BOOKS

EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH. Raoul Berger. Cambridge, Massachusetts: Harvard University Press, 1974. Pp. vii, 430. $14.95.

*Reviewed by Lee A. Albert**

Executive Privilege: A Constitutional Myth succinctly defines the privilege as a "President's claim of constitutional authority to withhold information from Congress" (p. 1). Its thesis, simply asserted, is that any such claim is a constitutional "myth" (p. 1). The book's formidable undertaking is to demonstrate, purportedly with unequivocal proof, that a President's refusal to disclose is an unlawful encroachment on Congress' constitutional power of inquiry into the executive branch. Whether broad or narrow, executive privilege cannot be legitimated by reconciling or balancing competing values or by "pruning a branch here or there; the axe must be put to the root" (p. 264) of this unconstitutional practice.

Executive Privilege is monumentally unpersuasive in establishing this case. The analysis is primarily historical, though functional justifications and practical accommodations are unsystematically interjected. The interpretation of early American history, though professing objectivity, is decidedly tilted and in the wrong direction. Its method of dealing with adverse precedents and opposing views unwittingly leads Professor Berger to make concessions which contradict the central propositions of the book. The functional considerations, primarily concerned with presidential supremacy, are tenuously related to the actual costs of executive privilege. Finally its recommendation of judicial remedies misconceives a workable role for courts. I shall consider these weaknesses in order.

In understanding Professor Berger's account of history, we may first consider his claim that constitutional interpretation may only be derived from the text and the intent of the Framers. Functional considerations, the wisdom of an allocation, may not influence construction, save where the authoritative materials are unclear and equivocal (pp. 10-11, 286). Few legal scholars rely upon this restrictive mode of interpretation;[1] nor is it reflected in scores of Supreme Court adjudications, doubtless because it affords no recognition to what Justice Brandeis aptly termed "a capacity for adaptation."[2] But we need not resolve this broader issue, since Professor Berger's historical interpretations are, in fact, wedded to his policy preferences, and the offspring of this

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1. E.g., C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969); A. BICKEL, THE LEAST DANGEROUS BRANCH 106-10 (1962).

2. A. BICKEL, *supra* note 1, at 107.

union is an advocate's version of history. Paradoxically, Berger alerts his readers to the pervasiveness of such subjectivity in using the past: "Each generation tends to read history in the focus of its own preoccupations" (p. 342).

The immediate sources of authority are inconclusive. The Constitution specifies neither a general legislative power of inquiry nor an executive power to withhold information. The Framers at the Convention discuss neither of these powers, save indirectly by references to impeachment, which implies a power of inquiry into specific wrongdoing (pp. 35-36). The historian must therefore turn to indirect sources, and here Professor Berger provides a detailed account of Parliamentary inquiries into executive affairs, initially for impeachment, but later for policing appropriations and, at times, legislation and foreign affairs. *Executive Privilege* emphasizes that Parliament tolerated but one or two instances of withholding, attributable to an extraordinary diplomatic situation and to a Prime Minister's dominance over Parliament. Professor Berger concludes that since Congress was "patently modeled" (p. 10) after the Houses of Parliament, their broad inquiry practices provide the measure of the intended scope of Congress' power.

This is a large and questionable assumption. We do not know whether the Framers were familiar with the particular incidents of Parliamentary inquiry, themselves apparently in flux, or whether they wanted to duplicate them. But we do know that the Framers understood that the differences between Congress, with limited and enumerated powers, and Parliament, with unwritten plenary authority, were as great as their similarities.[3] More particularly, Parliament inquired of "executive" ministers who were themselves members of Parliament and directly accountable to it, and not of an independent President far less accountable to Congress. Correspondingly, the American executive, unlike the Prime Minister, had no control over the legislature or its inquiries (p. 26). Yet *Executive Privilege* appears oblivious to these patent differences and unconcerned with their import regarding the intent of the Framers.

