"[PERHAPS] THE PRINCIPLE IS ESTABLISHED": THE SENATE, GEORGE WASHINGTON, AND THE AMBIGUOUS ORIGINS OF EXECUTIVE PRIVILEGE

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Word quickly reached President George Washington that the Senate requested information relating to the American minister to France's correspondence with both Secretary of State Thomas Jefferson and the French government. He must have been mystified.[2] Washington repeatedly sent information to the Senate relating to United States' neutrality in the ongoing war between France and Great Britain.[3] Why would the Senate request this specific information, particularly in the manner it did? The vote followed partisan lines.[4] Those who opposed the Washington Administration's policies voted favorably and those who supported the Administration voted against the request.[5] To determine his response, Washington deliberated and

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[1] A draft of this article was presented at the 2018 Law & Society Annual Conference in Toronto, Ontario, Canada.

[2] *See* S. JOURNAL, 3d Cong., 1st Sess. 38 (1794).

[3] *See id.* at 12, 20-24.

[4] *See id.* at 38 (Voting yea: Bradley, Brown, Burr, Butler, Edwards, Gallatin, Hawkins, Jackson, Langdon, Martin, Monroe, Robinson and Taylor. The Biographical Directory of the United States Congress, maintained by the United States Congress, identifies each of them as "Anti-Administration." Voting nay: Bradford, Cabot, Ellsworth, Foster, Frelinghuysen, Izard, Livermore, Mitchell, Morris, Strong and Vining. All were identified as "Federalist" or "Pro-Administration" in the Biographical Directory.); *see also* BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, http://bioguide.congress.gov/biosearch/biosearch.asp (1774–present)).

[5] *See* S. JOURNAL, 3d Cong., 1st Sess. 38 (1794).

consulted his cabinet.[6] More than a month later, Washington provided the correspondence to the Senate, but redacted matters necessitated by "public interest."[7] The Senate accepted this without comment or complaint.[8]

Although the delayed response was unusual for Washington, he previously provided correspondence extracts to the Third Congress.[9] The Senate's request and Washington's response differed from the ordinary inter-branch dialogue.[10] As a result, some historians and legal scholars argue that Washington's redactions establish the principle of "executive privilege."[11] Others assert that the Senate's acceptance indicates its understanding of the need for confidentiality and not an acquiescence to "executive privilege."[12] Both sides operate from a shallow understanding of the exchange.[13] A much deeper understanding clarifies whether Washington's response and the Senate's silence constitute executive privilege.[14] With this

[6] *See infra* Section I.B; *see generally* Lindsay M. Chervinsky, *George Washington and the First Presidential Cabinet*, 48 PRESIDENTIAL STUDIES QUARTERLY 139 (2018) (suggesting that Washington did not make decisions until he consulted the other members of his administration); *see also id.* at 143-144 (explaining that throughout most of Washington's first term, he consulted only Secretary of State Thomas Jefferson, Secretary of War Henry Knox and Secretary of Treasury Alexander Hamilton. In the waning days of his first term and into his second, Attorney General Edmund Randolph also participated.).

[7] S. JOURNAL, 3d Cong., 1st Sess. 56 (1794).

[8] *See id.*

[9] *See id.* at 25, 35.

[10] *See infra* section I.A.

[11] Mark J. Rozell, *Restoring Balance to the Debate over Executive Privilege: A Response to Berger*, 8 WM. & MARY BILL RTS. J. 541, 555-57 (2000); Abraham Sofaer, *Executive Power and the Control of Information: Practice under the Framers*, 1977 DUKE L.J. 1, 45–46, 48 (1977); Roberto Iraola, *Congressional Oversight, Executive Privilege, and Requests for Information Relating to Federal Criminal Investigations and Prosecutions*, 87 IOWA L. REV. 1559, 1570 (2002); David A. O'Neil, *The Political Safeguards of Executive Privilege*, 60 VAND. L. REV. 1079, 1082 (2007); Louis Fisher, *Invoking Executive Privilege: Navigating Ticklish Political Waters*, 8 WM. & MARY BILL RTS. J. 583 (2000).

[12] Raoul Berger, *The Incarnation of Executive Privilege*, 22 UCLA L. REV. 4, 19 (1974); Saikrishna Prakash, *A Critical Comment on the Constitutionality of Executive Privilege*, 83 MINN. L. REV. 1143, 1180 (1999); Bernard Schwartz, *Executive Privilege and Congressional Investigatory Power,* 47 CAL. L. REV. 3, 41 (1959); Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 IOWA L. REV. 489, 508-09 (2007).

[13] *See infra* Section II.

[14] *See infra* Section III.

clarification, the historical roots of executive privilege do not grow as deep as thought.

Today's political climate again raises the possibility of executive privilege.[15] Any investigation into a sitting President's conduct—criminal or otherwise—creates that possibility.[16] Therefore, understanding its application and limits is crucial to assessing its applicability in any given situation. Historical precedent serves as one means for determining when the privilege applies.[17] Washington's practices serve as an important precedent as they demonstrate the intent of those who created the United States' constitutional government.

This article argues that Washington's redactions did not constitute an exercise of executive privilege. Instead, his actions equate best with efforts to protect national security information. The Senate's request related to matters the President himself asked Congress to address.[18] The Administration's response indicates they did not intend to claim a privilege.[19] Instead, the Administration sought to protect the information and its source.[20] Finally, the Administration's internal deliberations focused on the Senate's constitutional authority to ask for the information and the President's duty to disclose it.[21]

The argument begins by describing the Senate's "request" and the Washington Administration's response. It places both branches' actions within their larger political and legal contexts. It explains how Hamilton believed the Administration's action established the "principle" he desired. The second section questions how well-

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[15] *See* Carrie Johnson, *Bannon and Trump White House Raising Questions About Executive Privilege, Lawyers Say*, NAT'L PUB. RADIO (January 17, 2018), https://www.npr.org/2018/01/17/578634802/bannon-and-trump-white-house-raising-questions-about-executive-privilege-lawyers [http://perma.cc/MXF2-6YRJ]; Joan Biskupic, *"What Nixon and Clinton's Supreme Court cases mean for Trump's options on executive privilege"*, CNN (May 2, 2018) https://www.cnn.com/2018/05/02/politics/supreme-court-nixon-clinton-trump-executive-privilege/index.html [http://perma.cc/ZYW4-5DGH]; Chris Megerian, *Executive privilege, a flashpoint since George Washington, now roils Russian investigation*, L.A. TIMES (January 15, 2018), http://www.latimes.com/politics/la-na-trump-russia-congress-20180118-story.html [http://perma.cc/3GNT-GHMK].

[16] Iraola, *supra* note 11, at 1570-1580.

[17] *See, e.g.*, Sofaer, *supra* note 11.

[18] *See* S. JOURNAL, 3d Cong., 1st Sess. 10–11 (1793).

[19] *See infra* Section III.

[20] *See infra* Section III.

[21] *See infra* Section III.

established Hamilton's principle truly is by surveying subsequent conflicts between the presidency and the other branches. It explains the continuum between a very narrow executive privilege and one that permits executive privilege on a case-by-case basis. The final section analyzes the incident and determines that, rather than establishing executive privilege, the Senate's request and Washington's response established the principle that Presidents can withhold a limited set of national security information.

I. THE SENATE, WASHINGTON, AND MORRIS' CORRESPONDENCE

On January 24, 1794, the Senate passed a resolution requesting President Washington provide copies of Gouverneur Morris's correspondence with Secretary of State Thomas Jefferson and with the French government. One month later, Washington complied with the Senate's request by sending redacted copies. The Senate accepted these redactions without formal complaint.

These basic facts, which form the basis of arguments for and against executive privilege, conceal the politics and law operating in the background. The Third Congress looked different from its two predecessors.[22] Political factions had fully emerged during the election and the Senate had more people opposing Washington's policies than supporting them.[23] Washington, however, set the new Congress's agenda. In a joint session, Washington explained America's precarious position between France and Great Britain and asked them to legislate so that America could remain neutral.[24] In the weeks following his address, Washington forwarded a variety of documents to the Senate for its consideration.[25] In some instances, he provided the full documents while, in others, he provided extracts.[26] The Senate never complained.[27] Then, on January 17th, the Senate introduced a

[22] *See* David P. Currie, *The Constitution in Congress: The Third Congress, 1793-1795*, 63 U. CHI. L. REV. 1, 1–2 (1996).
[23] *See* STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1788-1800 289 (1993); JAMES ROGER SHARP, AMERICAN POLITICS IN THE EARLY REPUBLIC: THE NEW NATION IN CRISIS 53–60 (1993).
[24] S. JOURNAL, 3d Cong., 1st Sess. 7–8 (1793).
[25] *See id.* at 14–24.
[26] *See id.*
[27] *See id.*

motion to "direct" Washington to provide Morris's correspondence.[28] A week later, the motion passed along factional lines; however, it now "requested" the information rather than "directing" the production.[29] Before receiving the formal motion, word of the request reached Washington.[30] This launched an internal Administration debate about how to respond.[31] Half the cabinet had turned over since the new year began, and its response reflected these changes.[32] Secretary of War Henry Knox opposed disclosure. Treasury Secretary Alexander Hamilton, Secretary of State Edmund Randolph, and Attorney General William Bradford concurred that the President had the power to withhold whatever information might harm the public. Ultimately, Washington concluded he would comply but removed sections based upon "public considerations."[33] While the Senate did not formally complain, at least one member expressed concerns privately.[34]

