University of Baltimore Law Review

Volume 10
Issue 2 *Winter 1981*

Article 7

1981

Casenotes: Executive Power — Executive Privilege — Privilege of Executive to Shield Information from Discovery — Doctrine of Executive Privilege Recognized in Maryland to Prevent Disclosure of Official Information. Hamilton v. Verdow, 287 Md. 544, 414 A.2d 914 (1980)

JoAnn Ellinghaus-Jones
University of Baltimore School of Law

EXECUTIVE POWER – EXECUTIVE PRIVILEGE – PRIVILEGE OF EXECUTIVE TO SHIELD INFORMATION FROM DISCOVERY – DOCTRINE OF EXECUTIVE PRIVILEGE RECOGNIZED IN MARYLAND TO PREVENT DISCLOSURE OF OFFICIAL INFORMATION. *HAMILTON v. VERDOW*, 287 Md. 544, 414 A.2d 914 (1980).

I. INTRODUCTION

The doctrine of executive privilege has long been used in federal courts to shield official information from public disclosure.[1] In *Hamilton v. Verdow*,[2] the Court of Appeals of Maryland considered, for the first time, whether a confidential report prepared at the request of the Governor of Maryland was protected by this privilege.[3] The court incorporated the doctrine of executive privilege into the law of Maryland,[4] but held that an *in camera* inspection of the report in question would not be improper.[5]

This casenote analyzes the scope and effect of the *Hamilton* decision. In addition, it examines the policy reasons behind the privilege[6] and attempts to clarify the position adopted by the court in *Hamilton*.

II. THE FACTUAL BACKGROUND OF *HAMILTON*

While on leave from a Maryland state psychiatric hospital, Arthur F. Goode, III killed a young boy, Jason S. Verdow, in Florida.[7] Verdow's estate brought suit in the United States District Court for the District of Maryland against the hospital superintendent and two staff psychiatrists, for their alleged negligence in recommending that Goode be treated at the hospital

---

1. *See, e.g.*, Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318 (D.D.C. 1966), *aff'd sub nom.* V.E.B. Carl Zeiss, Jena v. Clark, 384 F.2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967).
2. 287 Md. 544, 414 A.2d 914 (1980).
3. *Id.* at 553-56, 414 A.2d at 920-21.
4. *Id.* at 562, 414 A.2d at 924.
5. *Id.* at 567-70, 414 A.2d at 927-28.
6. This note is confined to the judicial proceedings aspect of the executive privilege. For comprehensive discussions of the privilege as it relates to congressional proceedings, see Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383, 1419-38 (1974) [hereinafter cited as Cox]; Dorsen & Shattuck, *Executive Privilege, the Congress and the Courts*, 35 OHIO ST. L.J. 1 (1974); Gard, *Executive Privilege: A Rhyme Without a Reason*, 8 GA. L. REV. 809 (1974).
7. Hamilton v. Verdow, 287 Md. 544, 547, 414 A.2d 914, 917 (1980). Goode had entered Spring Grove State Hospital in Catonsville, Maryland in 1975, as a condition of probation, after having been convicted of sexually molesting male minors. *Id.* at 546, 414 A.2d at 916. Shortly after killing Verdow, Goode killed another youth in Virginia. Having been convicted of murder in both Florida and Virginia, Goode is currently awaiting execution in a Florida prison. *Id.* at 546-47, 414 A.2d at 917.

rather than at a maximum security institution, in failing to prescribe adequate treatment for Goode, and in allowing him to leave the hospital without notifying any appropriate authority.[8]

During discovery, the personal representative of Verdow's estate sought the production of an investigative report that had been prepared for the Governor of Maryland by a member of his staff concerning Goode's progress and treatment at the hospital.[9] The Maryland Attorney General and the Acting Governor of Maryland[10] requested a protective order to prevent the plaintiff from obtaining a copy of the report. The officials supported this request by stating that "the report was a confidential report, prepared for the purpose of future executive action in order to attempt to prevent other similar occurrences at state facilities, and contained opinions and recommendations for the Governor's use as well as other confidential, personal information relating to Goode."[11]

The federal district court initially ordered that the report be produced to aid the court in determining, through an *in camera* inspection, the extent to which the material merited protection. However, due to the absence of controlling precedent in Maryland on the doctrine of executive privilege, certification was made to the Court of Appeals of Maryland on the question of whether the report should be kept from discovery and *in camera* inspection based upon this privilege.[12]

---

8. *Id.* at 547, 414 A.2d at 917. These claims were premised on the theory that the defendants knew that Goode had not responded to their treatment and still possessed criminal tendencies. *Id.*
9. The plaintiff also sought the production of Goode's medical records, for which Goode claimed a privilege under § 9-109 of the Maryland Courts and Judicial Proceedings Code Annotated. *Id.* at 547-50, 414 A.2d at 917-18. This statute protects "communications relating to diagnosis or treatment of [a] patient's mental or emotional disorder." MD. CTS. & JUD. PROC. CODE ANN. § 9-109(b) (1980). A patient may consent to waive the privilege. *Id.* § 9-109(d)(6). The *Hamilton* court held that Goode had waived this privilege by previously authorizing the release of his medical records to other plaintiffs in a case against the same defendants, involving the same issues as *Hamilton*. 287 Md. 544, 550-51, 414 A.2d 914, 918-19 (1980).
10. Acting Governor Blair Lee, III made the original claim of executive privilege in this case, and the present Governor Harry R. Hughes reiterated it. The investigative report had been prepared at the request of former Governor Marvin Mandel. 287 Md. 544, 548 n.1, 414 A.2d 914, 917 n.1 (1980).
11. *Id.* at 548, 414 A.2d at 917.
12. *Id.* at 548-49, 414 A.2d at 917-18. The Court of Appeals of Maryland is empowered to receive and answer questions of law certified to it by certain state and federal courts, including United States district courts, in cases in which: (1) the question may be determinative of a cause pending in the certifying court, and (2) there is no controlling precedent in the Court of Appeals of Maryland. MD. CTS. & JUD. PROC. CODE ANN. § 12-601 (1980).