Professor Berger notes additionally that the Framers were familiar with monarchy, royal prerogatives and colonial governors. Therefore, they feared executive tyranny and favored a Congress with adequate powers to keep the executive in check (pp. 50-56). This generality obviously sheds little light on the particular issue of executive privilege. Moreover, it too requires major qualification: one of the well-known and more immediate dissatisfactions leading to the Constitutional Convention was the experience of government without a separate executive branch under the Articles of Confederation. The Convention favored greater centralization of authority in an executive inde-

3. L. FISHER, PRESIDENT AND CONGRESS 22-26 (1972).

pendent of Congress, with power sufficient to resist "legislative usurpation and oppression,"[4] which they also feared. A more balanced view of history would record that the Framers wanted a strong though not unchecked Presidency.[5]

The early days of the republic provide more specific evidence of original intent: Presidents asserted a power to withhold information in limited though varied circumstances, and Congress, though protesting on some occasions, acquiesced in and recognized refusals to disclose on others and in general eschewed any test of legality. Washington, Jefferson, Hamilton and Madison all endorsed an executive power to withhold information from Congress (pp. 168-69, 174). The treatment of this data in *Executive Privilege* reveals even more clearly its tendentious interpretation of history (pp. 167-91).

Specifically, a House inquiry in 1792 into a disastrous Indian expedition caused Washington to convene his cabinet and to observe that "there might be papers of so secret a nature, as that they ought not to be given up."[6] As reflected in Jefferson's notes, the cabinet found these papers unobjectionable, but confirmed an executive discretion to refuse a disclosure that would injure the public.[7] In 1796, Washington denied the House's demand for papers on the Jay treaty on the ground that it had no authority to participate in treaty-making.[8] Similarly, Jefferson invoked the public welfare in denying the House information on the Burr conspiracy and a similar privilege for state secrets in the trial of Burr (pp. 179, 189-90). Chief Justice Marshall acknowledged the claim in ruling against disclosure unless the paper was "essential to the justice of the case" (p. 191). Madison staunchly defended privilege on the floor of the House (p. 174); Jackson declined a number of requests for information (pp. 181-82), and Tyler, in denying a House request, referred to judicial acknowledgements of executive privilege in private litigation (pp. 183-84).

Berger deals with this array of notable actors and precedential events by drawing fine and often illusory distinctions, by asserting that the proponent of privilege was simply mistaken, and by unwittingly distorting his own definition of executive privilege. The interpretation of Washington's cabinet provides weak precedent because the information was supplied without a formal communication to Congress of the Cabinet's views on privilege, and the discussion was found in Jefferson's papers, not the Government's files (pp. 167-70). Washington later relied on the treaty power, not privilege. The House had excepted confidential material regarding the Burr affair, and Marshall

4. Statement of John Mercer of Maryland, *quoted in* L. FISHER, *supra* note 3, at 21-22.

5. *See generally* A. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY (1973).

6. *Id.* at 16.

7. *Id.*

8. *Id.* at 16-17. In observing that the treaty power was vested in the Senate, a smaller body than the House, Washington stressed the need for confidentiality in diplomatic affairs. *Id.* at 17.

actually rejected the privilege in insisting on production if needed for trial (pp. 187-94). Madison's was not the majority view (pp. 174-77), and Jackson's views, asserted years after the Convention, provided "feeble 'precedent'" (pp. 181-82). Tyler merely invoked a judicial analogy against Congress (pp. 183-85), and so forth. In any event, Washington, Jefferson and others were mistaken in their views of history and privilege (pp. 169-71, 173).

These attempts at transforming incidents of nondisclosure into false precedents are not only unpersuasive, but in arguing them, Professor Berger contradicts his own central thesis. Initially, he defined the privilege to be inferred simply as a President's claim of constitutional power to withhold information. But in distinguishing these precedents in part on the basis of the particular reason a President assigns for withholding information—for example, military secrets, confidentiality, the public welfare, state secrets, or a lack of power in the House—he unwittingly concedes that some privilege, though perhaps a narrow one, may indeed be appropriate. We can only understand Berger's purported distinctions as constitutionally based, since there was no statutory privilege, and therefore his central argument regarding constitutional power is undercut to the extent we allow his exceptions.