This describes the prevailing academic view of the incident. Recent biographies of Washington and major works on the political history of the era do not mention the incident.[35] The most thorough work on the history of executive privilege also neglects the incident.[36] It only emerges in recent scholarly articles about executive privilege's

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[28] *Id.* at 34.
[29] *Id.* at 38.
[30] *See To George Washington from Edmund Randolph, 25 January 1794*, FOUNDERS ONLINE, https://founders.archives.gov/documents/Washington/05-15-02-0094 [https://perma.cc/ZEJ7-XAGX].
[31] *See infra* Section II.B.
[32] *See* DAVID S. HEIDLER & JEANNE T. HEIDLER, WASHINGTON'S CIRCLE: THE CREATION OF THE PRESIDENT xiii (2015). At the end of 1793, Thomas Jefferson retired. Attorney General Edmund Randolph was appointed Secretary of State. At the time the motion passed, the Senate had yet to confirm William Bradford as Attorney General. He was confirmed the next Monday. This meant Washington had a new Secretary of State and Attorney General. The two remaining members were Secretary of Treasury Alexander Hamilton and Secretary of War Henry Knox.
[33] S. JOURNAL, 3d Cong., 1st Sess. 56 (1794).
[34] *See To Thomas Jefferson From James Monroe, 3 March 1794*, FOUNDERS ONLINE, https://founders.archives.gov/documents/Jefferson/01-28-02-0027 [https://perma.cc/JW98-RPHP].
[35] *See* RON CHERNOW, GEORGE WASHINGTON: A LIFE (2010); JOHN FERLING, THE ASCENT OF GEORGE WASHINGTON: THE HIDDEN POLITICAL GENIUS OF AN AMERICAN ICON (2009); ELKINS & MCKITTRICK, *supra* note 23; JOHN C. MILLER, THE FEDERALIST ERA, 1789–1801 (1998).
[36] *See* RAOUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH (1974).

viability.[37] Even in these articles, the incident appears briefly and without any context.[38] The most detailed treatment appears in Abraham Sofaer's four-page article about the incident.[39] Even that does not go beyond the Senate's request and the multiple cabinet opinions.[40] All of this operated against the background of a political debate over one senator's eligibility and a motion to open the Senate's proceedings to the public.[41] These factors combined to influence Washington's decision. Leaving out the political and legal contexts leads to the erroneous conclusion that Washington asserted an early form of executive privilege.

A. The Senate's "Request"

The Third Congress convened on December 2, 1793, after the nation's first partisan election in 1792.[42] The leading partisans, Thomas Jefferson and Alexander Hamilton, both served in Washington's Administration.[43] Both sought like-minded people to serve in the Third Congress.[44] While Jefferson clearly won the House, the Senate convened with an almost equal division between those supporting the administration (Hamilton) and those opposed (Jefferson).[45] This created barriers for Hamilton's desire to clear his name.[46] The first two Congresses enacted Hamilton's economic program, but a growing minority began investigating Hamilton's conduct.[47] For his part, Jefferson resigned as Secretary of State soon after the Third Congress convened.[48]

On December 3rd, Congress convened in the Senate chamber for President Washington's address. After expressing gratitude for and

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[37] *See supra* notes 11–12 (discussing Washington's redactions to Gouverneur Morris's correspondence with Thomas Jefferson and the French government).
[38] *See, e.g.*, Fisher, *supra* note 11, at 587; *see also* Sofaer, *supra* note 11, at 7–8.
[39] Sofaer, *supra* note 11, at 45–46, 48.
[40] *See id.*
[41] *See* Currie, *supra* note 22, at 3.
[42] *See* S. JOURNAL, 3d Cong., 1st Sess. 3, 10 (1794).; ELKINS & MCKITRICK, *supra* note 23, at 288.
[43] *See* ELKINS & MCKITRICK, *supra* note 23, at 288–92; JOHN FERLING, JEFFERSON AND HAMILTON: THE RIVALRY THAT FORGED A NATION, 203–05 (2013).
[44] *See* ELKINS & MCKITRICK, *supra* note 23, at 288–89.
[45] *See* Currie, *supra* note 22, at 1–2; [ELKINS & MCKITRICK], *supra* note 23, at 289.
[46] *See* RON CHERNOW, ALEXANDER HAMILTON 455–56 (2004).
[47] *See id.*
[48] *See* FERLING, *supra* note 43, at 253–54.

reluctance in taking executive power, Washington addressed his primary concern.[49] France and Great Britain were at war, and the United States found itself positioned between them.[50] He had hoped to continue commercial relations, but "our disposition for peace [was] drawn into question by the suspicions too often entertained by belligerent nations."[51] Washington knew he had to act to allay the belligerent nations' concerns.[52] "It seemed, therefore, to be my duty to admonish our citizens of the consequences of a contraband trade, and of hostile acts to any of the parties . . . ."[53] This "duty" led Washington to issue his April 22, 1793 Neutrality Proclamation.[54] Washington continued, "In this posture of affairs, both new and delicate, I resolved to adopt general rules, which should conform to the treaties and assert the privileges of the United States."[55] Washington then promised to communicate these rules to the Congress.[56]

Washington turned to how he wanted Congress to act.

> "It rests with the wisdom of Congress to correct, improve, or enforce this plan of procedure; and it will probably be found expedient to extend the legal code and the jurisdiction of the Courts of the United States to many cases which, though dependent on principles already recognized, demand some further provisions . . . . Whatsoever those remedies may be, they will be well administered by the Judiciary . . . ."[57]

He left open the means for achieving this objective. Washington did not propose specific legislation. The goal was to maintain peace.

In the weeks following his address, Washington voluntarily sent the Senate various documents. His first correspondence consisted of a letter to the House and Senate explaining America's position between

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[49] *See* S. JOURNAL, 3d Cong., 1st Sess. 4 (1793).
[50] *See* Scott Ingram, *Replacing the "Sword of War" with the "Scales of Justice": Henfield's Case and the Origins of Lawfare in the United States,* 9 J. NAT'L SECURITY L. & POL'Y 483, 488–92 (2018).
[51] S. JOURNAL, 3d Cong., 1st Sess. 4 (1793).
[52] *See* Ingram, *supra* note 50, at 492–93.
[53] S. JOURNAL, 3d Cong., 1st Sess. 4 (1793).
[54] George Washington, *Neutrality Proclamation, April 22, 1793*, FOUNDERS ONLINE, https://founders.archives.gov/documents/Washington/05-12-02-0371 [https://perma.cc/LE5A-5ELR].
[55] S. JOURNAL, 3d Cong., 1st Sess. 4 (1793).
[56] *See id.*
[57] *Id.* at 4–5.

France and Great Britain in more detail.[58] He described the Administration's interactions with French Minister Edmond Genet:

> "It is with extreme concern that I have to inform you that the proceedings of the person whom they have unfortunately appointed their Minister Plenipotentiary here have breathed nothing of the friendly spirit of the nation which sent him; their tendency, on the contrary, has been to involve us in war abroad and discord and anarchy at home. So far as his acts, or those of his agents, have threatened our immediate commitment in the war, or flagrant insult to the authority of the laws their effect has been counteracted by the ordinary cognizance of laws, and by an execution of the powers confided to me."[59]

Washington then described how he agreed to restore vessels seized or compensate for losses to keep the United States out of war.[60] To further Congressional understanding, Washington sent Congress copies of the transactions.[61]

Throughout December, the Administration sent Congress a steady supply of documents covering a variety of topics. On December 16th, Secretary of War Henry Knox sent a variety of papers.[62] On December 31, Washington forwarded a letter from Secretary of State Jefferson about impediments to minting coins.[63] The Senate requested none of these, but it received each one and read the contents to the Chamber.[64]

With the start of the New Year, the Senate began considering Constitutional amendments while Washington continued sending information about the situation with France. On January 15, Washington sent the Senate correspondence between Jefferson and Genet.[65] The next day, Washington sent "certain intelligence lately received from Europe, as it relates to the subject of [his] past communications."[66] The next week, on January 21st, Washington reiterated his opposition to Genet.[67] Earlier he sent a copy of Jefferson's instructions to Morris regarding Genet's recall.[68] Two days

[58] *See id.* at 7.
[59] *Id.*
[60] *See id.* at 7-8.
[61] *See id.* at 8.
[62] *See id.* at 22.
[63] *See id.* at 24.
[64] *See* S. JOURNAL, 3d Cong., 1st Sess. 24 (1793).
[65] *See id.* at 31.
[66] *Id.* at 32.
[67] *See id.* at 36.
[68] *See id.* at 31.

later, Washington sent "extracts from the last advices from our Minister in London, as being connected with communications already made."[69] This series of communications demonstrates Washington's willingness to keep Congress informed about Franco-American relations. Yet, it also demonstrates Washington's ability to edit information he sent. There is no record the Senate ever objected.