III. BACKGROUND OF EXECUTIVE PRIVILEGE

A. Origin of the Doctrine

The Constitution of the United States does not expressly establish an executive privilege to withhold information from the courts or a judicial power to obtain information withheld by the executive.[13] As a result, much controversy has arisen over judicial recognition of an executive privilege.[14] Whether advocating total rejection of the privilege, adoption of an absolute privilege, or an intermediate view, each position is rooted in this country's constitutional separation of powers and varying interpretations of the holding in *United States v. Burr.*[15]

In the earliest American case dealing with executive privilege, Aaron Burr, on trial for treason[16] and for leading troops against a foreign power with which the United States was at peace,[17] demanded to see letters containing incriminating information about him, which were in the possession of President Jefferson.[18] Chief Justice John Marshall, sitting as trial judge in *Burr,* issued two subpoenas to President Jefferson, one to appear personally as a witness and the other to produce the letters.[19] Although the President ignored the subpoena to testify and denied that the court was empowered to issue it, he partially complied with the order to produce the letters by submitting excerpted versions of them to the court.[20] The deletions were made by Jefferson's attorney, who avowed that the parts omitted contained state secrets and were neither relevant nor necessary to Burr's defense.[21] Although only partial compliance with the subpoena had thus been effected, Chief Justice Marshall did not pursue the matter further.[22]

---

13. Cox, *supra* note 6, at 1384.
14. *See* Berger, *The Incarnation of Executive Privilege,* 22 U.C.L.A. L. REV. 4, 10 (1974) [hereinafter cited as Berger]; Cox, *supra* note 6, at 1384.
15. 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692d.); 25 F. Cas. 187 (C.C.D. Va. 1807) (No. 14,694). The *Burr* cases were decided by Chief Justice John Marshall of the United States Supreme Court, sitting on the circuit court. In the early nineteenth century, it was common practice for Justices of the Supreme Court to sit on the circuit courts. O'Brien, *The Dissenting Opinions of* Nixon v. Sirica: *An Argument for Executive Privilege in the White House Tapes Controversy,* 28 SW. L.J. 373, 380 (1974) [hereinafter cited as O'Brien]. For the purposes of this note, the *Burr* cases will be referred to collectively.
16. United States v. Burr, 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692d.).
17. United States v. Burr, 25 F. Cas. 187 (C.C.D. Va. 1807) (No. 14,694).
18. O'Brien, *supra* note 15, at 380. General James Wilkinson, who had been a close friend of Burr's, had written the letters to Jefferson, exposing Burr and his conspiracy. *Id.* at 379-80.
19. 25 F. Cas. 30, 37-38 (C.C.D. Va. 1807) (No. 14,692d.).
20. 25 F. Cas. 187, 191 (C.C.D. Va. 1807) (No. 14,694); *see* Berger, *supra* note 14, at 5-6; Cox, *supra* note 6, at 1392; O'Brien, *supra* note 15, at 380-83.
21. O'Brien, *supra* note 15, at 381.
22. *Id.* at 387.

Based upon *Burr* and the separation of powers doctrine, several positions on the executive privilege issue have emerged. One school of thought, which is in favor of an absolute privilege, asserts that the executive privilege is inherent in the powers granted to the President in article II of the United States Constitution.[23] The separation of powers doctrine is, therefore, interpreted as "mak[ing] one master in his own house" and "preclud[ing] him from imposing his control in the house of another who is master there."[24] Under this line of reasoning, chief executives possess an absolute privilege to withhold information and the ultimate power to determine when that privilege may properly be invoked.[25] Courts may not impose their control over an executive official by regulating his use of the privilege.[26]

Burr has been read to support this position.[27] In *Burr*, the President himself determined the scope of the privilege, by directing his attorney to delete all irrelevant portions of the letters before delivering them to the court.[28] Although the Chief Justice acknowledged the judiciary's power to require the executive to produce evidence, the court appeared to accept Jefferson's judgment, stating that "in no case of this kind would a court be required to proceed against the President as against an ordinary individual."[29] This passage has been construed to indicate the judiciary's lack of power over the Chief Executive.[30]

At the other end of the spectrum are those who view recognition of the privilege as "open[ing] the door to unchecked executive power, an evil dreaded by the Founders."[31] This position places far