The clearest example of this confusion in Berger's argument is his apparent acceptance of Tyler's invocation of judicial rules of privilege against Congress and Marshall's ruling in the Burr trial.[9] These rules endorse a qualified executive privilege, under which a court weighs the policies behind nondisclosure against the extent of need for the information.[10] Professor Berger appears unaware that such a qualified privilege cannot be reconciled with his overall thesis on constitutional power: a constitutional privilege which must yield on occasion is still a constitutional privilege. Berger's acceptance of a qualified privilege, which entails weighing the practical policies in a particular case, is even more mystifying given his emphatic rejection of "practicality" as material to the recognition of constitutional power (p. 10). At the least, this apparent approval of a qualified privilege obscures just what executive privilege Berger seeks to abolish.

This emphasis of *Executive Privilege* on particularizing cases and establishing the irrelevance of other matter also derives from its preoccupation with disparaging recent apologists for an expansive privilege, particularly William P. Rogers.[11] Professor Berger is reasonably persuasive in refuting their po-

9. Berger's approval is not very qualified. He characterizes Tyler as providing "the most elaborate and reasoned justification theretofore proffered" for withholding information from Congress (pp. 184-85), and accepts Beard's statement that Marshall "had better opportunities than any student of history or law today to discover the intention of the framers. . . ." (P. 193.)

10. Litigation between private parties and government agencies often involve such case-by-case balancing. *E.g.*, Timken Roller Bearing Co. v. United States, 38 F.R.D. 57 (N.D. Ohio 1964); Machin v. Zuckert, 316 F.2d 336 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 896 (1963).

11. The entire chapter on "Presidential 'Precedents'" is written as a response to a

lemics, but at a cost to his own thesis. He too easily assumes that if the advocates are wrong, he must be right.

Professor Berger's undue concern with refutation and the accompanying deluge of detail also may account for his failure to recognize the significance of early executive-congressional interactions regarding the privilege. The history of early Presidents and their cabinets affirming both broad legislative powers of inquiry and authority to withhold information from Congress in various circumstances, for instance, quite conclusively indicates that there were problems of executive confidentiality and secrecy in that smaller and simpler society; it correspondingly suggests that the Framers were familiar with the idea of an executive privilege, though they left its contours to the future.[12]

At times, Professor Berger's analysis demonstrates a remarkable unwillingness even to air both sides of an argument over historical inference. *Executive Privilege* quotes many statements of Congressmen and several committees favoring the legislative prerogative of inquiry, particularly into suspected wrongdoing, and on this basis the author concludes that Congress neither accepted nor recognized privilege as an exception to its plenary investigative power (pp. 37-48, 174-77, 197-203). He also makes much of a 1789 statute directing the Secretary of the Treasury to provide information as the House required. These materials are not without force, but the book fails to note essential qualifications and matters of greater import, perhaps because they are not central to the colloquy dominating the analysis. For instance, Presidential statements about privilege are self-serving, as Berger asserts, but so are similar statements by Congressmen or Committees. Congress' overall stance on privilege might have been suggested had Berger explored a spectrum of congressional views rather than culling only those which support his position.

The congressional record, including committee reports, appears to reflect division and debate, with no lack of notable supporters of privilege. Significantly, Congress did not once provide an institutional response to presidential refusals to disclose, either by way of a statute specifying when privilege was improper or a resolution condemning its assertion on a particular occasion (pp. 43-45). The 1789 Treasury statute, reflecting a special interest in appropriations (seen today in the role of the Comptroller-General), had not been extended to other important departments, such as War or Foreign Affairs.[13]

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memo endorsed by William P. Rogers when he was Deputy Attorney General (pp. 136-66). Berger notes that most of his criticisms in this chapter were submitted to Mr. Rogers shortly before their publication as an article in 1965. Berger finds it significant that the manuscript was returned without comment, and Mr. Rogers has not subsequently responded to the arguments (p. 208). There are also several other targets of sustained attack: pp. 60-63, 88-100, 286-97, 352.

12. A. SCHLESINGER, JR., *supra* note 5, at 15-18, 32, 39-41.

13. Berger provides a strained explanation for this differentiation. Hamilton, the prospective Secretary of the Treasury, drafted a broad reporting requirement allowing that Department to report to Congress on its own initiative. Congress resisted such an intrusion and redrafted the provision to require information on request. Foreign Affairs

This pattern of congressional inaction suggests more a recognition than a rejection of executive privilege; at the least, it provides no strong inference one way or the other.