The Senate also utilized its power to request information from the Administration. One example occurred on January 16th when the Senate "requested" a translation of the Navigation Act passed by France.[70] Apparently, the Administration sent the Act to Congress in one of its prior messages. Two important aspects of this transaction require noting. First, the Senate used the term "request."[71] It was not a demand. Second, there was no vote.[72] The message came from the Senate as a whole. Both aspects distinguish this request from ones the Senate would make the next day.

On Friday, January 17th, the Senate discussed amending the Constitution and opening the Senate to the public.[73] Following that, someone made a motion to "direct [the Secretary of State] to lay before the Senate the correspondence between the Minister of the United States at the Republic of France and said Republic, and between said Minister and the office of the Secretary of State."[74] Following its introduction, the Senate postponed consideration until Monday and took up a motion held over from January 8th.[75] That motion requested the Secretary of Treasury to provide the Senate with statements concerning the Public Debt.[76] The day ended without any resolution, so the Senate continued both motions until Monday.[77]

On Monday, the Senate considered both information request motions.[78] The motion for U.S. Minister's Gouverneur Morris's correspondence was delayed, but the Senate debated the motion to obtain the public debt statements.[79] During the debate, several

[69] *Id.* at 4.
[70] *Id.* at 32.
[71] *Id.*
[72] *See id.*
[73] *See id.* at 34.
[74] *Id.* at 4.
[75] *See id.*
[76] *See id.*
[77] *See id.* at 23.
[78] *See id.*
[79] *See id.* at 23.

amendments were made.[80] With these amendments, the Senate adopted the resolution.[81] Importantly, the *Senate Journal* does not indicate a recorded vote.[82]

Debate on Morris's correspondence resumed on the 23rd.[83] At that time, someone made a motion to amend the resolution so that "directed" became "requested."[84] The Senate Journal contains no information regarding why this was changed.[85] Possibly this was done because the Senate doubted whether it had authority to "direct" the President to comply. Another possibility is that the Senate wished to make its language consistent. In the translation and public debt motions, the Senate used "requested." This latter interpretation finds support when considered with the Senate's final vote.

The Senate spent most of January 24th debating the resolution requesting Morris's correspondence.[86] Eventually, the Senate voted on the amended motion.[87] The Senate Journal recorded 13 yeas and 11 nays, something not recorded for prior resolutions.[88] All who supported the resolution would later be identified as Anti-Administration or Republican.[89] Those opposed were pro-Administration or Federalist.[90] This strict divide adds a political layer onto the Senate's legal authority. The political divide casts doubt on the "authority" theory. Had the wording caused a significant debate over the Senate's authority to "direct" the President to produce the documents, then the change should have produced unanimity, not division. Senate Republicans had no reason to soften the language if the change did not earn them Federalist votes. Federalists, who tended to support Executive power, would have no desire to strengthen the Senate's power vis-à-vis the President.[91] Therefore, language

[80] *See id.*
[81] *See id.*
[82] *See id.*
[83] *See id.* at 25.
[84] *Id.*
[85] *See id.*
[86] *See id.*
[87] *See id.* at 26.
[88] *See id.*
[89] *See id.* (voting in favor: Bradley, Brown, Burr, Butler, Edwards, Gallatin, Hawkins, Jackson, Langdon, Martin, Monroe, Robinson and Taylor).
[90] *See id.* (voting in opposition: Bradford, Cabot, Ellsworth, Foster, Frelinghuysen, Izard, Livermore, Mitchell, Morris, Strong and Vining).
[91] *See* ELKINS & MCKITRICK, *supra* note 23, at 22–25.

uniformity seems the more likely reason for the change. This leaves open, however, the question as to why the Senate divided. The Senate's debate, which was not recorded, could answer this question. Washington's repeated document deliveries to the Senate about French relations established a precedent for government transparency. The Senate spent most of its session learning about what happened during the time between the Second and Third Congresses. It considered the appropriate legislative response to Washington's initial message.[92] The requested correspondence appears relevant to these inquiries.

B. The Administration's Deliberations and Response

Word of the Senate's action quickly reached the Administration. This was not the first time that Congress had requested information and Washington considered withholding it. The first occurred two years prior when General Arthur St. Clair was defeated in the northwest territories.[93] Following the defeat, the House of Representatives began a formal inquiry into the events.[94] To aid its inquiry, the House requested the Administration produce documents relating to the mission. Washington hesitated and consulted the Cabinet.[95] They noted that, in this instance, the House operated as an inquest.[96] This gave them broad powers to request information.[97] The Administration balked, however, because the House did not address the proper official.[98] The House corrected this and modified its request slightly to exclude information "not of a public nature."[99] This allowed the President to keep some material confidential if the President deemed it necessary. The House left the decision to the President. Ultimately, Washington disclosed all the information from the mission and even recommended that St. Clair make himself available for questioning.[100]

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[92] *See* Currie, *supra* note 22, at 15–17.
[93] *See* Sofaer, *supra* note 11, at 5.
[94] *See* MILLER, *supra* note 35, at 147.
[95] *See* Sofaer, *supra* note 11, at 6.
[96] *See id.*
[97] *See id.*
[98] *See id.*
[99] *Id.*
[100] *See id.* at 6–7.

The morning after word of the Senate's latest request reached Washington, a Saturday, new Secretary of State and former Attorney General Edmund Randolph arrived at Washington's Philadelphia residence.[101] He found Hamilton meeting with Washington.[102] Earlier, Hamilton and Randolph had discussed the Senate's action.[103] Hamilton, as the Federalist's figurehead, likely reacted viscerally to the Senate's conduct, but realized the Senate provided Washington the opportunity to establish the principle that the President could withhold information from Congress.[104] Randolph did not interrupt this meeting. Instead, he wrote Washington informing him that Randolph possessed all of Morris's correspondence and was reviewing them when word reached Randolph that his youngest son was dangerously ill.[105]

After checking on his son, Randolph completed his review of Morris's correspondence and reported to Washington.[106] From the outset, Randolph noted his astonishment at how little "objectionable material" the correspondence contained.[107] Prior to his review, Randolph had heard from Hamilton, presumably, that the correspondence contained highly inflammatory material.[108] With this thought in mind, Randolph believed the most exceptional material was nothing more than patriotic.[109] Nonetheless, he found some material Washington should withhold and divided it into three categories:

> "1. What relates to Mr. [Genet]; 2. Some harsh expressions on the conduct of the rulers in France, which, if returned to that country, might expose [Morris] to danger; 3. The authors of some interesting information, who, if known, would be infallibly denounced."[110]

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[101] *See To George Washington from Edmund Randolph, 25 January 1794*, *supra* note 30.
[102] *See id.*
[103] *See id.*
[104] *See* CHERNOW, *supra* note 46, at 391–92.
[105] *See To George Washington from Edmund Randolph, 25 January 1794*, *supra* note 30.
[106] *See To George Washington from Edmund Randolph, 26 January 1794*, FOUNDERS ONLINE, https://founders.archives.gov/documents/Washington/05-15-02-0097) [https://perma.cc/7S5X-NJH8].
[107] *Id.*
[108] *See id.*
[109] *See id.*
[110] *Id.*

Randolph concluded his report ensuring Washington that Randolph would be available to discuss the matter further.[111]

Randolph's categories are curious, yet recognizable, to a modern reader. The first category piques curiosity. Randolph identifies communications relating to Genet as objectionable.[112] Why did Randolph object to this? Perhaps it arose from Hamilton's objections. Perhaps Randolph did not know Washington had already sent correspondence about Genet to the Senate. Perhaps Randolph feared that public disclosure of the government's anti-Genet rhetoric would further hamper the government's neutrality efforts. Whatever the reason, Randolph's objections contradict Washington's prior conduct with the Senate. His next two categories, however, resonate with modern considerations about the disclosure of diplomatic correspondence. First, Randolph sought to protect Morris from French recriminations. The candid information Morris provided might cause him problems with the volatile French government. Second, Randolph sought to protect sources and methods of information gathering. In his correspondence, Morris informed the Administration of his intelligence sources.[113] Should such information become public, the government could lose those sources.[114]

Later that day, Randolph sent Washington a second letter responding to one he received from Washington.[115] Washington, reflecting upon Randolph's first letter, asked about the Senate's authority to request the documents.[116] Hamilton probably influenced Washington's question.[117] Prior to the Senate's partisan motion, Washington accepted, without question, the Senate's requests.[118]

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[111] *See id.*

[112] *See To George Washington from Edmund Randolph, 26 January 1794*, *supra* note 106.

[113] *See id.*

[114] *See* William H. Webster, *Symposium: Foreign Affairs and the Constitution: The Roles of Congress, the President, and the Courts: The Role of Intelligence in a Free Society,* 43 U. MIAMI L. REV. 155, 158 (1988) (explaining that the main purposes of secrecy in these efforts is to preserve and protect "sources" and "methods," two of the most important words in the intelligence world).

[115] *See To George Washington from Edmund Randolph, 26 January 1794*, *supra* note 106.