---

23. *See* Brief for Respondent at 49, United States v. Nixon, 418 U.S. 683 (1974); Cox, *supra* note 6, at 1387; O'Brien, *supra* note 15, at 374.
24. Brief for Respondent at 74, United States v. Nixon, 418 U.S. 683 (1974) (quoting Humphrey's Ex'r v. United States, 295 U.S. 602, 630 (1935)).
25. *See* Reply Brief for Respondent at 3, United States v. Nixon, 418 U.S. 683 (1974). Apparently, under this view, all an executive official need do is make a claim of privilege, and the request for production will be denied. *See* Nixon v. Sirica, 487 F.2d 700, 762-99 (D.C. Cir. 1973) (Wilkey, J., dissenting).
26. *See* Nixon v. Sirica, 487 F.2d 700, 750-52 (D.C. Cir. 1973) (MacKinnon, J., dissenting); Reply Brief for Respondent at 3, United States v. Nixon, 418 U.S. 683 (1974); O'Brien, *supra* note 15, at 374-76.
27. *See, e.g.*, O'Brien, *supra* note 15, at 380.
28. *See* text accompanying notes 20 & 21 *supra*.
29. United States v. Burr, 25 F. Cas. 187, 192 (C.C.D. Va. 1807) (No. 14,694).
30. *See, e.g.*, Nixon v. Sirica, 487 F.2d 700, 781-88 (D.C. Cir. 1973) (Wilkey, J., dissenting).
31. Berger, *supra* note 14, at 4-5 (citing R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 49-50, 53, 58, 62 (1974)). The view of the Founders was expressed by James Wilson, who represented Pennsylvania at the Constitutional Convention in 1787: "The executive power is better to be trusted when it has no screen . . . . [The President cannot] hide either his negligence or inattention; . . . not a *single privilege* is annexed to his character." 2 J. ELLIOTT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 480 (2d ed. 1836) (emphasis in original).

greater confidence in the courts than in the executive branch and would always require the latter to yield to judicial control over the evidence in a case.[32] Thus, executive officials would be obliged to deliver all requested material to the court, which would then determine whether such material should be made available to the requesting litigant.[33]

Support for this position also has been found in *Burr*.[34] Chief Justice Marshall emphasized that a president's asserted need for nondisclosure must yield to a litigant's need for evidence.[35] Furthermore, President Jefferson exhibited a willingness to supply the court with any materials it might find relevant and necessary to the trial.[36] This has been interpreted as evidence of Jefferson's ultimate concession to the power of the court to decide which materials should be disclosed to a demanding litigant.[37]

The position taken by all courts that have addressed the issue represents a compromise between these two opposing views. First enunciated in *Burr* to protect state secrets at the President's request, the privilege has been extended to protect military secrets[38] and confidential communications.[39] Thus recognized to exist, the privilege must be asserted by the head of the executive agency or department seeking nondisclosure.[40] The executive official's claim of privilege, however, is not conclusive; the applicability and scope of the privilege are judicially determined.[41]

---

32. *See, e.g.*, United States v. Reynolds, 345 U.S. 1, 9-10 (1953); Berger, *supra* note 14, at 28.
33. *See* Cox, *supra* note 6, at 1409.
34. *See, e.g.*, R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 187-94 (1974).
35. 25 F. Cas. 30, 37 (C.C.D. Va. 1807) (No. 14,692d.); 25 F. Cas. 187, 191 (C.C.D. Va. 1807) (No. 14,694); *see* Berger, *supra* note 14, at 6-7. Although commentators who oppose the privilege rely on this passage from *Burr* for support, the actual statement made in the case by Chief Justice Marshall included the important qualification that there had been no showing that the letters sought by Burr contained "any matter, the disclosure of which would endanger the public safety." 25 F. Cas. 30, 37 (C.C.D. Va. 1807) (No. 14,692d.); 25 F. Cas. 187, 191 (C.C.D. Va. 1807) (No. 14,694). Read in its entirety, this passage appears to support the executive privilege doctrine as it exists today. *See* text accompanying notes 38-60 *infra*.
36. *See* 25 F. Cas. 187, 190 (C.C.D. Va. 1807) (No. 14,694); O'Brien, *supra* note 15, at 384.
37. *See, e.g.*, Berger, *supra* note 14, at 6.
38. United States v. Reynolds, 345 U.S. 1 (1953).
39. United States v. Nixon, 418 U.S. 683 (1974); Machin v. Zuckert, 316 F.2d 336 (D.C. Cir.), *cert. denied*, 375 U.S. 896 (1963); Boeing Airplane Co. v. Coggeshall, 280 F.2d 654 (D.C. Cir. 1960); Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939 (Ct. Cl. 1958).
40. United States v. Reynolds, 345 U.S. 1, 7 (1953).
41. United States v. Nixon, 418 U.S. 683, 705 (1974); United States v. Reynolds, 345 U.S. 1, 8-10 (1953); Ethyl Corp. v. EPA, 478 F.2d 47, 51 (4th Cir. 1973). This rule is based on the holding of Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Id.* at 177.

B. Scope of the Privilege

Federal courts have held that state secrets, including diplomatic, military, and sensitive security matters, are absolutely privileged from disclosure.[42] When one of these areas is asserted as the basis of the privilege, a court may not automatically examine the document in question, but must consider, through testimony, the validity of the assertion.[43] A court will not require disclosure of materials alleged to contain state secrets unless it finds the claim of privilege to have been arbitrarily or capriciously asserted.[44] If such a finding is made, the materials may be subject to both *in camera* inspection by the court and disclosure to the requesting litigant.[45]

