Executive Privilege

The right of the president of the United States to withhold information from Congress or the courts.

Historically, presidents have claimed the right of executive privilege when they have information they want to keep confidential, either because it would jeopardize national security or because disclosure would be contrary to the interests of the Executive Branch.

The Constitution does not specifically enumerate the president's right to executive privilege; rather, the concept has evolved over the years as presidents have claimed it. As the courts have ruled on these claims, their decisions have refined the notion of executive privilege and have clarified the instances in which it can be invoked. The courts have ruled that it is implicit in the constitutional Separation of Powers, which assigns discrete powers and rights to the legislative, executive, and judicial branches of government. In reality, however, the three branches enjoy not separate but shared powers, and thus are occasionally in conflict. When the president's wish to keep certain information confidential causes such a conflict, the president might claim the right of executive privilege.

The term *executive privilege* emerged in the 1950s, but presidents since George Washington have claimed the right to withhold information from Congress and the courts. The issue first arose in 1792, when a congressional committee requested information from Washington regarding a disastrous expedition of General Arthur St. Clair against American Indian tribes along the Ohio River, which resulted in the loss of an entire division of the U.S. Army. Washington, concerned about how to respond to this request and about the legal precedent his actions would set, called a cabinet meeting. Although no official record was kept of the proceedings, Thomas Jefferson described the deliberations in his diary. The participants, Jefferson wrote, concluded that Congress had the right to request information from the president and that the president "ought to communicate such papers as the public good would permit & ought to refuse those the disclosure of which would injure the public." In the case at hand, they agreed that "there was not a paper which might not be properly produced," so Washington provided all the documents that Congress had requested. This event, though notable as the first recorded deliberation concerning executive privilege, did not carry precedential value until after 1957, when Jefferson's notes were discovered. In 1958, Attorney General William P. Rogers cited Jefferson's remarks as precedent for an absolute presidential privilege. Legal scholar Raoul Berger declaimed Rogers's arguments as "at best self serving assertions by one of the claimants in a constitutional boundary dispute." Instead, Berger argued, Washington's willingness to turn over the requested documents shows his recognition of Congress's right to such materials.

In subsequent incidents, however, Washington and his successors did choose to withhold requested information from Congress, citing various reasons. In 1794, for example, the Senate requested from Washington the correspondence of Gouverneur Morris, the U.S. ambassador to France, who was suspected of aiding the French aristocrats against the revolutionaries despite the United States' official stance of neutrality. Washington provided the letters, but he censored them first, acting on the advice of officials such as Attorney General William Bradford, who said that the president should "communicate to the Senate such parts of the said correspondence as upon

examination he shall deem safe and proper to disclose: withholding all such, as any circumstances, may render improper to be communicated." The following year, Washington refused to provide the House with information relating to Ambassador John Jay's negotiation of a treaty with Great Britain, arguing that the House had no constitutional right to participate in the treaty making process and so had no right to request materials associated with it.

The judiciary, like Congress, can also request information from the president. When Aaron Burr was indicted on charges of Treason, for example, both Congress and the judiciary asked President Jefferson to provide correspondence from General James Wilkinson, a Burr confidant and aide. Jefferson argued that it was wrong to ask him to provide private letters, written to him, containing confidential information. Chief Justice John Marshall, presiding over the Burr trial, *United States v. Burr*, 25 Fed. Cas. 187, 191 (C.C. Va. 1807), did not ultimately force Jefferson to turn over each requested document, but he did maintain the right of the judiciary to request such information from the president, writing that "the President of the United States may be … required to produce any paper in his possession" and adding that "[t]he occasion for demanding it ought, in such a case, [to] be very strong, and to be fully shown to the court before its production could be insisted on."

As the power of the president's office grew over the nineteenth and twentieth centuries, presidents attempted more frequently to use executive privilege to shield themselves and their subordinate officials from investigation. In 1836, for example, a House committee requested personnel rosters and salary information from President Andrew Jackson. He declined to fulfill the request, stating that he would "repudiate all attempts to invade the just rights of Executive Departments, and of the individuals composing the same." Similarly, in 1909, President Theodore Roosevelt took personal possession of Federal Trade Commission documents requested by Congress, claiming Immunity for the materials since they were under presidential control. In both cases, Congress failed to pursue its investigations.