Although his argument develops in historical terms, because Professor Berger is hostile to implied constitutional powers, functional appropriateness or necessity is at the core of his case against executive privilege. The functional syllogism is roughly this: The powers and responsibilities of Congress, the national forum of debate, include making the laws which the President executes, policing administration in the executive branch and informing the people. These functions cannot be performed without ample and adequate information, much of which is gathered by the executive branch. Hence the constitutional allocation of powers and responsibilities requires a plenary power of inquiry for Congress and an obligation of full disclosure in the executive (pp. 2-9, 265-81).

The key empirical assumption that any executive privilege would substantially interfere with the work of Congress is neither elaborated nor supported by a discursive argument that executive functions, such as war, foreign affairs, executive agreements or commander-in-chief, are ultimately within congressional authority (pp. 60-162). The extensive argumentation that Presidents have unlawfully usurped these powers in recent years is peripheral to the subject of privilege. The implication that executive privilege has played a major role in the erosion of congressional power and responsibility is not only unsubstantiated but is intuitively very doubtful, to say the least.

Professors Black[14] and Schlesinger[15] have recently argued that despite the constitutional allocation of powers favoring Congress, the Presidency is ideally structured for the exercise of authority. It has the advantages of unity, dispatch, initiative and a national constituency, rendering the office a symbol of national community in a world of perceived crisis. Congress, on the other hand, operates with the burdens of fragmented constituencies, local concerns and bicameralism, leading to avoidance of major responsibility, inaction, acquiescence and delegation.

Although secrecy may serve an activist President, privilege does not seem essential and certainly does not account for the growth of presidential power in recent decades. Professor Berger exaggerates the role of privilege in disabling Congress, as he describes the secret escalation, deceptive and misleading statements, optimistic reports and nondisclosure of internal memoranda associated with the executive branch during the Vietnam and Cambodian conflicts (pp. 265-82). The troop escalation and the bombing under

had no Hamilton to intrude and hence it did not get a statutory obligation to provide information (pp. 197-203).

14. Black, *The Working Balance of the American Political Departments*, 1 HASTINGS CONST. L.Q. 13 (1974).

15. A. SCHLESINGER, JR., *supra* note 5, at 208-35.

Presidents Kennedy and Johnson were accomplished without any invocation of executive privilege (p. 252). Moreover, as Schlesinger has observed,[16] congressional inaction during the war and other recent foreign involvements cannot be explained simply by a lack of adequate information on the larger issues, for much of the necessary information, particularly in the case of Vietnam, was available in the daily press. Part of the explanation was a lack of congressional will to know stemming from an awareness of the responsibility that knowledge imposes. Further, the unavailability of privilege does not guarantee executive candor or integrity in providing information; nor does it ensure the availability of important documents, such as the Pentagon Papers, since the Executive may choose not to undertake the considerable research and preparation of such material without some assurances regarding its use.[17]

Paradoxically, Berger's argument against privilege becomes more convincing when he leaves the realm of early history and presidential aggrandizement for more mundane illustrations of the costs of withholding information. Focusing chiefly upon the extravagant privilege raised by the Eisenhower Administration, which theoretically served to protect communications of all executive personnel in the interest of a candid exchange of opinions, Berger describes well how it masked a plethora of waste, inefficiency and maladministration, such as the Dixon-Yates scandal (pp. 237-39). Not only department heads but middle-level bureaucrats used the shelter of privilege to avoid exposure and responsibility (pp. 241-44). And many of these events might have gone undiscovered without breaches or waivers of the privilege (pp. 239-40). Berger doubtlessly makes a well-detailed practical case here for some control over nondisclosure, especially in the area of spending, conflict of interest and, of course, alleged criminal activities.