Confidential communications enjoy only a qualified privilege in the federal courts.[46] In determining which confidential communications should be disclosed and which should not, the court is involved in a balancing process. The court must weigh the public's interest in free access to information that would facilitate a just resolution of a legal dispute against the compelling public need for confidentiality.[47] Subject to this limitation, an executive has a privilege to maintain the confidentiality of intragovernmental documents containing advisory opinions, recommendations, or deliberations used in formulating governmental policies and decisions.[48] Furthermore, the executive privilege does not protect government documents consisting solely of factual data.[49] If factual and deliberative materials are intertwined, all severable factual material will be subject to disclosure.[50]

---

42. *See* United States v. Reynolds, 345 U.S. 1, 7 (1953); Totten v. United States, 92 U.S. 105 (1875); Nixon v. Sirica, 487 F.2d 700, 713 (D.C. Cir. 1973); Ethyl Corp. v. EPA, 478 F.2d 47, 51 (4th Cir. 1973); C. McCORMICK, LAW OF EVIDENCE § 107 (2d ed. 1972); 8 J. WIGMORE, EVIDENCE § 2378(g)(2) (J. McNaughton rev. 1961). *See generally* Carrow, *Governmental Nondisclosure in Judicial Proceedings*, 107 U. PA. L. REV. 166, 177-79 (1958).
43. United States v. Reynolds, 345 U.S. 1, 8 (1953); Ethyl Corp. v. EPA, 478 F.2d 47, 51 (4th Cir. 1973).
44. Ethyl Corp. v. EPA, 478 F.2d 47, 51 (4th Cir. 1973).
45. *See id.*
46. *See, e.g.*, United States v. Nixon, 418 U.S. 683, 706 (1974).
47. Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 324 (D.D.C. 1966), *aff'd sub nom.* V.E.B. Carl Zeiss, Jena v. Clark, 384 F.2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967); *see* Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 728-29 (D.C. Cir. 1974).
48. U.S. v. Nixon, 418 U.S. 683, 705-07 (1974); Machin v. Zuckert, 316 F.2d 336, 339 (D.C. Cir.), *cert. denied*, 375 U.S. 896 (1963); Boeing Airplane Co. v. Coggeshall, 280 F.2d 654, 660 (D.C. Cir. 1960); Cox, *supra* note 6, at 1408.
49. EPA v. Mink, 410 U.S. 73, 87-88 (1973); Boeing Airplane Co. v. Coggeshall, 280 F.2d 654, 660-61 (D.C. Cir. 1960).
50. *See* cases cited note 49 *supra*.

The Freedom of Information Act of 1966[51] includes provisions relating to executive privilege on the federal level.[52] This Act provides that governmental agencies shall make a broad range of information accessible to the public.[53] However, matters relating to national defense or foreign policy[54] and other material that would be unavailable to a private litigant in a suit against a government agency[55] are exempted from the operation of the Act. The latter provision demonstrates a congressional intent to incorporate in the Act the common law doctrine of executive privilege relating to confidential communications.[56]

The privilege of an executive official to insulate governmental information from public disclosure has been codified in several states.[57] Other states have adopted the doctrine judicially.[58] In most areas, state executive officials enjoy substantially the same qualified privilege for confidential communications as do federal executive officials.[59] The state and federal privileges are distinguishable, however, because the privilege based on diplomatic and military secrets is generally within the exclusive domain of the federal government.[60]

---

51. 5 U.S.C. § 552 (1976).
52. *See id.*
53. *See id.* § 522(a).
54. *Id.* § 522(b)(1).
55. *Id.* § 522(b)(5).
56. EPA v. Mink, 410 U.S. 73, 86 (1973). See text accompanying notes 46-48 *supra.* Article 76A of the Maryland Annotated Code contains provisions relating to maintenance and disclosure of "public information." MD. ANN. CODE art. 76A, §§ 1-5 (1980). Section 3(b)(v) thereof is substantially similar to 5 U.S.C. § 522(b)(5).
57. *See, e.g.,* CAL. EVID. CODE § 1040 (West 1966), *construed in In re* Lynna B., 92 Cal. App. 3d 682, 155 Cal. Rptr. 256 (1979); OR. REV. STAT. § 44.040 (1979), *construed in* City of Portland v. Nudelman, 45 Or. App. 425, 608 P.2d 1190 (1980). For additional statutes, see 8 J. WIGMORE, EVIDENCE § 2378(g), at 799-800 n.9 (J. McNaughton rev. 1961).
58. *See, e.g.,* Assured Investors Life Ins. Co. v. National Union Assocs., 362 So. 2d 228 (Ala. 1978); Cirale v. 80 Pine St. Corp., 35 N.Y.2d 113, 316 N.E.2d 301, 359 N.Y.S.2d 1 (1974).
59. Comment, *Executive Privilege at the State Level,* 1974 U. ILL. L.F. 631, 646. The author notes that "this qualified privilege does not attach to all communications between public officials. Only communications made by an official in the course of his official duties and in the public interest are protected by the privilege." *Id.* (footnote omitted).
60. *Id.* at 645 (citing Zagel, *The State Secrets Privilege,* 50 MINN. L. REV. 875 (1966)); *see* U.S. CONST. art. I, §§ 8, 10. There are instances, however, in which the privilege for diplomatic and military secrets may be asserted by a state official. For example, art. I, § 10, cl. 3 of the United States Constitution impliedly empowers states to compact with other states or with foreign states and to declare war when actually invaded. In addition, art. I, § 8, cl. 10 of the United States Constitution reserves to the states the authority to maintain and deploy their National Guard units. Materials prepared by executive officials in connection with the exercise of these powers would presumably be protected from disclosure in judicial proceedings by the executive privilege.

