup>222</sup> Nor does a congressional effort to define and regulate

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<sup>219</sup> The Supreme Court held, in *Nixon v. Administrator of General Services*, 433 U.S. 425, 449 (1977), that former presidents do retain the right to assert executive privilege over information generated during their administration. The Court did not explore the contours of that right, however, except to note that executive privilege claims from former presidents not supported by the incumbent would be entitled to less weight. *Id.* at 449.

<sup>220</sup> The Freedom of Information Act, a landmark piece of legislation regarding government openness, was enacted over President Ford's veto. Amanda Fitzsimmons, *National Security or Unnecessary Secrecy? Restricting Exemption 1 to Prohibit Reclassification of Information Already in the Public Domain*, 4 I/S: J.L. & POL'Y FOR INFO. SOC'Y 479, 486 (2008).

<sup>221</sup> See generally Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, LAW & CONTEMP. PROBS., Winter-Spring 2000, at 7, 15.

<sup>222</sup> The Classified Information Procedures Act, 18 U.S.C. app. 3, §§ 1-16 (2000 & Supp. IV 2004) (governing the use and handling of classified information during criminal proceedings), the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1806(f) (providing procedures for handling disputes over the use of sensitive information), FOIA, 5 U.S.C. § 552(a)(4)(B) (governing requests for disclosure of government information to the public), and the Presidential Records Act, 44 U.S.C. § 2201-07 (governing archiving of presidential records), all establish rules regarding information flow from and within the executive branch. Congress also requires the president to "establish procedures to govern access to classified information" and security clearances, 50 U.S.C. § 435(a), and to disclose national security-related information to the congressional intelligence committees, 50 U.S.C. § 413(a)-(c).

the use of executive privilege exceed the bounds of separation of powers limits or run afoul of *United States v. Nixon*. As noted above, the presumption itself was unnecessary to the *Nixon* Court's judgment, and thus arguably dicta. But even if Congress cannot wholly undo the presumption itself, it can legislate with respect to the procedures through which that presumption is given effect. After all, even with respect to the presidential communications privilege, which the Supreme Court has justified based on its ability to aid the president's execution of his constitutional obligations,<sup>223</sup> the privilege is not absolute.<sup>224</sup> Congress always has had the power to contest presidential claims of privilege. In enacting a statute to promote the orderly settlement of disputes, Congress would merely exercise this power in a more systemic fashion.

Should Congress decide to take action on this issue, litigation, for the reasons noted earlier, is neither the most efficient nor the wisest path. Instead, Congress should assert itself both politically and legislatively to accomplish this goal. Politically, through both its oversight and budgetary powers, Congress has considerable clout over the executive branch.<sup>225</sup> Denying funding for executive branch programs, delaying confirmation of executive branch appointments, publicizing the executive branch's recalcitrance through oversight hearings, or even, in extreme cases, impeaching the president—each are tools Congress can use to extract information from the executive branch. This will not be easy, especially when the congressional majority and the president share the same party affiliation. But Congress should use its political tools when appropriate. While such action would not officially overturn the canon, it would mitigate its effects.

Of course, political tools are not always sufficient. Sometimes, they are impractical. At other times, they are too blunt—the proverbial sledgehammers in situations where scalpels are required. For example, refusing to appropriate funds for the Justice Department budget might have forced the executive to provide information regarding the firing of the U.S. attorneys. But it also would have brought the nation's criminal justice system, civil rights enforcement, counterterrorism efforts, and many more operations to a standstill.

Moreover, each political tool, although increasing the cost of secrecy for the executive branch, also requires Congress to spend a large amount of political capital—sometimes more than Congress possesses, often more than it is willing to spend. The tools require coordinated action among significant numbers of legislators, always a challenge for any form of legisla-

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<sup>223</sup> *United States v. Nixon*, 418 U.S. 683, 708, 712-13 (1974); see *supra* notes 33-35 and accompanying text.

<sup>224</sup> *Nixon*, 418 U.S. at 706-07.