[116] *See id.*

[117] *See* GILBERT L. LYCAN, ALEXANDER HAMILTON AND AMERICAN FOREIGN POLICY 152–55 (1971) (noting that at the beginning of the neutrality crisis, Hamilton proffered ten questions for Washington to ask the entire cabinet).

[118] *See supra* text accompanying notes 58–69.

Randolph, when Attorney General, regularly answered requests for opinions, so he endeavored to answer Washington's question.[119] Randolph examined the question in terms of the Senate's dual role.[120] It acted in an executive capacity when consenting to treaties and executive appointments.[121] It acted in a legislative capacity when considering legislation.[122] According to Randolph, under the former, the Senate could only act when the President submitted a treaty or nomination.[123] As this had not occurred, the Senate's request could not be an executive action.[124] Therefore, as a legislative function, the Senate had power to obtain information relevant to any legislative business, including when seeking "to originate business."[125] Despite this conclusion, Randolph asserted the President has the discretion "to give to [the Senate] no more, than, in his judgment, is fit to be given."[126] As usual, Randolph did not give authority for his position, demonstrating the issue's legal novelty.[127]

Two days later, Randolph, Knox, and Hamilton met to discuss the situation.[128] Knox took the most extreme position, believing that Washington should withhold all correspondence.[129] Hamilton concurred but, perhaps seeking a conciliatory approach, suggested only withholding parts the President deemed necessary.[130] Randolph agreed with Hamilton's approach.[131]

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[119] *See* JOHN J. REARDON, EDMUND RANDOLPH: A BIOGRAPHY 191–207 (1974) (explaining Randolph's "significant" legal work for the Administration's first term).
[120] *See To George Washington from Edmund Randolph, 26 January 1794*, *supra* note 106.
[121] *See id.*
[122] *See id.*
[123] *See id.*
[124] *See id.*
[125] *Id.*
[126] *Id.*
[127] *See id.*; *see also* REARDON, *supra* note 119, at 229 ("With a thoroughness not characteristic of Randolph when working under pressure, he examined virtually all the seventeenth and eighteenth-century authorities on international law and quoted at length from some.").
[128] *See Cabinet Opinion on a Resolution of the U.S. Senate, 28 January 1794*, FOUNDERS ONLINE, https://founders.archives.gov/documents/Washington/05-15-02-0105 [https://perma.cc/HKH3-2X3D].
[129] *See id.*
[130] *See id.*
[131] *See id.*

Two key aspects emerge from this. First, Hamilton's rationale indicates "that the principle is safe."[132] This refers to Presidential discretion to withhold information from Congress. Hamilton's preference for executive power supports this interpretation.[133] Hamilton had long advocated for strong executive power. At the Constitutional Convention, he proposed a radical alternative to Randolph's initial proposal, but it garnered little support.

With the Constitution completed, Hamilton played a key role in New York's ratification, penning, along with John Jay and James Madison, the Federalist Papers.[134] Two of these papers discussed secrecy and the executive. In the 64th Federalist Paper, John Jay addressed the Senate's treaty-making power.[135] Jay recognized secrecy's importance to treaty negotiations.[136] He wrote:

> "It seldom happens in the negotiation of treaties, of whatever nature, but that perfect SECRECY and immediate DESPATCH are sometimes requisite . . . there doubtless are many . . . who would rely on the secrecy of the President, but who would not confide in that of the Senate, and still less in that of a large popular Assembly. The convention have done well, therefore, in so disposing of the power of making treaties, that although the President must, in forming them, act by the advice and consent of the Senate, yet he will be able to manage the business of intelligence in such a manner as prudence may suggest."[137]

Here, Jay advocated for executive secrecy in foreign affairs. In Number 70, Hamilton wrote about the energy instilled into a unitary executive.[138] He wrote,

> "That unity is conducive to energy will not be disputed. Decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished."[139]

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[132] *Id.*
[133] *See* CHERNOW, *supra* note 46, at 232–34 (discussing Hamilton's plan for an executive presented at the Constitutional Convention).
[134] *See* PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788 326–28, 335–37 (2011).
[135] THE FEDERALIST NO. 64 (John Jay).
[136] *See id.*
[137] *Id.*
[138] *See* THE FEDERALIST NO. 70 (Alexander Hamilton).
[139] *Id.*

From this, one can infer that the President, like Congress, has the ability to maintain secret information.

Second, new Attorney General, William Bradford, did not participate.[140] Beginning in 1792 and throughout 1793, Randolph, as Attorney General, became part of Washington's cabinet and regularly participated in Cabinet meetings.[141] Bradford's absence could have resulted from his inexperience with the Administration or the fact that he had only been confirmed the day before the cabinet met.[142]

Washington did solicit Bradford's opinion, however. Bradford opined that the President has a duty to withhold all information he deems "unsafe or improper to be disclosed."[143] The Senate's resolution did not override "those just exceptions which the rights of the executive and the nature of foreign correspondences require."[144] He continued, "[e]very call of this nature, where the correspondence is secret and no specific object pointed at, must be presumed to proceed upon the idea, that the papers requested are proper to be communicated."[145] The President has the power to withhold, "any Letters, the disclosure of which might endanger national honour or individual safety."[146] Bradford ultimately concluded,

> "[t]hat it will be advisable for the President to communicate to the Senate such parts of the said Correspondence as upon examination he shall deem safe & proper to disclose: withholding all such, as any circumstances, may render improper to be communicated."[147]

Essentially, Bradford concurred with Hamilton and Randolph but expanded upon the principle. He added specific justifications to guide the President's exercise of discretion. Washington could not simply refuse to disclose the information, but the information must be secret; there must be no specific showing of Congressional need for the

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[140] *See Cabinet Opinion on a Resolution of the U.S. Senate, 28 January 1794*, *supra* note 128.
[141] *See* REARDON, *supra* note 119, at 212–20.
[142] *See Senate Executive Journal*, LIBR. OF CONGRESS, https://memory.loc.gov/ammem/amlaw/lwej.html [https://perma.cc/S65L-HWWT].
[143] *To George Washington from William Bradford, January 1794*, FOUNDERS ONLINE, https://founders.archives.gov/documents/Washington/05-15-02-0128 [https://perma.cc/F6VS-V7JU].
[144] *Id.*
[145] *Id.*
[146] *Id.*
[147] *Id.*

information; and, it must be shown that the disclosure could endanger national honor or safety.

None of these opinions contained any legal authority to withhold the documents despite three coming from highly-experienced attorneys. They did not cite authority because none existed. All understood that they were working from a blank slate with new ideas about government responsibilities.[148] While their legal system and basic principles derived from their British heritage, American lawyers, especially those working on federal issues, developed their own common law.[149] The uniqueness of the federal system meant that no one had confronted these questions previously. British law did not provide any insight because everyone answered to the monarch. The American president did not have such freedom. Without legal authority to draw upon, Washington's cabinet relied upon their personal legal conceptions and pragmatism.

Hamilton's statement at the cabinet meeting best reflects their mindset. He opined "that the correct mode of proceeding is to do, what General Knox advises; but that the principle is safe, by excepting such parts as the President may choose to withhold."[150] Everything Washington did as president established a precedent. By withholding information Congress requested, Hamilton believed the Administration would set a precedent. Exactly what was withheld was less important as withholding something. Establishing "the principle" meant setting a precedent for an executive prerogative to withhold information Congress requested.[151]

Despite the Cabinet's unanimity, a week later, Washington was still uncertain about how to proceed. He still had not received the formal resolution.[152] Washington wrote Randolph asking about the

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[148] *See* WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830 92 (Univ. of Georgia Press ed. 1975).

[149] *See* LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW 7 (Simon & Schuster ed., 3d ed. 2005).

[150] *Cabinet Opinion on a Resolution of the U.S. Senate, 28 January 1794*, *supra* note 128.

[151] Washington providing extracts to Congress is distinguishable from this incident because Washington providing the extracts was voluntary, rather than in response to Congressional action.

[152] *See To George Washington from Edmund Randolph, 2 February 1794*, FOUNDERS ONLINE, https://founders.archives.gov/documents/Washington/05-15-02-0131 [https://perma.cc/6PTZ-RCBT].

logistics of a response, wondering whether a committee would wait on him while he produced the documents or whether he could send them to the Senate once prepared.[153] This matter concerned Washington because he wanted more time to consider his response.[154] Randolph responded, "Still the answer, which the President has recited, seems to be proper in the first instance. For time must be taken to consider the resolution, so as to determine how far it is to be complied with, or if at all."[155] For Randolph, the crux of the matter remained the capacity in which the Senate acted. Unless specifically stated in the resolution, which Randolph doubted, Washington could construe it as he wished.[156] If Washington determined it an executive action, then the President could withhold all correspondence.[157] If legislative, then the President could determine what to send and what to withhold.[158] Randolph concluded by floating a third option, "[Washington] may, it is presumed, call for an explanation, as to the source, from which it proceeds."[159] This would give Washington an answer to the question.