C. *The Use of* In Camera *Inspection*

Ordinarily, the claim of privilege must be asserted by the head of the executive agency or department seeking to prevent disclosure.[61] When such a claim is made, the documents in question are automatically presumed to be privileged from any type of examination.[62] The presumption may be rebutted, however, if the person seeking disclosure makes a preliminary showing that the material is not privileged,[63] or that there is a substantial need for disclosure of the material despite any existing privilege.[64] Once either has been demonstrated, the court may order an *in camera* inspection[65] of the material.[66]

When documents are alleged to contain purely factual and, thus, discoverable information,[67] *in camera* inspection by the court is used to determine whether or not the documents sought are privileged.[68] Another function of the *in camera* procedure is to sever privileged from non-privileged, discoverable material, if possible.[69] Finally, in those situations involving confidential communications, which enjoy only a qualified privilege,[70] the *in camera* examination is used to balance the litigant's need for production against the government's need for confidentiality.[71]

Throughout the *in camera* proceeding, the court must constantly consider the relevance and admissibility of the evidence.[72] If material is found to be irrelevant or otherwise inadmissible, the

---

61. United States v. Reynolds, 345 U.S. 1, 7 (1953).
62. Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 730 (D.C. Cir. 1974); Nixon v. Sirica, 487 F.2d 700, 717 (D.C. Cir. 1973); *see* Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 324-25 (D.D.C. 1966), *aff'd sub nom.* V.E.B. Carl Zeiss, Jena v. Clark, 384 F.2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967).
63. *See, e.g.*, Boeing Airplane Co. v. Coggeshall, 280 F.2d 654 (D.C. Cir. 1960).
64. *E.g.*, Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 730-31 (D.C. Cir. 1974); Nixon v. Sirica, 487 F.2d 700, 717 (D.C. Cir. 1973). It should be noted that materials containing state secrets will never be discoverable, regardless of the litigants' need. *See* text accompanying notes 42-45 *supra*.
65. "A cause is said to be heard *in camera* either when the hearing is had before the judge in his private chambers or when all spectators are excluded from the courtroom." BLACK'S LAW DICTIONARY 684 (5th ed. 1979).
66. *See* cases cited notes 63 & 64 *supra*.
67. *See, e.g.*, Boeing Airplane Co. v. Coggeshall, 280 F.2d 654 (D.C. Cir. 1960).
68. *Id.*
69. Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 331-32 (D.D.C. 1966), *aff'd sub nom.* V.E.B. Carl Zeiss, Jena v. Clark, 384 F.2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967). For example, this procedure would be appropriate when factual data is allegedly intertwined with privileged advisory opinions. *See id.;* Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939 (Ct. Cl. 1958).
70. United States v. Nixon, 418 U.S. 683, 713-14 (1974).
71. *Id.;* Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 730-31 (D.C. Cir. 1974); Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 331 (D.D.C. 1966), *aff'd sub nom.* V.E.B. Carl Zeiss, Jena v. Clark, 384 F.2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967).
72. *See* Cox, *supra* note 6, at 1414.

court will exclude it on that basis, regardless of whether the material is privileged.[73] Because governmental information is seldom relevant in civil or criminal litigation,[74] the threat of disclosure is minimal. This, together with the executive privilege doctrine, makes it unlikely that the spontaneity or candor of communications within the executive branch will be hampered markedly because of fear of public exposure.[75]

IV. THE *HAMILTON* COURT'S ANALYSIS

Although the Court of Appeals of Maryland did not address the issue of executive privilege until *Hamilton v. Verdow*,[76] it had previously recognized "that the Governor bears the same relation to [Maryland] as does the President to the United States, and that generally the Governor is entitled to the same privileges and exemptions in the discharge of his duties as is the President."[77] In addition, the court had acknowledged prior to *Hamilton* that the separation of powers doctrine[78] limits the judiciary's authority to interfere in the "conclusions, acts or decisions of a coordinate branch of government made within its own sphere of authority."[79] In *Hamilton*, the court recognized the doctrine of executive privilege as part of the law of Maryland.[80]

Having made that threshold determination, the court focused upon whether the investigative report, prepared in confidence for the Governor of Maryland for the purpose of possible executive action, was guarded from discovery and *in camera* examination on

---

73. *Id.*
74. *Id.* at 1411; Comment, *Executive Privilege at the State Level*, 1974 U. ILL. L.F. 631, 645.
75. Cox, *supra* note 6, at 1413; Comment, *Executive Privilege at the State Level*, 1974 U. ILL. L.F. 631, 645.
76. 287 Md. 544, 414 A.2d 914 (1980).
77. Hamilton v. Verdow, 287 Md. 554, 556, 414 A.2d 914, 921 (1980) (citing Magruder v. Swann, 25 Md. 173, 212 (1866); Miles v. Bradford, 22 Md. 170, 184-85 (1864)).
78. Article 8 of the Maryland Declaration of Rights provides that "the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other." MD. CONST., DECL. OF RIGHTS art. 8.
79. Hamilton v. Verdow, 287 Md. 544, 556, 414 A.2d 914, 921 (1980) (citing Department of Natural Resources v. Linchester Sand & Gravel Corp., 274 Md. 211, 334 A.2d 514 (1975) (power of court to interfere with administrative board); Heaps v. Cobb, 185 Md. 372, 45 A.2d 73 (1945) (same); Magruder v. Swann, 25 Md. 173 (1866) (power of court to issue writ of mandamus to Governor in discharge of ministerial duties); Miles v. Bradford, 22 Md. 170 (1864) (no power to issue writ of mandamus to Governor for discharge of discretionary duty); Green v. Purnell, 12 Md. 329 (1858) (no power to issue writ of mandamus to Comptroller of Treasury in discharge of discretionary duty); Watkins v. Watkins, 2 Md. 341 (1852) (power of court to restrain unconstitutional legislative enactments)).
80. 287 Md. 544, 562, 414 A.2d 914, 924 (1980).