<sup>225</sup> For a discussion of the information-forcing political tools available to Congress to combat claims of executive privilege, see generally FISHER, *supra* note 200, at 245-47; ROZELL, *supra* note 200, at 12-15, 98-100.

tive action. And with their busy legislative agenda, sufficient numbers of members of Congress might not be willing to invest the time, energy, and effort in convincing colleagues to bear the political cost of using one of these mechanisms.<sup>226</sup>

On the other hand, other tools have been rendered ineffective. Take, for example, congressional contempt citations. Historically, they had proved useful in prompting disclosure of information from the executive branch.<sup>227</sup> Now, however, contempt-of-Congress resolutions have been rendered toothless when it comes to executive branch officials. Despite a criminal contempt statute that requires any congressional contempt citation to be referred to the Justice Department for a grand jury investigation into possible indictment,<sup>228</sup> the Justice Department has taken the position that no such grand jury investigation is required when executive branch officials carry out a presidential instruction to assert executive privilege before Congress.<sup>229</sup> This policy essentially removes the contempt hammer from Congress's toolbox.<sup>230</sup>

Still other tools would actually prove counterproductive. Rather than rely on the Justice Department to enforce a congressional contempt citation, Congress could itself act on its inherent contempt powers to try a witness for contempt in the House or Senate chamber and to imprison any witness found guilty in the Capitol's jail.<sup>231</sup> But to arrest a presidential aide, drag them before a congressional chamber, and subject them to trial and possible imprisonment hardly seems a productive way of resolving information disputes. Indeed, it seems the most likely way to exacerbate tensions between the branches and guarantee contentious information disputes in the future.

To complement the existing political tools, Congress could enact legislation designed to facilitate access to information from within the executive branch.<sup>232</sup> Such legislation should have three key elements. First, it should set out guidelines for the executive branch, specifying procedures for in-

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<sup>226</sup> Note that the executive's denial of information to Congress sometimes can exacerbate Congress's inability to mobilize politically. If the information relates to significant executive wrongdoing, and if it were known, Congress likely would be highly motivated to gain access to all of the information regarding the misconduct. But so long as the executive is willing to prevent the first information from being disclosed, it can maintain a political climate that makes aggressive congressional action unlikely.

<sup>227</sup> BERMAN, *supra* note 55, at 19.

<sup>228</sup> 2 U.S.C. §§ 192, 194 (2006).

<sup>229</sup> 8 Op. Off. Legal Counsel 101, 101 (1984).

<sup>230</sup> But see Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. CHI. L. REV. 1083, 1152-53 (2009) (arguing that Congress can and should more aggressively enforce its contempt findings by using its inherent contempt power to arrest and hold contemnors in the capitol jail or by using its other political tools to vindicate contempt findings).

<sup>231</sup> Stanley M. Brand & Sean Connelly, *Constitutional Confrontations: Preserving a Prompt and Orderly Means by Which Congress May Enforce Investigative Demands Against Executive Branch Officials*, 36 CATH. U. L. REV. 71, 73 (1986) (describing Congress's inherent contempt power).

<sup>232</sup> One of the authors has drafted such a legislative proposal. BERMAN, *supra* note 55. The legislation described in this paper is based on that proposal.

voking executive privilege as well as the limited circumstances in which the president may seek to invoke the privilege, such as over communications with his close advisors. Second, legislation should specify what showing Congress must make in order to overcome the privilege. Because executive privilege is a qualified privilege, even under existing Supreme Court precedent, it can be overcome by a sufficient showing of need.<sup>233</sup> It should make plain that evidence of unlawful activity by the executive will entitle Congress to information about that particular subject matter. And finally—and perhaps most importantly—the statute should expressly authorize Congress to submit executive privilege disputes to the federal courts for resolution on an expedited schedule when inter-branch negotiations have proved unsuccessful and a majority of either House of Congress votes to authorize a specific suit.

