

Sec. 2—Powers, Duties of the President Cl. 2—Treaties and Appointment of Officers

cause of the introduction of the issue into an impeachment proceeding, a somewhat lengthy treatment of the doctrine is called for.

Conceptually, the doctrine of executive privilege may well reflect different considerations in different factual situations. Congress may seek information within the possession of the President, either in effectuation of its investigatory powers to oversee the conduct of officials of the Executive Branch or in effectuation of its power to impeach the President, Vice President, or civil officers of the Government. Private parties may seek information in the possession of the President either in civil litigation with the Government or in a criminal proceeding brought by government prosecutors. Generally, the categories of executive privilege have been the same whether it is Congress or a private individual seeking the information, but it is possible that the congressional assertion of need may overbalance the presidential claim to a greater degree than that of a private individual. The judicial precedents are so meager that it is not yet possible so to state, however.

The doctrine of executive privilege defines the authority of the President to withhold documents or information in his possession or in the possession of the executive branch from compulsory process of the legislative or judicial branch of the government. The Constitution does not expressly confer upon the Executive Branch any such privilege, but it has been claimed that the privilege derives from the constitutional provision of separation of powers and from a necessary and proper concept respecting the carrying out of the duties of the presidency imposed by the Constitution. Historically, assertion of the doctrine has been largely confined to the areas of foreign relations, military affairs, pending investigations, and intragovernmental discussions.⁵⁹³ During the Nixon Administra-

⁵⁹³ For a good statement of the basis of the doctrine, the areas in which it is asserted, and historical examples, see *Executive Privilege: The Withholding of Information by the Executive: Hearings Before the Senate Judiciary Subcommittee on Separation of Powers*, 92d Congress, 1st Sess. (1971), 420–43, (then-Assistant Attorney General Rehnquist). Former Attorney General Rogers, in stating the position of the Eisenhower Administration, identified five categories of executive privilege: (1) military and diplomatic secrets and foreign affairs, (2) information made confidential by statute, (3) information relating to pending litigation, and investigative files and reports, (4) information relating to internal government affairs privileged from disclosure in the public interest, and (5) records incidental to the making of policy, including interdepartmental memoranda, advisory opinions, recommendations of subordinates, and informal working papers. *The Power of the President To Withhold Information from the Congress*, Memorandum of the Attorney General, Senate Judiciary Subcommittee on Constitutional Rights, 85th Congress, 2d Sess. (Comm. Print) (1958), reprinted as Rogers, *Constitutional Law: The Papers of the Executive Branch*, 44 A.B.A.J. 941 (1958). In the most expansive version of the doctrine, Attorney General Kleindienst argued that the President could assert the privilege as to any employee of the Federal Government to keep secret any information at all. *Executive Privilege, Secrecy*