the basis of executive privilege.[81] The Governor alleged that the report contained, *inter alia*, a staff member's "confidential 'opinions, recommendations, and deliberations . . . for use by the Governor in deciding what executive action, if any, was appropriate.' "[82] The court had little doubt that the material would be privileged, "without any need for" an *in camera* inspection, were it essentially comprised of such materials.[83] The plaintiff asserted, and the Governor's affidavit confirmed, however, that the report was basically factual.[84] In addition, the plaintiff exhibited a willingness to forego any advisory opinions or recommendations that may have been part of the report,[85] requesting only those portions of the report consisting of "statements of witnesses and psychiatrists, records of Goode's prior arrests, medical and educational records from institutions other than [the hospital] and conclusions of psychiatrists that the doctors at [the hospital] had 'misdiagnosed' Goode."[86] This combination of factors was deemed by the court to constitute a sufficient showing to overcome the presumptive privilege that attaches to governmental documents. An *in camera* examination of the report, therefore, was held not to be inconsistent with the executive privilege doctrine that had just been adopted.[87]

The court then suggested guidelines for the federal district court's *in camera* inspection. Although some factual material in the report may have been entitled to protection, such as information obtained upon promise of confidentiality, that material was not determined to require the same degree of privilege as were advisory opinions and materials of a similarly deliberative nature.[88] Consequently, the court suggested a balancing of the Governor's asserted reasons for nondisclosure against the plaintiff's need for disclosure,[89] in order to determine which information

81. *Id.* at 567-70, 414 A.2d at 927-28. It should be remembered that the court in *Hamilton* was responding to a certified question from the United States District Court for the District of Maryland. Therefore, the court's opinion in this case differs from one rendered on appeal from a final decision of a Maryland trial court, in that no determination of the issue had yet been made. *See id.* at 569 n.9, 414 A.2d at 928 n.9.
82. *Id.* at 567, 414 A.2d at 927 (quoting ¶ 8 of the gubernatorial affidavit).
83. *Id.*
84. *Id.* at 568-70, 414 A.2d at 927-28.
85. *Id.* at 567, 414 A.2d at 927.
86. *Id.* at 568, 414 A.2d at 927.
87. *Id.* at 567, 414 A.2d at 927.
88. *Id.*
89. *See id.* at 569, 414 A.2d at 928.

in the report would be discoverable.[90] In this manner, the court effectively advanced the public policy of encouraging the free flow of information among government officials by protecting the deliberative processes of the Governor and his supportive staff.[91]

V. ANALYSIS

Hamilton v. Verdow[92] represents Maryland's adoption of the doctrine of executive privilege. One aspect of the court's opinion, however, may be viewed as diverging from the national trend. This is the extent to which advisory opinions and deliberations are to be covered by the privilege.

Governmental communications containing confidential recommendations and advice generally enjoy only a qualified privilege.[93] However, at one point, the *Hamilton* court stated that, had the report in question consisted mainly of such deliberative matter, "there could be little doubt that . . . it would be privileged *without any need for* an *in camera* inspection."[94] This statement may be interpreted by later courts as sanctioning an absolute privilege for executive recommendations and opinions. Such an interpretation clearly would be at odds with the established doctrine and may conceivably invite wholesale withholding of information by an executive official.

A claim of absolute executive privilege for confidential communications of policy and advice was at issue in *United States v. Nixon*.[95] In this case, President Nixon had asserted an indefeasible right to prevent a federal district court from gaining access to the

---

90. The court also suggested other theories under which the report may be discoverable. For example, the court indicated that Goode may have waived his privilege to protect much of the data contained in the report by having released that data previously to a litigant in a similar case. *Id.* at 570, 414 A.2d at 928. *See* note 9 *supra*. In addition, the plaintiff claimed that Governor Mandel had waived the entire executive privilege. The court declined to consider that claim because it had been insufficiently developed. 287 Md. 544, 570 n.10, 414 A.2d 914, 928 n.10 (1980).

91. 287 Md. 544, 560-61, 414 A.2d 914, 923-24 (1980) (citing Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 324-26 (D.D.C. 1966), *aff'd sub nom.* V.E.B. Carl Zeiss, Jena v. Clark, 384 F.2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967)).

92. 287 Md. 544, 414 A.2d 914 (1980).

93. *See, e.g.*, Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 788 (D.C. Cir. 1971); Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318 (D.D.C. 1966), *aff'd sub nom.* V.E.B. Carl Zeiss, Jena v. Clark, 384 F.2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967); Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939 (Ct. Cl. 1958); Cox, *supra* note 6, at 1416.

94. 287 Md. 544, 567, 414 A.2d 914, 927 (1980) (emphasis added).

95. 418 U.S. 683 (1974).