During the presidency of DWIGHT D. EISENHOWER, executive privilege underwent three major developments. First, in the area of national security, the Supreme Court ruled in *United States v. Reynolds*, 345 U.S. 1, 73 S. Ct. 528, 97 L. Ed. 727 (1953), that the military may refuse to divulge requested information when national security is at stake. While warning that such requests could not be simply left to the "caprice of executive officers," the Court maintained that there would be times when "there is a reasonable danger that the compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged."

The second development in the use of executive privilege became known as the candid interchange doctrine. In an attempt to shield the executive branch from the bullying investigative tactics of Senator JOSEPH R. MCCARTHY, President Eisenhower directed that executive privilege be applied to all communications and conversations between executive branch employees; without the assurance of confidentiality, he claimed, they could not be completely candid. This doctrine marked a tremendous change in the scope of executive privilege, extending it from the president and the president's top advisers to the myriad offices and agencies that make up the executive branch.

Finally, the third development in executive privilege resulted from *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939, 141 Ct. Cl. 38 (Cl. Ct. 1958). In this case, Kaiser sought documents containing executive branch employees' opinions regarding the sale of aluminum manufacturing plants. The court ruled that it was ultimately up to the courts "to determine executive privilege in litigation," adding that "the privilege for intradepartmental advice would very rarely have the importance of diplomacy or security." The opinion in this case contains the first recorded use of the phrase *executive privilege.*

The use of executive privilege decreased during the 1960s, but it became the crux of the constitutional crisis created by Watergate, a series of scandals involving President RICHARD M. NIXON and his associates. When Congress sought to obtain White House tapes containing Oval Office conversations, Nixon refused to turn them over, claiming that the tapes were subject to absolute executive privilege and asserting that the judiciary had no authority to order their production or inspection. Eventually the dispute reached the Supreme Court, where, in UNITED STATES V. NIXON, 418 U.S. 683, 94 S. Ct. 3090, 41L. Ed. 2d 1039 (1974), the Court ruled against Nixon. While acknowledging the importance of the president's claims, the Court stated that "neither the doctrine of separation of powers, nor the need for confidentiality of high level communications, without more, can sustain an absolute, unqualified presidential privilege of immunity from judicial process under all circumstances." In its opinion, therefore, the Court explicitly recognized the president's authority to assert executive privilege but ruled that the use of executive privilege is limited, not absolute. Furthermore, the Court maintained that the judiciary, not the president, has the power to determine the applicability of executive privilege. While the Court affirmed the use of executive privilege, therefore, it determined that in this case, the right of the U.S. people to full disclosure outweighed the president's right to secrecy. This momentous decision soon led to Nixon's resignation from the office of president.

Executive branch officials under presidents William Jefferson Clinton and GEORGE W. BUSH have sought to limit dissemination of information through executive privilege, though these efforts were often unsuccessful. When Clinton was investigated by Independent Counsel KENNETH W. STARR about whether Clinton lied in a deposition regarding an affair with a former White House intern, Starr subpoenaed Secret Service agents to testify before a Grand Jury about Clinton's actions. Several agents refused to testify. This forced Starr to file a motion in the U.S. District Court for the District of Columbia to compel their testimony. The agents asserted they were protected by a "protective function" privilege that allowed them to conceal what they observe in the protection of the president.

U.S. District Judge Norma Holloway Johnson declined to recognize the privilege, holding that there was no support for it in the U.S. Constitution, federal statute, or the Common Law. Johnson cited federal statutes that require the president to accept Secret Service protection and require executive branch personnel, which includes Secret Service agents, to report criminal activity that they observe. The absence of a protective function privilege in those statutes suggested that Congress did not intend to create one. She rejected the argument that without the privilege, presidents would push away their protectors.

Officials in the Bush administration have also been criticized for failing to release information in an investigation of an energy taskforce led by Vice President Richard B. Cheney. A federal judge

ordered the release of the information under the Freedom of Information Act, but administrators stalled when delivering the information. Although the case against Cheney's energy group was later dismissed, several liberal and conservative interest groups have criticized the Bush administration for its policy of controlling information. In October 2001, Attorney General John David Ashcroft issued a memorandum to government agencies suggesting that the U.S. JUSTICE DEPARTMENT would defend an agency if it chose to withhold certain records requested through the FOIA.