Randolph's answer is the last internal record prior to Washington's response to the Senate on February 26th. Washington sent the correspondence to the Senate under the following cover:

> "After an examination of it, I directed copies and translations to be made; except in those particulars, which, in my judgment, for public considerations, ought not to be communicated. These copies and translations are now transmitted to the Senate; but the nature of them manifests the propriety of their being received as confidential."[160]

Washington's cover letter both concealed and revealed his concerns and rationale. He withheld particular pieces of the correspondence after determining that communication was improper due to "public considerations."[161] Washington failed to describe these considerations or provide more specific reasons.[162] Both Randolph

[153] *See id.*
[154] *See id.*
[155] *Id.*
[156] *See id.*
[157] *See id.*
[158] *See id.*
[159] *Id.*
[160] *From George Washington to the United States Senate, 26 February 1794*, FOUNDERS ONLINE, https://founders.archives.gov/documents/Washington/05-15-02-0221 [https://perma.cc/DSE7-VGK3].
[161] *Id.*
[162] *See id.*

and Bradford gave Washington specific bases to withhold information, but Washington did not identify these to the Senate.[163] This also demonstrates Hamilton's influence. Providing a rationale to Congress could limit the principle's force as precedent. At the same time, Washington revealed his concern about wider disclosure of the correspondence he did provide.[164] He clearly communicated to the Senate that the contents should remain confidential and that he supplied the Senate with the documents with the understanding that they would remain confidential.[165] This action signifies that Washington made protecting the information his chief concern.

C. The Need for Secrecy

Washington's concerns about secrecy emanated from the Senate's ongoing debates about opening its chamber to the public and its increasingly fractured political culture. During the first two Congresses, the Senate met in secret.[166] The new "Republican" Senate believed its deliberations should be more accessible to the people.[167] Federalists opposed the idea.[168] The debate, however, was a symptom of the larger factional political culture. Beginning with chartering a United States bank and continuing through the 1793 Neutrality crisis, political factions formed around constitutional interpretation as Federalists sought to expand federal power and Republicans hoped to constrain it.[169] Both sides appealed to the people for support, using newspapers as their mouthpieces.[170] Washington knew Republicans would not hesitate to take Morris's negative comments about Genet to the people, endangering not only Morris but the nation's neutrality.[171]

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[163] *See id.*
[164] *See id.*
[165] *See id.*
[166] *See* Currie, *supra* note 22, at 2.
[167] S. JOURNAL, 3d Cong., 1st Sess. 33-34 (1794).
[168] *See id*. (clarifying that the Senate delayed consideration of the resolution until February 19th when it voted to postpone further consideration until the next session. Those voting in favor of postponement were generally Federalist).
[169] *See* FERLING, *supra* note 43, at 213–14; ELKINS & MCKITRICK, *supra* note 23, at 257–63.
[170] *See* ELKINS & MCKITRICK, *supra* note 23, at 282–88.
[171] *See* HARRY AMMON, THE GENET MISSION 33–34 (1973); CHARLES MARION THOMAS, AMERICAN NEUTRALITY IN 1793: A STUDY IN CABINET GOVERNMENT 35–40 (1931).

On January 16th, one day before the motion requesting Morris's correspondence, North Carolina Senator Alexander Martin proposed opening the Senate chamber to the public.[172] His resolution began, "That, in all representative Governments, the Representatives are responsible for their conduct to their constituents, who are entitled to such information that a discrimination and just estimate be made thereof."[173] It continued,

> "That the Senate of the United States, being the Representatives of the sovereignties of the individual States, whose basis in the people, owe equal responsibility to the Powers by which they are appointed, as if that body were derived immediately from the people, and that all questions and debates, arising there upon in the Legislative and Judiciary capacity ought to be public."[174]

In short, Martin asserted that the Senate must be accountable to the people and that could only occur by opening its doors to the public. Yet, Martin limited his proposal to legislative and judicial functions. Martin did not list the Senate's executive function. Perhaps Martin recognized the need for secrecy in executive proceedings.

The Senate began considering Martin's resolution. After one day, debate was continued to the following Wednesday as the Senate debated the motion for Morris's correspondence.[175] On the 22nd, the Senate considered the open-door resolution but decided to postpone further consideration for two weeks.[176] This was the situation as Washington considered his response to the Senate's request for Morris's correspondence. Then, on February 19th, the Senate pushed consideration to the next session.

The proposed procedural change weighed on Washington's mind. The Senate, whenever it received documents, read them to the entire body.[177] If Washington submitted the documents to the Senate and the Senate read them to an open chamber, all would learn Morris's comments about France and neutrality and Morris's sources would be exposed. The exposure would damage national security by providing France with a potential cause for war and by encouraging people to fight for France. This concern also explains why Randolph emphasized the distinction between executive and legislative duties.

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[172] *See* S. JOURNAL, 3d Cong., 1st Sess. 22 (1794).
[173] *Id.*
[174] *Id.*
[175] *See id.*
[176] *See id.* at 25.
[177] *See, e.g.*, *id.* at 36 (informing the Senate about correspondence with France).

If the Senate's request was executive activity, perhaps the contents could be protected.

Washington's concerns about unwarranted political disclosure formed the primary basis for his reluctance to disclose Morris's correspondence. In the context of Congress's political battles, Washington feared that parts of Morris's correspondence would subject Washington to ridicule, harm Morris, and, most importantly, undermine the neutrality effort. When the Senate postponed consideration of the open chamber resolution to the next session, he sent the requested correspondence.[178]

Washington zealously guarded his public persona while the increasing political divisions threatened his reputation for acting without regard to political factions.[179] As his first term ended and the Republican opposition intensified, Washington found himself subjected to political attacks.[180] Consequently, he longed to withdraw from government.[181] Only joint pleas from the two factional leaders within his Administration—Hamilton and Jefferson—prevented Washington from retiring.[182] Following the 1792 election, political attacks continued as Republican societies formed to confront Washington's policies.[183] They accused him of wanting to become a constitutional monarch.[184] The gains Republicans made in Congress foreshadowed intensified political battles.[185] Washington feared Morris's frank statements supporting neutrality and criticizing the French would provide more ammunition for Republican criticism.

Morris also faced potential repercussions. A former member of the Continental Congress and the Constitutional Convention, Morris arrived in France in 1789 and officially assumed a ministerial role in 1792.[186] In France, Morris witnessed the French Revolution devolve

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[178] *See id.* at 33.
[179] *See* FERLING, *supra* note 35, at xix–xxi.
[180] *See id.* at 305–06; GORDON WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789-1815 155–56 (2009).
[181] *See* SHARP, *supra* note 23, at 81–82; FERLING, *supra* note 35, at 304–07; CHERNOW, *supra* note 35, at 716–17.
[182] *See* SHARP, *supra* note 23, at 81–82; FERLING, *supra* note 35, at 304–07.
[183] *See* FERLING, *supra* note 35, at 323–28; WOOD, *supra* note 181, at 161–64.
[184] *See* FERLING, *supra* note 43, at 249.
[185] *See* SHARP, *supra* note 23, at 69–70; ELKINS & MCKITTRICK, *supra* note 23, at 288–92.
[186] *See* MELANIE RANDOLPH MILLER, ENVOY TO THE TERROR: GOVERNEUR MORRIS AND THE FRENCH REVOLUTION 91–120 (2005).

from a popular uprising to a reign of terror.[187] During 1793, Morris provided important and detailed information about French intentions and military progress. In one letter, Morris reported "Monsieur Genest took out with him three hundred blank Commissions which he is to distribute to such as will fit out Cruizers in our Ports to prey on the British Commerce."[188] In another, Morris spoke candidly about the French revolutionary leadership:

> "Those who plannd the Revolution which took Place on the tenth of August sought a Person to head the Attack, and they found a Mr. Westermann whose Morals were far from Exemplary. He has no Pretensions to Science or to Depth of Thought, but he is fertile in Ressources and endued with the most daring Intrepidity. Like Cæsar he beleives in his Fortune—When the Business drew towards a Point, the Conspirators trembled; but Westermann declard they should go on. They obey'd because they had trusted him too far. On that important Day his personal Conduct decided (in a great Measure) the Success. Rewards were due, and military Rank with Opportunities to enrich himself were granted."[189]

Despite Morris's utility, his public reputation in the United States suffered. Although an ocean away, Morris became identified with the Federalist faction.[190] As a federalist reporting on the French Revolution, Republicans identified him as a biased information source.[191] Jefferson identified him as a "high-flying monarchyman."[192] Morris earned this label when he attempted to help the deposed French monarch flee France.[193] Added to this was that Genet, whom Washington demanded be recalled, publicly wrote to France seeking Morris's recall.[194] Revealing Morris's comments about Genet could inflame the situation.

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[187] *See id.*

[188] *To Thomas Jefferson from Gouverneur Morris, 7 March 1793*, FOUNDERS ONLINE, https://founders.archives.gov/documents/Jefferson/01-25-02-0295 [https://perma.cc/6LRN-AFEN].

[189] *To George Washington from Gouverneur Morris, 10 January 1793*, FOUNDERS ONLINE, https://founders.archives.gov/documents/Washington/05-11-02-0389 [https://perma.cc/3BF8-5RLG].

[190] *See* FERLING, *supra* note 35, at 327; MILLER, *supra* note 186, at 93–94.