"Watergate tapes" by claiming that the tapes were confidential.[96] The Supreme Court found the executive privilege to be "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution."[97] Nevertheless, the Court held that a claim of privilege based only on an unspecified interest in confidentiality "must yield to the demonstrated, specific need for evidence in a pending criminal trial."[98] The Court reasoned that:

> Absent a claim of need to protect military, diplomatic, or sensitive security secrets, we find it difficult to accept the [President's] argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such [confidential] material for *in camera* inspection with all the protection that a district court will be obliged to provide.[99]

Thus, the order requiring President Nixon to surrender the tapes to the district court was affirmed.[100]

Although the holding in *Nixon* was limited to claims of privilege in criminal trials, its rationale is also applicable to civil proceedings.[101] The *Hamilton* court, in determining the applicability of the privilege in a civil context, relied in part upon the *Nixon* rationale to support its conclusion that "confidential advisory and deliberative communications" among members of the executive branch are entitled to some protection from disclosure.[102]

If the *Hamilton* court intended to endorse an absolute privilege for confidential communications, its rationale for such a decision may have been based on the holdings of federal courts. Although all courts that have considered the issue treat the privilege as a qualified one, no civil cases, other than actions to review agency procedures, have required the production of documents containing opinions and recommendations.[103] This is presumably due to the litigants' failure to make an adequate showing of need

---

96. *Id.* at 686. The proceeding pending before the federal district court was criminal in nature. Following an indictment alleging violation of federal statutes by White House staff members and Nixon supporters, Special Prosecutor Archibald Cox filed a motion under rule 17(c) of the Federal Rules of Civil Procedure for a subpoena for the pretrial production of tapes and documents regarding specific conversations and meetings, in which the President and others were involved. *Id.* at 686-88.
97. *Id.* at 708 (footnote omitted).
98. *Id.* at 713.
99. *Id.* at 706.
100. *Id.* at 714.
101. Berger, *supra* note 14, at 8, 10.
102. 287 Md. 544, 558, 414 A.2d 914, 922 (1980).
103. Cox, *supra* note 6, at 1416, 1417.

for the material when seeking disclosure.[104] It is possible, therefore, that the *Hamilton* court's ostensible sanction of an unqualified privilege for advisory communications was based upon a belief that no litigant's need for disclosure would ever outweigh an executive's need for nondisclosure. Were this true, it would be the practical equivalent of an absolute privilege, so that *in camera* inspection would be unnecessary.

In spite of the ambiguous language, it is probable that the *Hamilton* court did not propose to authorize an absolute privilege for confidential communications when it stated that such matters "would be privileged without any need for an *in camera* inspection."[105] The court had earlier recognized the doctrine "essentially as set forth" in federal decisions.[106] It seems logical, therefore, that the court intended to indicate only that an *in camera* inspection would not be necessary to determine that confidential communications are qualifiedly privileged, because such communications always enjoy a qualified privilege.[107] As this is consistent with precedent,[108] courts in the future should interpret the *Hamilton* decision in this way.

Preservation of the confidentiality of governmental documents containing advice or deliberations used in formulating governmental policies and decisions is laudable for two reasons. Confidentiality promotes the exchange of completely candid advice by executive aides and colleagues by reducing the risk that such discussions will be publicly disclosed, criticized, or avenged, and it allows the President or other executive the liberty to "think out loud," unhampered by the possibility that his every thought, whether acted upon or not, will be exposed to the public.[109] These justifications are no doubt worthy of consideration, but they should not be taken to authorize liberal application of the privilege. Rather, it is necessary to examine the countervailing policy arguments in favor of disclosure.

First, there is the consideration that the framers of the United States Constitution declined to expressly authorize secrecy in the executive branch, although such a provision was made for Con-

---

104. *See* Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 730-31 (D.C. Cir. 1974); Berger, *supra* note 14, at 13 (construing United States v. Reynolds, 192 F.2d 987 (3d Cir. 1951), *rev'd on other grounds*, 345 U.S. 1 (1953)).

105. 287 Md. 544, 567, 414 A.2d 914, 927 (1980).

106. *Id.* at 562, 414 A.2d at 924.

107. *See* United States v. Nixon, 418 U.S. 683 (1974).

108. *See* text accompanying notes 46-48 *supra*.

109. International Paper Co. v. Federal Power Comm., 438 F.2d 1349, 1358-59 (2d Cir.), *cert. denied*, 404 U.S. 827 (1971); Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 324-26 (D.D.C. 1966), *aff'd sub nom.* V.E.B. Carl Zeiss, Jena v. Clark, 384 F.2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967); Cox, *supra* note 6, at 1410.

gress.[110] This lack of protection for executive secrecy may indicate an intention to preclude such secrecy,[111] notwithstanding the fact that executive officials regularly engage in deliberative, policy-making discussions much like those conducted by Congress.

In addition, the fact that the United States flourished from 1789 to 1954, under a government whose executive branch operated without the benefit of a privilege for confidential communications, refutes the contention that protection of candid interchange among executive officials and aides is indispensable to good government.[112] During this period, innumerable investigations of the executive branch were conducted, the records of which disclose no evidence that "confidentiality" was ever claimed as a basis for nondisclosure of documents.[113]

The argument premised upon the vital role of the privilege is further discounted because claims of executive privilege were seldom asserted during the administrations of President Kennedy and Johnson, with no appreciable detriment to the administration of government.[114] Moreover, statements made by former President Nixon, in reference to his refusal to release the Watergate tapes, suggest that information is sometimes withheld to avoid embarrassment or conceal matters that should be made public and not to encourage free discussion among policy-makers.[115]

Finally, consideration should be given to litigants' needs for executive documents. Chief Justice John Marshall, writing for the court in *United States v. Burr*,[116] considered it a "very serious thing" to deprive an individual of the power to make use of a governmental document containing information material to his case.[117] The enforcement of substantial rights may depend upon a party's access to information that the government claims to be confidential and, thus, privileged. This fact makes the use of a balancing approach imperative in cases in which an executive seeks to prevent discovery of governmental documents.

