Candid Interchange and the Public Good
The Development of Modern Executive Privilege, 1954-1974

Adam Gillenwater

Miller Center of Public Affairs

Professor George H. Gilliam

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Defeats by two men named St. Clair provide the bookends for the historical development of executive privilege, one of the most controversial powers consistently claimed by America's chief executives. The first was handed to a man named St. Clair early in the administration of George Washington, while the second occurred in the final stages of the administration of Richard Nixon.

On November 4, 1791, U. S. Army forces under the command of Major General Arthur St. Clair suffered a humiliating defeat near the headwaters of the Wabash River in the Northwest Territory. Dubbed "St. Clair's Massacre," the battle resulted in the deaths of over 600 soldiers and stands as the greatest defeat ever suffered by the U.S. Army at the hands of Native Americans. Calls for an official committee of inquiry began almost immediately and an outraged Congress demanded St. Clair's resignation. A committee of the House of Representatives formed in March 1792 asked the two year-old presidency to surrender documents pertaining to its investigation. On April 2, President Washington formally summoned all of his department heads to a meeting to discuss how to handle the investigation. This April 2nd gathering is among the first recorded meetings of the President and the entire Cabinet and likely ranks as the first emergency Cabinet meeting in United States history.[1] At issue was the separation of powers – to what extent could the executive branch, in the interest of the public good, withhold documents from the legislative branch? The precedent for executive privilege in American governance goes back to this meeting of the earliest Cabinet.

This meeting planted the seeds for the concept of executive privilege in American governance. Secretary of State Thomas Jefferson recorded the consensus reached by Washington, Alexander Hamilton, Henry Knox, Edmund Randolph, and himself:

[1] Mary Louise. Hinsdale, *A History of the President's Cabinet*, vol. 3 (Ann Arbor: University of Michigan, 1911), 13.

> "We had all considered, and were of one mind 1. That the House was an inquest & therefore might institute inquiries. 2. That they might call for papers generally. 3. That the Executive ought to communicate such papers as the public good would permit & ought to refuse those the disclosure of which would injure the public."[2]

Although Washington turned over all of the requested documents to the House and forced St. Clair to resign his command, the idea of executive privilege survived, on the strength, some say, of the flimsy precedent of Jefferson's notes.[3] Only four years later, Washington again invoked executive privilege to withhold correspondence pertaining to the Jay Treaty from the House. A decade later, President Jefferson famously clashed with Chief Justice John Marshall to protect his own correspondence when Aaron Burr was tried for treason in 1807. Marshall issued a judicial order under the Sixth Amendment that due process gave the court the right to subpoena such documents despite Jefferson's claim of executive privilege.[4] Jefferson, the first articulate proponent of executive privilege, acquiesced.

While the contours of executive privilege were clearly at issue in the early American Republic, and were even coincident with the birth of the Cabinet, the power has become extremely important for the modern presidency. Since Eisenhower, modern presidents have invoked executive privilege exponentially more than Washington and Jefferson would have ever dreamed necessary. Executive privilege was most notably contested in the 1974 Supreme Court decision, *United States v. Nixon*, in which the doctrine received its first judicial legitimization while our second St. Clair went down in defeat. The Nixon era stands as the well-known apex of

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[2] Thomas Jefferson, *The Jeffersonian Cyclopedia: A Comprehensive Collection of the Views of Thomas Jefferson*, ed. John P. Foley (New York: Funk & Wagnalls, 1900), 179.
[3] Raoul Berger, *Executive Privilege: A Constitutional Myth* (Cambridge, MA: Harvard University Press, 1974), 167-168.
[4] Mark J. Rozell, *Executive Privilege: Presidential Power, Secrecy, and Accountability*, 3rd ed. (Lawrence: University Press of Kansas, 2010), 27.

executive privilege, but the modern history of this unique presidential power began twenty years earlier in the Army-McCarthy hearings during the Eisenhower Administration. This paper will explore the development of executive privilege in the modern presidency during this crucial period from 1954-1974.

Executive Privilege & the Burgeoning American Republic

Before the Eisenhower Administration, executive privilege was invoked often, but sporadically. Political scientist and executive privilege scholar, Mark J. Rozell, lists singular cases in which executive privilege is invoked by 24 of the 33 presidents who precede Eisenhower.[5] The cases are too numerous to even adumbrate, much less to describe in detail. Although suggesting that the practice was widespread, it is important to note that most of these presidencies only withheld information from Congress on one occasion. However, there exist some noteworthy exceptions. In his often stormy relationship with Congress, Andrew Jackson insisted that the executive privilege applied to diplomatic correspondence with the Argentines and the British, Cabinet meetings that discussed removing money from the Bank of the United States, and the removal of a U. S. Surveyor General.[6] Jackson's 1835 dispute over the dismissal of Surveyor General Gideon Fitz has been called the first "unequivocal position of an exclusive privilege."[7] The tempestuous Jackson remarked:

> "…I have yet to learn under what constitutional authority that branch of the Legislature has a right to require of me an account of any communication, either verbally or in writing, made to the heads of Departments acting as a Cabinet

[5] Rozell, *Executive Privilege: Presidential Power, Secrecy, and Accountability*, 30-40.
[6] Rozell, *Executive Privilege: Presidential Power, Secrecy, and Accountability*, 35.
[7] Adam Carlyle Breckenridge, *The Executive Privilege: Presidential Control Over Information* (Lincoln: University of Nebraska Press, 1974), 37.