[191] *See* FERLING, *supra* note 35, at 327.

[192] *Cabinet Meeting. Opinion on Communicating to the Senate the Dispatches of Gouverneur Morris [Jan. 28, 1974]*, Note 1, FOUNDERS ONLINE, https://founders.archives.gov/documents/Hamilton/01-15-02-0506 [https://perma.cc/E8LW-BQEJ].

[193] *See* MILLER, *supra* note 186, at xi.

[194] *See* Note 1 to Cabinet Meeting, *supra* note 193.

Washington primarily feared inflaming the already high tensions between the United States and France.[195] Thus far, the Administration's policies avoided war with Great Britain, but Washington's increasing frustrations with repeated French attacks on British commerce in United States waters and France-instigated land expeditions into Spanish territories damaged Franco-American relations.[196] Reports from Morris, critical of the French Revolution, would not only inflame the French, but French supporters in the United States as well. Many Americans served aboard vessels that attacked British shipping.[197] Other Americans plotted and participated in forays into Spanish territory.[198] The political nature of the Senate's request, coupled with opening the Senate chamber, caused Washington to fear Republicans would use the information contained in Morris's correspondence to garner support for activities that might raise questions about America's neutrality.

Despite these concerns, Washington delivered the documents to the Senate. When they arrived on February 26th, the Senate ordered them to lie for consideration, its usual practice.[199] There is no evidence the Senators failed to maintain the confidentiality Washington requested. Later in the session, Congress passed an embargo on all foreign commerce and the neutrality act, prohibiting Americans from serving in foreign military actions.[200] Washington's actions established a principle, but precisely what was the principle?

II. THE CONSTITUTIONALITY OF EXECUTIVE PRIVILEGE

While Hamilton may have been correct that Washington providing redacted correspondence established the principle that the President had this power, once in practice, the principle's use failed to create clear standards for its application. Even during Washington's

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[195] *See* ELKINS & MCKITRICK, *supra* note 23, at 303–11; AMMON, *supra* note 172, at 22.
[196] *See* MILLER, *supra* note 35, at 134–38; ELKINS & MCKITRICK, *supra* note 23, 350–52.
[197] *See* WILLIAM R. CASTO, FOREIGN AFFAIRS AND THE CONSTITUTION IN THE AGE OF FIGHTING SAIL 46–47 (2006).
[198] *See* ROBERT J. ALDERSON, JR., THE BRIGHT ERA OF HAPPY REVOLUTIONS: FRENCH CONSUL MICHEL-ANGE-BERNARD MANGOURIT AND INTERNATIONAL REPUBLICANISM IN CHARLESTON, 1792-1794, 133–37 (2008).
[199] *See* S. JOURNAL, 3d Cong., 1st Sess. 55 (1794).
[200] *See* Currie, *supra* note 22, at 15–20.

presidency, the House of Representatives and the President clashed about information disclosure. Subsequent Presidents adopted information protection policies and fought with both the Congress and Judiciary about when to disclose information. During the twentieth century, Presidents asserted an "executive privilege" to keep information from the Congress and the Judiciary.[201] Executive privilege refers to the President's power to withhold information from investigatory bodies based on the fact that the president, as chief executive, must rely on advisors to provide candid opinions about which course of action to take or which policy to pursue.[202] In 1974, the Supreme Court decided *United States v. Nixon,* in which President Richard Nixon sought to quash a subpoena demanding he produce recordings of Oval Office conversations.[203] The Supreme Court recognized an executive privilege, but decided that it must yield to a criminal prosecution against a former Administration official.[204] Today, the precise contours of executive privilege remain ambiguous. Although *Nixon* established a qualified executive privilege, scholars still debate the privilege's proper basis and extent.

A. The Road to Privilege

Despite establishing the principle that a President may withhold information, conflicts continued involving Congressional and Judicial demands for information from the President. Two years after Washington produced only extracted correspondence for the Senate, the House requested Washington provide it with documents relating to John Jay's instructions for negotiating a treaty with Great Britain.[205] Washington, after consulting his cabinet plus the retired Alexander Hamilton, refused to provide the documents, citing the documents' irrelevance to House duties.[206] With the partisanship surrounding Jay's treaty ratification and implementation, political considerations also played a significant role in Washington's refusal.

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[201] Berger, *supra* note 12, at 13–14; Schwartz, *supra* note 12, at 5–6.
[202] Kitrosser, *supra* note 12, at 491–92; Mark Rozell, *Executive Privilege Revived?: Secrecy and Conflict During the Bush Presidency*, 52 DUKE L.J. 403, 404 (2002).
[203] *See* United States v. Nixon, 418 U.S. 683, 686 (1974).
[204] *See id.* at 707–08.
[205] *See* Sofaer, *supra* note 11, at 8–14; Fisher, *supra* note 11, at 588–592.
[206] *See id*.

Washington's successors, irrespective of political party, followed the principle established in the Morris correspondence incident. When informing Congress of the Adams Administration's efforts to negotiate with France, President Adams conveyed un-coded messages sent by his emissaries and withheld coded messages. As President, Jefferson maintained a system of private and public correspondence. He willingly disclosed the public correspondence but refused to reveal the confidential correspondence. His procedures were challenged during the prosecution of his former vice-president, Aaron Burr, for treason. Burr's counsel sought reports sent to Jefferson about the matter. Chief Justice Marshall ruled that Jefferson had to disclose the information or suffer the case's dismissal.[207]

Conflicts arose sporadically following Jefferson's presidency as Presidents sought to balance disclosure with secrecy.[208] To avoid conflicts, Congress often narrowed its requests to exclude any material the President believed should be withheld.[209] When conflicts did occur, they involved a wide-range of topics. Presidents Jackson, Tyler, Hayes, and Cleveland all refused to provide information relating to the dismissal of executive officials.[210] Buchanan, Grant, and Coolidge refused to supply information when they believed the requests were motivated by political animus.[211] A succession of Presidents from Franklin Roosevelt to Truman to Eisenhower withheld executive branch investigative files.[212] In each incident the branches sought practical resolutions through compromise.[213] Yet these practical compromises yielded no fixed principles to rely upon when negotiation failed.

Faced with a political and legal scandal that would eventually lead to his resignation as President, Richard Nixon asserted executive privilege when the United States District Court for the District of Columbia issued a subpoena for audio recordings Nixon made relating to burglaries of the Democratic National Committee Headquarters in Washington, D.C.'s Watergate complex.[214] The District Court issued

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[207] *See* Sofaer, *supra* note 11, at 17–18.
[208] *See iId*. at 18.
[209] *See* Archibald Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383, 1397 (1974).
[210] *See id.* at 1398–99.
[211] *See id.* at 1402.
[212] *See id.* at 1400–1401.
[213] *See* Sofaer, *supra* note 11, at 49.
[214] *See generally*, FRED EMERY, WATERGATE: THE CORRUPTION OF AMERICAN POLITICS AND THE FALL OF RICHARD NIXON (1994).

the subpoena when the Watergate special prosecutor in the criminal case pending against John Mitchell, Nixon's former Attorney General, who was accused in covering up the Nixon campaign's connection to the break-in, requested it.[215] Nixon moved to quash the subpoena claiming any compelled disclosure would impede the President's ability to receive full and candid advice from advisors.[216] Nixon lost in the trial court and then appealed to the D.C. Circuit.[217] The special counsel then sought a hearing before the Supreme Court, which the Court granted.[218] The Supreme Court recognized executive privilege based on the Administration's asserted interest, but the Court said the privilege must yield in a criminal prosecution of one of those advisors.[219] It did not address the need for secrecy in military and national security matters, creating the potential for broad executive privilege assertions.[220]

B. The Continuum of Executive Privilege

Following the *Nixon* decision, various legal scholars weighed in on its implications for executive privilege. Views ranged along a continuum. At one end, scholars argued that *Nixon* is limited to its facts. At the other, an executive privilege exists whenever the President asserts it, but Congress and the Judiciary can contest any executive privilege assertion. In-between these poles falls a subject-matter approach and a systems approach.

Professor Berger initially took the position that any constitutional basis for executive privilege was a myth.[221] When the Supreme Court decided *Nixon*, Berger provided his critique and argued that *Nixon's* application would be limited.[222] The Court's rationale for not upholding the privilege in *Nixon* applies equally to civil cases and Congressional inquiries.[223] Therefore, executive privilege might exist in theory, but have limited practical invocation.

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[215] *See* United States v. Mitchell, 377 F. Supp. 1326, 1328 (D.D.C. 1974).
[216] *See id.* at 1329–30.
[217] *See* Nixon v. Sirica, 487 F.2d 700, 704 (D.C. Cir. 1973).
[218] *See* United States v. Nixon, 418 U.S. 683, 686–690 (1974).
[219] *See id.* at 706–713.
[220] *See id.*; *see also* Cox, *supra* note 209, at 1413–15.
[221] *See* BERGER, *supra* note 36, at 1.
[222] *See generally* BERGER, *supra* note 36.
[223] *See id.* at 7–10.