Such legislation would not be designed to replace or supplant the traditional inter-branch negotiating process. Instead, it would be a stop-gap measure, available to be invoked when congressional-executive negotiations have reached a stalemate and when sufficient numbers of legislators (a majority of either House) deem the issue important enough to pursue. Together, the essential elements of the statute combine to create several effects. As an initial matter, they will facilitate resolution of conflicts. If both sides know what the ground rules are, they can use those rules to guide their initial bargaining positions as well as the bargaining itself. Moreover, the prospect of eventual judicial review has proven quite effective in prompting the parties to reach a negotiated resolution.<sup>234</sup> In addition, the statute's provisions give Congress a means to enforce its information rights without resorting to mechanisms that are either ineffective (such as contempt citations to executive branch officials) or counterproductive (such as initiating an inherent contempt proceeding). At the same time, the statute ensures that judicial review is a last resort and preserves the traditional inter-branch negotiations through the exhaustion requirement and the requirement that a majority of a House of Congress must determine that litigation is appropriate.

At least some members of Congress have determined that legislation along these lines is in order. A bill introduced in the House of Representatives in July, the Checks and Balances Restoration and Revitalization Act of 2009,<sup>235</sup> establishes procedures through which the executive must assert

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<sup>233</sup> *United States v. Nixon*, 418 U.S. 683, 706-07 (1974).

<sup>234</sup> There are historical examples where the prospect of judicial review has provided the necessary incentives to the parties to reach a negotiated settlement. See *Comm. on the Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53, 96-97 (D.D.C. 2008); *United States v. AT&T*, 551 F.2d 384, 385 (D.C. Cir. 1976).

<sup>235</sup> H.R. 3362, 111th Cong. (2009). In addition to its provisions regarding executive privilege and congressional contempt enforcement, the bill also tackles issues related to presidential signing statements and disclosure of Office of Legal Counsel opinions.

executive privilege before Congress. It also requires the executive branch to establish an internal policy regarding assertions of executive privilege, and it provides the House of Representatives with express standing to seek a civil judgment in a federal court to enforce subpoenas (the Senate already has such statutory authority). In such a proceeding, if the court determines that the information which is the subject of the subpoena is “presumptively privileged based upon the President’s generalized interest in confidentiality, the House may overcome the presumption by showing . . . a specific need for the information or material [in question] in order to carry out its constitutional obligations,” and that, “the information is not otherwise available.”<sup>236</sup>

With Congress and the White House both controlled by Democrats, the likelihood of aggressive congressional action to secure information from within the executive branch appears unlikely. But the patience of members of both parties had been exhausted by the unprecedented secrecy of the prior administration. President Obama’s pledge to create “an unprecedented level of openness in Government”<sup>237</sup> satiated congressional hunger for reform, at least for a time. But should this promise prove to be more aspirational than actual—a possibility some claim has already come to pass<sup>238</sup>—Congress’s appetite might return.

## CONCLUSION

We have argued that the presumption of secrecy for presidential communications recognized by the Supreme Court in *United States v. Nixon* is based on flawed and superficial reasoning, fails to recognize the harms that secrecy can cause, and exalts the asserted needs of the executive branch over those of the other branches of government. Moreover, we posit, the damage done by entering this presumption in the *United States Reports* is far from trivial. Indeed, the (faulty) logic adopted in *Nixon* took root, spreading beyond the narrow confines of the circumstances presented by that case and justifying much of the expansive executive branch secrecy that prevails today. The *Nixon* canon thus permitted the dangerous concentration of power in the executive that excessive secrecy enables, and that constitutional checks and balances were designed to prevent. To honor the proper constitutional balance, the presumption must be reversed. Each branch of government has it within its power to do so. The most promising means of doing so lies with Congress, which should undertake the project.

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<sup>236</sup> *Id.* § 201(d)(1)(A)–(B).

<sup>237</sup> Memorandum on Transparency and Open Government, *supra* note 2; *see also supra* note 2 and accompanying text.

<sup>238</sup> *See, e.g., Obama’s Mixed Signals*, *supra* note 7; *Mr. Obama’s Promise of Transparency*, *supra* note 7; Hamburger & Nicholas, *supra* note 7.