> council. As well might I be required to detail to the Senate the free and private conversations I have held with those officers on any subject relating to their duties and my own."[8]

John Tyler and James K. Polk also frequently clashed with the Senate and sought to preserve diplomatic secrecy.[9] During the Civil War, Abraham Lincoln withheld sensitive military information from the House and Senate on multiple occasions, citing "the public interest."[10] In the other presidential administrations, it is remarkable that executive privilege is only invoked one or two times.

The underpinnings for executive privilege evolved during this period, as nurtured by Presidents Polk and Lincoln. Polk is the first president to offer arguments that transcend "publicly idiosyncratic reasons for the denial of information requests"[11] by grounding the justifications for his executive privilege claims in explicit constitutional terms. Polk sought to defend the confidentiality of diplomatic negotiations with Mexico that had taken place during the preceding Tyler Administration. The argument for executive privilege, which Tyler made on the basis of public interest, was transplanted by Polk into the constitutional soil. Polk asserted that it was his "constitutional right" and "solemn duty" [12] to decline to comply with the House's request, even citing Washington's March 30, 1796 memorandum to the House on the Jay Treaty as historical precedent for his opinion. According to Heidi Kitrosser, a separation of powers specialist at the University of Minnesota Law School, these constitutional arguments are the

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[8] James D. Richardson, ed., *A Compilation of the Messages and Papers of the Presidents*, vol. 2 (New York: Bureau of National Literature, 1897), Google Books, 1255.
[9] Breckenridge, *The Executive Privilege: Presidential Control Over Information*, 39-44.
[10] Rozell, *Executive Privilege: Presidential Power, Secrecy, and Accountability*, 37.
[11] Robert M. Pallitto and William G. Weaver, *Presidential Secrecy and the Law* (Baltimore: Johns Hopkins University Press, 2007), 63.
[12] James D. Richardson, comp., *A Compilation of the Messages and Papers of the Presidents*, vol. 2 (New York: Bureau of National Literature, 1897), 2417, in Mark J. Rozell, *Executive Privilege: Presidential Power, Secrecy, and Accountability*, 3rd ed. (Lawrence: University Press of Kansas, 2010), 37.

"seeds of a more radical executive privilege" because they provided the chief executive with a means by which to avoid defending each claim in an open and "fact-specific manner."[13] In 1863, during the midst of the Civil War, Lincoln refused to disclose evidence to Congress regarding the 1861 arrest of General Charles P. Stone. Stone had been arrested after his strategic blunder at Ball's Bluff, a battle where Lincoln's personal friend, Senator Edward Baker, was killed. For the first time, the House's request for information was phrased in a manner (provided it was in Lincoln's judgment compatible with the public interest) that acknowledged the president's power to withhold such information.[14]

Invocations of executive privilege were established practice in the nineteenth and early twentieth centuries. As Rozell notes, the willingness of successive presidents to claim executive privilege created "a strong presumption of validity"[15] with regard to this unique presidential power. By their presumptive behavior, these strong executives gave legal justifications that were accepted, albeit begrudgingly, by different Congresses. Still, the practice of withholding information from Congress did not blossom until the Eisenhower Administration. Modern executive privilege was used far more frequently, with a wider range of applicable justifications, during his presidency than in any previous period.

A Working Definition

Before beginning a discussion about the exercise of executive privilege during the Eisenhower and Nixon administrations, it is important to provide a working definition for this unique presidential power. The term itself was first coined during the Eisenhower administration

[13] Heidi Kitrosser, *Supremely Opaque? Accountability, Transparency, and Presidential Supremacy*, University of Minnesota Law School, Legal Studies Research Paper Series, 2010, 16.
[14] Pallitto & Weaver, *Presidential Secrecy and the Law*, 64.
[15] Rozell, *Executive Privilege: Presidential Power, Secrecy, and Accountability*, 29.