Professor Rozell adopts the opposite pole, arguing that the President has a legitimate executive privilege but that it is subject to certain constraints.[224] Any executive privilege assertion requires a challenge to determine its legitimacy.[225] Resolving the challenge, according to Rozell, requires balancing the harm to the executive placed on one side and the need for access placed on the other.[226] Any precise delineation will fail because of the infinite variety of circumstances that might arise.[227]

A President can invoke executive privilege in a variety of matters. The government's secrecy interest differs based upon the information sought.[228] The privilege has the most coverage when protecting military and state secrets.[229] Information in this category goes to the heart of national security and includes things such as military plans, technology, and intelligence.[230] Presidential communications comprise the next category.[231] These are communications from the President to subordinates or to foreign nations.[232] Like military plans and state secrets, disclosure of some Presidential communications can damage national security.[233] For instance, treaty proposals, should they be publicly released, could damage the nation's negotiating position.[234] Communications to the President comprise the next category.[235] These communications touch specifically upon policy advice, which Presidents must receive candidly.[236] Should advisors know their potentially controversial ideas are subject to disclosure, they may withhold their opinions.[237] Finally, law enforcement

[224] *See* Rozell, *supra* note 11, at 542.
[225] *See id.*
[226] *See id.*
[227] *See id.* at 577–78.
[228] *See* Iraola, *supra* note 11, at 1571–80.
[229] *See id.* at 1571–73.
[230] *See id.*
[231] *See id.* at 1573–77.
[232] *See id.* at 1576.
[230] *See* Peter Hoekstra, *Secrets and Leaks: The Costs and Consequences for National Security*, THE HERITAGE FOUNDATION (July 29, 2005), https://www.heritage.org/homeland-security/report/secrets-and-leaks-the-costs-and-consequences-national-security-0 [https://perma.cc/D9QD-35G6].
[234] *See* Rozell, *supra* note 11, at 573–74.
[235] *See* Iraola, *supra* note 11, at 1577–79.
[236] *See id.*
[237] *See id.*

information may be protected.[238] Should targets of criminal investigations become aware of their status, they may destroy evidence or evade apprehension.[239] Yet, on a scale of importance, law enforcement falls at the bottom of needs justifying privilege, as the *Nixon* case demonstrates.[240] As a result of these multiple subjects, according to Rozell, the *ad hoc* compromises best reflect the constitutional process.[241]

Finally, Professor Kitrosser places herself closer to Berger's view by arguing that the government may only permissibly maintain information secrecy when there exists a systemic political check.[242] She reached this conclusion by examining the effect permitting executive privilege could have on government secrecy and information control.[243] While a level of secrecy is necessary, removing political checks makes secrecy illegitimate.[244] As the People's voice, Congress "owns" all government information, enabling it to hold the Executive branch accountable.[245] Legislative access provided the requisite check.[246] Therefore, in any question of secrecy versus disclosure, the government should err on the side of disclosure.[247]

Each position relies on historical precedents for support. How one interprets the historical precedents dictates how one defines executive privilege's scope. Some say the Morris refusal demonstrates executive privilege.[248] Others respond that legislative acceptance demonstrates this was not executive privilege.[249] The debate centers on the interpretation of specific correspondence, yet these interpretations do

[238] *See id.* at 1579–80.
[239] *See* Sara Sun Beale & James E. Felman, *The Consequences of Enlisting Federal Grand Juries in the War on Terrorism: Assessing the USA Patriot Act's Changes to Grand Jury Secrecy*, 25 HARV. J.L. & PUB. POL'Y 699, 700–02, 710 (2001) (discussing the rationale for grand jury secrecy).
[240] *See* United States v. Nixon*,* 418 U.S. 683, 707–10 (1974).
[241] *See* Rozell, *supra* note 11, at 578–79.
[242] *See* Kitrosser, *supra* note 12, at 493–94.
[243] *See generally id.* at 528–33.
[244] *See id.* at 493–95.
[245] *See id.* at 512.
[246] *See id.* at 528–29.
[247] *See id.* at 543.
[248] *See* Rozell, *supra* note 11, at 555–56; *see also* Sofaer, *supra* note 11, at 48.
[249] *See* Kitrosser, *supra* note 12, at 511–12.

not place the correspondence in its wider historical context.[250] Doing so reveals that Washington's refusal to provide the Senate unredacted correspondence merely established that the executive can withhold national security information. It did not establish executive privilege.

III. WAS THE PRINCIPAL ESTABLISHED?

If Washington's redactions did not constitute executive privilege, they must fall into a different category, such as state secrets privilege or national security information. Based on the rationale underlying privileges, the circumstances under which Washington withheld the information is not an exercise of privilege, either executive or state secrets. Instead, it indicates that Washington considered the correspondence akin to what we currently designate national security information.

The President can assert executive privilege against the courts and Congress when they demand information from the President in a variety of circumstances.[251] Courts can compel the Administration to provide information in suits against the government or in matters where the government possesses information relevant to the matter before the court.[252] Congress, likewise, can compel information from the Administration when it conducts particular inquiries.[253] Oversight hearings constitute the primary mechanism for congressional inquiry.[254] Administration officials appear before congressional committees to report on their activities.[255] Often, this requires documentation.[256] The executive branch also possesses a wealth of expertise in a variety of relevant legislative areas.[257] Congress may

[250] *See* Abraham Sofaer, *Executive Privilege: An Historical Note*, 75 COLUM. L. REV. 1318 (1975) (giving one of the longest treatments of the incident but provides no context and covering only four pages).
[251] *See generally* Cox, *supra* note 209.
[252] *See id.* at 1392–93.
[253] *See* Iraola, *supra* note 11, at 1566–70.
[254] *See id.*
[255] *See generally* Walter J. Oleszek, *Congressional Oversight: An Overview*, CONG. RES. SERV. (Feb. 22, 2010), https://fas.org/sgp/crs/misc/R41079.pdf [https://perma.cc/7ECT-X4JX].
[256] *See id.*
[257] *See generally* Robert J. McGrath, *Congressional Oversight Hearings and Policy Control*, 38 LEGIS. STUD. Q. 349 (2013).

compel Administration officials to appear and provide information when necessary.[258]

At times, the Courts and Congress seek information which the President believes, for whatever reason, should not be disclosed.[259] The President can respond by asserting executive privilege.[260] This is an affirmative stance that the President will not comply with the demand and claims a legal right to defeat the subpoena.[261] When this occurs, the two sides must compromise or a court must resolve the dispute, as it did in *United States v. Nixon*.[262] To prevail, the Administration must show disclosure would threaten United States national security or impair the President's ability to receive candid advice.[263]

In the case of Morris's correspondence, Washington did not utilize any formal legal process, although his rationale for not disclosing the information relates to the basis for executive privilege.[264] The Senate's request, though unusual for its partisan vote, was not out of the ordinary.[265] Washington's response, likewise, is consistent with his responses to other information requests.[266] The Administration's internal debate focused upon the President's duty rather than the President's prerogative to withhold information.[267] They never contemplated a legal response. However, its basis for not providing unredacted correspondence is rooted in the executive privilege rationale. Washington wanted to shield Morris's information sources and candid advice from public view. He also sought to protect the nation's security in a time of considerable foreign peril.

The similarity in rationale, however, does not automatically categorize Washington's actions as executive privilege because other privileges and acts rely on the same rationale. While sharing legal heritage with executive privilege, state secret privilege separated from executive privilege has become much more robust in its breadth. Professors Weaver and Pallitto assert that, at the outset, distinctions

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[258] *See id.*
[259] *See generally* Fisher, *supra* note 11.
[260] *See supra* Section II.B.
[261] *See id.*
[262] *See* United States v. Nixon*,* 418 U.S. 683 (1974).
[263] *See* Fisher, *supra* note 11, at 602–03.
[264] *See supra* Section I.B.
[265] *See supra* Section I.A.
[266] *See supra* Section I.B.
[267] *See supra* Section I.B.

between executive privilege and state secrets were not clear.[268] The State Secrets Privilege emerged from the United Kingdom's Crown Privilege, which permitted the Crown from having to defend itself in court.[269] In the United States, executive privilege—as a legal term—arose in the Eisenhower Administration.[270] Following the Supreme Court's narrow recognition of the privilege, the Carter Administration turned to State Secrets Privilege to obtain the outcome Presidents hoped to achieve with executive privilege.[271] Today, Presidential administrations use State Secrets Privilege to prevent sensitive national security information from disclosure in lawsuits against the United States.[272] While it may cover more material, the State Secrets privilege only protects the President from court disclosures.[273] As the Morris correspondence involved a request from Congress, apart from litigation, State Secrets privilege also fails as a modern parallel for Washington's action.