These competing considerations have been reconciled by the law governing disclosure of governmental communications. Confidential information enjoys only a qualified privilege that may be defeated in cases in which the litigants' needs for governmental documents outweigh the desirability of nondisclosure as a means

110. Congress is required to keep and publish journals, except "such Parts as may in their Judgment require Secrecy." U.S. CONST. art. I, § 5, cl. 3. The Maryland Constitution, on the other hand, does not authorize secrecy in either the legislative or the executive branch. The General Assembly is required, without exception, to "keep a journal of its proceedings, and cause the same to be published." MD. CONST. art. III, § 22.

111. R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 206 (1974).

112. *Id.* at 44-45.

113. *Id.*

114. *Id.* at 252.

115. *See* Berger, *supra* note 14, at 27 n.132.

116. 25 F. Cas. 187 (C.C.D. Va. 1807) (No. 14,694).

117. *Id.* at 192.

of promoting governmental efficiency.[118] In addition to resolving these competing interests, other policies are also served by current application of the executive privilege.

Establishment of a presumptive privilege whenever a formal claim is made by an executive indicates a policy of initial deference to that separate-but-equal branch of government.[119] This same policy is evidenced by the *in camera* procedure; a court protects governmental material as much as possible, by "separat[ing] the parts which are relevant and otherwise admissible, and return[ing] the rest under seal"[120] to the executive.

The doctrine of executive privilege also evidences a great respect for the independent operation of the judicial system. President Nixon's assertion in *United States v. Nixon*[121] that his decision was dispositive of whether documents were privileged was rejected by the Supreme Court on the basis that it is the province and duty of the courts "to say what the law is."[122] In addition, the rejection of an absolute executive privilege is premised upon the theory that to uphold such a privilege would severely impair the role of the courts under article III of the United States Constitution[123] to determine the facts necessary to resolve the question of the admissibility of evidence.[124] As the *Nixon* Court reasoned, privileges are "exceptions to the demand for every man's evidence [and] are not lightly created nor expansively construed for they are in derogation of the search for truth."[125]

Maryland's recognition of the doctrine of executive privilege in *Hamilton v. Verdow*[126] reflects an equitable harmonization of these considerations. Additionally, the court of appeals' conclusion that an *in camera* inspection would be permissible under the circumstances of the case is sound under the doctrine. The report sought by the plaintiff in *Hamilton* contained only factual data and related recommendations. No military or state secrets were at

---

118. Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 728 (D.C. Cir. 1974); Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 324 (D.D.C. 1966), *aff'd sub nom.* V.E.B. Carl Zeiss, Jena v. Clark, 384 F.2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967).
119. *See, e.g.*, Nixon v. Sirica, 487 F.2d 700, 717 (D.C. Cir. 1973).
120. Cox, *supra* note 6, at 1408 (citing United States v. Nixon, 418 U.S. 683, 714-16 (1974)).
121. 418 U.S. 683 (1974).
122. *Id.* at 705 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).
123. United States v. Nixon, 418 U.S. 683, 707 (1974).
124. *See* 8 J. WIGMORE, EVIDENCE § 2379 (J. McNaughton rev. 1961).
125. 418 U.S. 683, 710 (1974).
126. 287 Md. 544, 414 A.2d 914 (1980).

stake,[127] although the court indicated that these would be protected from even an *in camera* inspection, should the issue ever arise.[128] The court's decision is consistent with the great weight of authority in holding that a preliminary demonstration that the information sought is purely factual or otherwise outside the scope of the privilege will overcome the presumptive privilege and legitimatize an *in camera* examination by the court.[129]

VI. CONCLUSION

In *Hamilton v. Verdow,*[130] the Court of Appeals of Maryland adopted the doctrine of executive privilege. An *in camera* inspection of a confidential report prepared for the Governor by a staff member was held to be proper under the newly recognized doctrine, because the plaintiff had made a sufficient preliminary showing that the report may not be privileged as it was basically of a factual nature. This holding represents the most equitable resolution of the conflicting claims asserted by the plaintiff and the Governor. It protects a litigant's evidentiary need for certain information contained in government documents, and it simultaneously promotes appropriate respect for the free and candid exchange of information among government advisors, which facilitates the decision-making process of the executive branch of government.

JoAnn Ellinghaus-Jones

---

127. Such matters would not often arise in state cases. Zagel, *The State Secrets Privilege,* 50 MINN. L. REV. 875 (1966); *see* Hamilton v. Verdow, 287 Md. 544, 563 n.5, 414 A.2d 914, 925 n.5 (1980).

128. 287 Md. 544, 563, 414 A.2d 914, 924-25 (1980).

129. *See, e.g.,* Committee for Nuclear Responsibility, Inc. v Seaborg, 463 F.2d 788, 792 (D.C. Cir. 1971).

130. 287 Md. 544, 414 A.2d 914 (1980).