in the Supreme Court case *Kaiser Aluminum & Chemical Corp. v. United States*. At its most basic level, executive privilege refers to a president's "right to withhold information from either Congress or the judicial branch"[16] and it has been applied in a variety of circumstances. Most modern claims of executive privilege "center around national security and foreign policy concerns."[17] As this paper will show, over time and not without controversy, the scope and application of executive privilege has evolved to cover a wider range of executive branch communications – often increasingly removed from the president's desk. In addition to national security concerns, presidents from Eisenhower onward have justified their use of executive privilege as vital to protecting both the "public interest" and the ability of executive branch employees "to be completely candid in advising with each other on official matters."[18] While some executive privilege disputes are settled through the judicial process, the vast majority of congressional requests for information are complied with, and if contested, resolved though negotiations between the president and Congress, which are subject to "the politics of the moment and practical considerations."[19]

The legal validity of executive privilege is not simply of historical interest; it is a question that still animates scholarly debate and more importantly, impacts how the executive and legislative branches interact. As with most claims of presidential secrecy, the refusal of presidents throughout American history to provide requested information to Congress or the courts has provoked a spirited debate over the constitutionality and necessity of executive privilege. Opponents of this presidential power point to the fact that "the Constitution nowhere

[16] *Executive Privilege*, 107th Cong. (2001) (testimony of Mark J. Rozell).
[17] Rozell, *Executive Privilege: Presidential Power, Secrecy, and Accountability*, 9.
[18] "Concerning the Testimony of Defense Department Officials Before the Senate Committee on Government Operations," Dwight D. Eisenhower to Charles E. Wilson, May 17, 1954, Dwight D. Eisenhower Presidential Library and Museum, Abilene, Kansas.
[19] Louis Fisher, *The Politics of Executive Privilege* (Durham, NC: Carolina Academic Press, 2004), xv.

speaks of executive privilege"[20] and some prominent scholars have gone so far as to call executive privilege "a myth."[21] These same critics also cite the Framers' fear of a tyrannical chief executive, democratic ideals of openness and accountability, and the potential for this power to be abused for political purposes, as additional arguments against the use of executive privilege.[22] However, many political scientists and legal scholars have come to the defense of executive privilege, highlighting the constitutional principle of separation of powers and historical precedent as justifications for its continued use. Supporters of executive privilege believe that not only is this power implied by Article II of the Constitution, but also that it is "essential if there is to be any real constitutional and political independence for the executive."[23]

The aim of this paper is not to take sides in this debate, but to examine in detail how the use of executive privilege in the modern context was impacted by developments that occurred from 1954-1974. Debates over executive privilege are no longer necessarily bitter confrontations between Congress and the president; they do not involve prerogatives as extensive as Lincoln's, nor do they seek to articulate what exactly the power entails, as Polk did. Modern arguments over executive privilege refer to a well-established, albeit controversial practice. The turn towards a modern conception of executive privilege began in 1954.

Widening the Scope: Eisenhower & the Development of the Candid Interchange Doctrine

When Dwight D. Eisenhower became president, he was no stranger to leadership. The wide latitude given to his command during the Second World War had accustomed him to the need for competent administrators in all parts of the newly burgeoning bureaucracies of the

[20] P. M. Kamath, *Executive Privilege Versus Democratic Accountability: The Special Assistant to the President for National Security Affairs, 1961-1969* (Atlantic Highlands, NJ: Humanities Press, 1982), 255.
[21] Berger, *Executive Privilege: A Constitutional Myth*, 1.
[22] Rozell, *Executive Privilege: Presidential Power, Secrecy, and Accountability*, 8-19.
[23] Breckenridge, *The Executive Privilege: Presidential Control Over Information*, 3.

federal government. Eisenhower realized that "this idea that all wisdom is in the President, that's baloney. I don't believe this government was set up to be operated by anyone acting alone."[24] Having spent years in frequent contact with the Executive Office of the White House, first as Supreme Allied Commander and later as Chief of Staff of the Army, Eisenhower had developed a strong aversion to what he perceived as the "lack of system under which it operated."[25] Upon his ascension to the presidency in 1953, Eisenhower was resolved that with his "training in problems involving organization" it was "inconceivable" to him that "the work of the White House could not be better systematized"[26] than it had been in prior administrations. A highly formalized staff structure, which had its origins in the president's military experience and also perhaps a the diligent application of the recommendations of the Brownlow and Hoover Commissions, was at the center of Eisenhower's vision for the organizational management of the modern presidency.