The best modern parallel for Washington's action is that by withholding aspects of Morris's correspondence, Washington protected vital national security information. National security information (NSI) is a 20th century executive creation dating to the Truman Administration.[274] As stated in Truman's executive order: "[t]he sole purpose of these regulations is to establish minimum standards . . . for identifying and protecting information the safeguarding of which is necessary in order to protect the security of the United States . . . ."[275] The order and its subsequent iterations recognize the important role information plays in national security matters. In modern times, a host of information falls under this umbrella. Executive Order 13526, the current version, protects eight information categories: 1) military plans, weapons systems and operations; 2) foreign government information; 3) intelligence activities and intelligence sources and methods; 4) foreign relations

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[268] *See* William Weaver & Robert Pallitto, *State Secrets and Executive Power*, 120 POL. SCI. Q. 85, 96–98 (2005).
[269] *See id.* at 97.
[270] *See id.* at 98.
[271] *See id.* at 101.
[272] *See* David Rudenstine, *The Courts and National Security: The Ordeal of the State Secrets Privilege*, 44 U. BALT. L. REV. 37, 37–38 (2014).
[273] *See id.* at 59–77 (discussing the criteria and bases for asserting state secrets privilege).
[274] Executive Order 10290, 16 Fed. Reg. 9795 (Sept. 24, 1951).
[275] *Id.*

and activities of the United States; 5) scientific, technical, or economic matters relating to United States national security; 6) government programs for safeguarding nuclear materials or facilities; 7) system vulnerabilities or capabilities; and 8) anything relating to weapons of mass destruction.[276] While many pertain to modern conditions, three relate to the information Washington sought to protect.

First, Morris provided the administration foreign government information. As an eye witness to the French Revolution and as an information collector, Morris reported on the French government's actions and conduct.[277] He opined on the likelihood of their success and predicted the steps it would take to stabilize the nation.[278] In one instance, Morris wrote that the French hoped to raise a 500,000 person army.[279] Washington relied on Morris's information when making decisions about United States conduct. For example, at the end of June 1793, Morris wrote Washington that the Jacobins had replaced the Girodins in France. This meant that Genet, who was allied with the Girodins, would likely be recalled.[280] If Washington had not received this prior to deciding to demand Genet's recall, Morris's report certainly influenced Washington's decision to allow Genet to remain in the United States.[281]

Second, Morris's information contained intelligence activities and sources. Morris reported conversations with French officials.[282] He provided reports from French newspapers.[283] He spoke with the

[276] *See* Executive Order 13526, 75 Fed. Reg. 707 (Dec. 29, 2009).
[277] *See* MILLER, *supra* note 186, at 120–34.
[278] *See id.*
[279] *See, e.g.*, *To Thomas Jefferson from Gouverneur Morris, 13 February 1793*, FOUNDERS ONLINE, http://founders.archives.gov/documents/Jefferson/01-25-02-0173 [http://perma.cc/93GC-GY3N].
[280] *See To George Washington from Gouverneur Morris, 25 June 1793*, FOUNDERS ONLINE, https://founders.archives.gov/documents/Jefferson/01-26-02-0336 [http://perma.cc/5QSB-TCC8].
[281] *See generally* Eugene Sheridan, *The Recall of Edmond Charles Genet: A Study in Transatlantic Politics and Diplomacy*, 18 DIPLOMATIC HISTORY 463 (1994).
[282] *See, e.g.*, *To Thomas Jefferson from Gouverneur Morris, 6 January 1793*, FOUNDERS ONLINE, https://founders.archives.gov/documents/Jefferson/01-25-02-0025 [http://perma.cc/7QEJ-34ZR].
[283] *See, e.g.*, *To Thomas Jefferson from Gouvernuer Morris, 5 April 1793*, FOUNDERS ONLINE, https://founders.archives.gov/documents/Jefferson/01-25-02-0465 [https://perma.cc/A4TT-EUPT].

revolutionaries and the deposed monarchy.[284] Morris incorporated information obtained from these various sources into reports for the Administration.[285]

Third, Morris's correspondence related to United States foreign policy and the actions of foreign nations. He informed the Administration of France's desire to utilize Americans to attack British and Spanish vessels and possessions.[286] He reported on France's relations with other European nations.[287] He wrote about the personalities and character of those leading the French Revolution.[288] Finally, Morris supported Washington's neutrality policy.[289] All of these relate to United States foreign policy.

Designating material as national security information provides a legal basis for withholding information from anyone who does not possess valid security clearance.[290] This includes most members of Congress. The President and Congress eventually agreed that members of the House and Senate Intelligence Committees and House and Senate leadership should receive security clearances.[291] Washington's approach parallels this idea. Although the Senate did not have regular committees, Washington stressed the need for confidentiality, something he did not do in previous deliveries.[292] The

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[284] *See, e.g.*, *To George Washington from Gouvernuer Morris, 10 January 1793*, FOUNDERS ONLINE, https://founders.archives.gov/documents/Washington/05-11-02-0389 [http://perma.cc/V2U4-UC9W].

[285] *See, e.g.*, *To Thomas Jefferson from Gouverneur Morris, 7 August 1793*, FOUNDERS ONLINE, https://founders.archives.gov/documents/Jefferson/01-26-02-0578 [https://perma.cc/K6Y7-DCJK].

[286] *See, e.g.*, *To Thomas Jefferson from Gouverneur Morris, 7 March 1793*, FOUNDERS ONLINE, https://founders.archives.gov/documents/Jefferson/01-25-02-0295 [https://perma.cc/X2VW-VX7F].

[287] *See, e.g.*, *To Thomas Jefferson from Gouverneur Morris, 26 March 1793*, NAT'L. ARCHIVES, https://founders.archives.gov/documents/Jefferson/01-25-02-0424 [https://perma.cc/8UZ5-S3RJ].

[288] *See To George Washington from Gouverneur Morris, 10 January 1793*, *supra* note 284.

[289] *See To George Washington from Gouverneur Morris, 25 June 1793*, *supra* note 280.

[290] *See* 18 U.S.C. § 798 (2012) (prohibiting disclosure of national security information to anyone not authorized to receive it and defining national security information as that designated by a United States government agency).

[291] *See* Heidi Kitrosser, *Congressional Oversight of National Security Activities: Improving Information Funnels,* 29 CARDOZO L. REV. 1049, 1073–74 (2008).

[292] *See supra* Section I.A.

Administration's internal debates reflected a similar secrecy concern.[293]

Finally, the documents Washington provided bore a close resemblance to publicly released national security information. Modern practice requires documents containing a mix of national security information and non-national security information be redacted to protect the national security information.[294] Before this occurs, national security information specialists review the documents to determine which material can be released and which cannot.[295] Washington followed this process. Once he learned of the Senate's request, Randolph reviewed the material and determined which pieces of the correspondence should be protected.[296] The remaining material was fit for public consumption.[297] When he completed this task, someone in the administration redacted the information that could not be publicly released.[298] The redacted documents then went to the Senate.[299]

Between executive privilege, state secrets privilege, and national security information, Washington's actions best conform to national security information. Executive privilege and state secrets privilege arise in formal legal settings.[300] They require specific assertions in specific contexts.[301] They also have dubious constitutional underpinnings.[302] No legal rationales or formal procedures appeared in Washington's decision to provide the Senate with redacted copies of Morris's correspondence. Instead, the Administration's rationale and actions align with modern practices related to national security information. The information in the correspondence related to foreign governments, United States foreign policy, and intelligence sources.

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[293] *See supra* Section I.B.
[294] *See* OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, CLASSIFICATION GUIDE VERSION 2.1 (2014).
[295] *See id.* at 14, 16–17.
[296] *See To George Washington from Edmund Randolph, 25 January 1794*, *supra* note 101; *To George Washington from Edmund Randolph, 26 January 1794*, *supra* note 106.
[297] *See To George Washington from Edmund Randolph, 26 January 1794*, *supra* note 106.
[298] *See* Sofaer, *supra* note 250, at 1320–21.
[299] *See id.*
[300] *See* Weaver & Pallitto, *supra* note 268, at 86.
[301] *See id.*
[302] *See id.*

When he disclosed the information, Washington emphasized the importance of maintaining confidentiality. To ensure confidentiality, Washington redacted sensitive information that could harm United States national security. George Washington's actions established the principle that the President can withhold national security information, not assert executive privilege.

IV. CONCLUSION

Government secrecy and a republican government system do not cooperate well. For the people to voice their preferences they must have complete and accurate information. They must know the decisions their representatives make and the basis upon which they do so. Keeping information secret, especially from the People's representatives, threatens an informed populace and, in turn, the Republic. Yet the government possesses information, that if disclosed, could harm the nation's security. The government must balance the needs of a republican government with the need to preserve its security.

At times, the government can tip the balance too far in one direction. When this occurs, it usually errs on the side of keeping information secret. The government occasionally uses its powers to keep information secret to protect itself from intra-government threats. Those threats arise in court proceedings and Congressional investigations. To defend itself, the President calls on executive privilege. Whether and to what extent the President has this power is contested.

Legal scholars debate executive privilege's constitutional legitimacy. They cite the Constitutional Convention, the Federalist Papers, and early Presidential practice as authority for their positions. Among early Presidential practice, Washington's delivery of redacted diplomatic correspondence serves as important precedent for both sides. Some say this is an example of executive privilege. Others say it is not a precedent for executive privilege. This article provides an unprecedented look at this decision by providing important contextual information and using it to inform an analysis of Washington's decision. Ultimately, Washington's actions do not establish the principle of executive privilege. Instead, Washington established the principle of protecting national security information.