But practical considerations also include the costs of disclosure, and many of these, such as individual privacy and national security, Berger merely wishes away by assuming a well-disciplined and highly responsible Congress, policed by the courts if necessary. He severely discounts the interest in encouraging frank inter-executive communications by setting up an extravagant version of the privilege as a straw man and, upon its rejection, leaping to the broader rejection of *any* argument for protecting candid exchange of opinions and advice among executive employees (pp. 235-36, 254-55). The reasoning he supplies to support this leap is that aides will always wish to speak out, even without the benefit of privilege, when they provide correct advice or ascertain wrongdoing; there are benefits in revealing that the chief ignored sound counsel. If the aide offers wrong advice, he should be fired, and public policy is not served by shielding his communication (pp. 241-43). Berger himself

16. A. SCHLESINGER, JR., *supra* note 5, at 372-73.
17. *See* R. WINTER, JR., WATERGATE AND THE LAW: POLITICAL CAMPAIGNS AND PRESIDENTIAL POWER 55 (1974).

seems to recognize that the problem cannot be disposed of quite so simply. Thus he purports to allow some confidentiality for communications among the President, Cabinet members and their aides.[18] As the Supreme Court accepted in *United States v. Nixon*[19] as "too plain to require further discussion,"[20] the threat of public dissemination may well temper candor with caution and thereby impair the consultative and deliberative process. In admitting "an accommodation" for such communications, however, Berger again effectively concedes the inappropriateness of his own major thesis of "no executive privilege," and also neglects to discuss the source of the privilege he inferentially accepts, save offhandedly to note that Congress, the people or the courts can work out some arrangement (p. 264). Practical recognitions, though acknowledged as irrelevant, are not without effect.

Professor Berger's most defensible conclusion (in this reviewer's opinion though not that of others)[21] is that judicial remedies should be available for disputes over privilege. Regrettably these proposals are marred by overstating the appropriate role for courts and by allocating to them the wrong issues for adjudication. *Executive Privilege* ignores that most legislative-executive conflicts over privileges are settled informally through negotiation, compromise and compliance. Presidents have generally recognized Congress' power of inquiry and its consequent entitlement to information from the executive branch. Congress' informal political powers apparently have been adequate to induce satisfactory responses on most occasions. Judicial review should not be viewed as a substitute for this pattern of political accommodation.[22]

There are occasions, however, when the President formally stands on privilege and Congress is left with limited forms of self-help to resolve an impasse, such as marshalling public opinion, refusing to legislate, appropriate or confirm, or ultimately proceeding with impeachment. Professor Berger

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18. Although insisting that control over any executive privilege must not be in the executive branch, Berger seems to rely on a notion of inevitability regarding the confidentiality of communications between a President and his immediate aides (pp. 264, 302). He more grudgingly endorses cabinet secrecy (pp. 214, 235).

19. 94 S. Ct. 3090 (1974). This case came down after the publication of this book. But the Court's opinion, though rejecting the President's absolute, unqualified claim of privilege, does not support Mr. Berger's statement of the law. The Court established that Article II and the separation of powers create a substantial presidential privilege for communications between high governmental officials and their aides. Such protection, based on the public interest in candid, objective and blunt opinions in presidential decision-making, is "fundamental to the operation of government," *id.* at 3107. A generalized interest in confidentiality, however, may have to yield to other high constitutional functions, such as due process notions of fairness in criminal trials. Hence a showing of a particular need for relevant evidence in pending criminal prosecutions would overcome the executive's interest in nondisclosure. The Court added that greater deference to privilege would be due where a President relies on a more specific need to protect military, diplomatic or national security secrets. *Id.* at 3107-09.

20. *Id.* at 3106.

21. *See* R. WINTER, JR., *supra* note 17, at 53-62 (1974).

22. In referring to the past, Berger at one point seems to acknowledge this pattern of informal cooperation (pp. 44-45). But he regards it as a part of early history, without relevance to modern conflicts over privilege and the need for judicial remedies (pp. 304-20).

concludes that self-help remedies are either ineffective or too costly and this conclusion, limited to these more formal measures, seems correct. For example, public opinion is likely to be nonexistent on this issue; legislative retaliation is politically hazardous because the costs may fall on the public as well as the President, as reflected in a recent bill defunding the State Department for failure to disclose information;[23] and impeachment is far too grave. Moreover, the political hazards to the President are minimal, since he, unlike Congress, need not do anything and typically his opponent is not the Congress, but a committee of one House. These perhaps atypical cases of impasse are the ones in which courts may be an appropriate arbiter, assuming that the issues are fit for adjudication.

The major problem with Professor Berger's extensive analysis of justiciability arises from his uncritical assurance that there are well-developed standards suitable for the adjudication of contests between Congress and the President over privilege. Failing to recognize that congressional challenges to privilege raise distinct considerations, Professor Berger finds the appropriate standards in the precedents dealing with several evidentiary privileges where courts "weigh" the policies of privilege against a party's showing of a particular need for the information. This, indeed, is what the Court did in *United States v. Nixon*,[24] where the nonspecific and undifferentiated claim of confidentiality was rejected upon a finding that the tapes contained material evidence needed for a fair adjudication of a pending criminal case.

But these evidentiary precedents are inapposite, in that Congress' need for information cannot be assessed in a similar manner. As Professor Winter has argued,[25] Congress' need is relatively nonspecific, general and undifferentiated, and serving one or more purposes, such as promoting partisan political objectives, informing or influencing the public, formulating legislation, or determining whether laws are needed. Some indication of the difficulty courts encounter in attempting to sort out these purposes is provided by the many judicial denials of relief to private witnesses alleging improper legislative motive or a purpose to expose.[26] Similarly, courts cannot determine the extent of materiality of data to yet unformulated legislation.

These weaknesses of analysis in *Executive Privilege* invite the reader to reject the feasibility of judicial remedies. This is unfortunate, since Berger's arguments from expediency and other considerations persuasively suggest the appropriateness of judicial intervention. As the history of the privilege itself suggests, such intervention need not drift in Professor Winter's sea of stan-

23. See A. SCHLESINGER, JR., *supra* note 5, at 395-96.
24. 94 S. Ct. 3090 (1974).
25. R. WINTER, JR., *supra* note 17, at 57-58.
26. *E.g.*, Barenblatt v. United States, 360 U.S. 109 (1959); Uphaus v. Wyman, 360 U.S. 72 (1959). *But cf.* Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963).

dardlessness. This history suggests at the outset a rejection of the now common practice of lumping the various circumstances in which information has been withheld under the same heading and treating them all as raising the same question. Presidents have, with few recent exceptions, invoked privilege in quite narrow and special circumstances.[27] If we focus on this reality and view the question as when the asserted reason for refusing data is legally sanctioned, a basis for an acceptable, if limited, judicial role emerges. Courts are not competent to weigh relative needs, but they can define the scope of a privilege and the occasions and procedures appropriate for its exercise. For example, they can determine which executive officials and aides are entitled to rely on the confidentiality of communications; whether members of the White House staff, particularly those performing functions similar to the Heads of Departments, enjoy a blanket immunity from testimony or must, like Cabinet members, assert the privilege more selectively; which categories of information are so related to inherent or essential executive functions as to warrant nondisclosure; what kinds of documents are protected (compare census surveys with files containing raw unevaluated data on individuals); and what kind of prima facie congressional showing of wrongdoing or malversation will suffice to overcome any or most assertions of privilege (an area where a need standard might prove relatively administrable). These issues do not necessarily require courts to participate in proceedings textually committed to other branches of government, such as impeachment.

Granted this approach does not provide a comprehensive and completely tidy solution of all the questions and ambiguities raised by executive privilege (these are not characteristics of judge-made law generally), Congress is not likely often to use the courts to resolve disputes over privilege. Indeed, it has tried only once to invoke judicial assistance, and then only as a last resort after exhausting all other remedies.[28] As even this precedent suggests, judicial review is not likely to undermine the established pattern of informal political accommodation in the typical case, since litigation does not usually afford a prompt remedy and does not eliminate the risk of an adverse precedent for either party. Conceivably, the availability of review may reinforce political resolutions.

Less speculatively, however, it provides a healthy check against the more extravagant claims of absolute privilege and thereby diffuses excessive congressional retaliation. Equally importantly, this approach would provide a beginning for the formulation of law on the subject, an impetus toward the task of issue definition and the formulation of standards, neither of which have been seriously attempted in discussions of the subject. As Professor Berger's book attests, the failure to define and focus upon particular issues creates the

27. *See* text accompanying notes 6-10 *supra*.
28. *See* In re Subpoena to Nixon, 360 F. Supp. 1 (D.D.C.), *aff'd sub nom.* Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973).

erroneous impression that standards cannot be developed. This invites a resort to absolutes supported by tendentious history, which beclouds analysis and generates a literature of polemics based on a pro-Congress or pro-President partisanship.