As a military officer, Eisenhower recounted that one of his first goals upon becoming president was to appoint his preeminent assistant, L. Sherman Adams, White House Chief of Staff. With his power to control access to Eisenhower, Sherman Adams was considered one of the most powerful men in Washington in the 1950s.[27] Perhaps Adams' most important job, and the one which won him the ire of members of his own Republican party, was to bar intra-party rivals from accessing the president.[28] The most infamously hated of Eisenhower's rivals was Senator Joseph McCarthy. The last prominent hearings of the McCarthy era were the Army-McCarthy Hearings of 1954. Nationally televised, the hearings were a major event and a high-

[24] Stephen E. Ambrose, *Eisenhower: Soldier and President* (New York: Simon and Schuster, 1990), 288.
[25] Dwight D. Eisenhower, *Mandate For Change: 1953-1956* (New York: DoubleDay, 1963), 87.
[26] Ibid.
[27] " "The Administration: O.K., S.A.," *Time*, January 9, 1956, pg. #, accessed February 12, 2011, http://www.time.com/time/magazine/article/0,9171,866694,00.html.
[28] Ambrose, *Eisenhower: Soldier and President*, 364.

water mark of McCarthyism. After army counsel John Adams mentioned his meetings with top White House aides before McCarthy's subcommittee, the senator subpoenaed various Defense Department officials to testify regarding the actions of the army's loyalty and security board. Eisenhower's response to this Senate investigation would define the scope of modern executive privilege.

On May 17th, President Eisenhower took a firm stand on executive privilege in a letter to Defense Secretary Charles Wilson. Eisenhower instructed Defense Department personnel not to testify, writing Wilson, "you will instruct employees of your Department that in all of their appearances before the Subcommittee... they are not to testify to any such conversations or communications or to produce any such documents or reproductions."[29] Eisenhower extended executive privilege to all members of the executive branch during the hearings. The May 17th letter was the broadest extension of executive privilege to that point and it marked the beginning of the modern practice of executive privilege. A livid Senator McCarthy calling Eisenhower's order "an iron curtain," retorted, "This is the first time I've ever seen the executive branch of the government take the Fifth Amendment."[30] McCarthy then called for constitutional disobedience to Eisenhower's orders. Furious, Eisenhower named McCarthy's statement "the most disloyal act we have ever had by anyone in the government of the United States".[31] Unwilling to degrade the office of president by getting into what he saw as a "pissing contest" with McCarthy[32],

[29] "Concerning the Testimony of Defense Department Officials Before the Senate Committee on Government Operations," Dwight D. Eisenhower to Charles E. Wilson, May 17, 1954, Dwight D. Eisenhower Presidential Library and Museum, Abilene, Kansas.
[30] Rozell, *Executive Privilege: Presidential Power, Secrecy, and Accountability*, 41.
[31] Arthur Herman, *Joseph McCarthy: Reexamining the Life and Legacy of America's Most Hated Senator* (New York: Free Press, 2000), 283.
[32] Sidney M. Milkis and Michael Nelson, *The American Presidency: Origins and Development, 1776-2007*, 5th ed. (Washington, D.C.: CQ Press, 2008), 313.

Eisenhower reinforced his instructions with a threat, "Any man who testifies as to the advice he gave me won't be working for me that night."[33]

The May 17 letter not only widened the scope of executive privilege to a new level, but also offered a novel argument to justify what some historians called "the boldest assertion of executive privilege in the history of the republic."[34] Executive privilege was justified, Eisenhower wrote:[35]

> "Because it is essential to efficient and effective administration that employees of the Executive Branch be in a position to be completely candid in advising each other on official matters, and because it is not in the public interest that any of their conversations or communications, or any documents or reproductions, concerning such advice be disclosed."

Kitrosser identifies this "candor rationale" as a new justification for executive privilege. The candor rationale means "it is basically up to the president to say, 'Well, you can't get that information because it would inhibit people from speaking candidly.'"[36] For the first time, the *candid interchange doctrine* was expounded as a core principle behind executive privilege. Eisenhower took a stand, in Rozell's words, upon "the notion that the president has the right to candid internal deliberations and that private advisers should not have to fear public disclosure of every utterance."[37] Eisenhower was the first to justify executive privilege primarily upon the candid interchange doctrine, and made the boldest statement tying the doctrine to the public interest. Under this doctrine, the public interest criterion that had long been used suddenly

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[33] Fred I. Greenstein, *The Hidden-Hand Presidency: Eisenhower as Leader* (New York: Basic Books, 1982), 205.
[34] Chester J. Pach and Elmo Richardson, *The Presidency of Dwight D. Eisenhower.* (Lawrence, Kan.: University Press of Kansas, 1991), 70-71.
[35] "Concerning the Testimony of Defense Department Officials Before the Senate Committee on Government Operations," Dwight D. Eisenhower to Charles E. Wilson, May 17, 1954, Dwight D. Eisenhower Presidential Library and Museum, Abilene, Kansas.
[36] Heidi Kitrosser, "Questions on Executive Privilege," telephone interview by author, February 18, 2010.
[37] Mark J. Rozell, "Questions on Executive Privilege," telephone interview by author, February 3, 2011.

became all-encompassing. It is in the public interest to have the executive branch function efficiently and effectively: any limitation on candor within the executive branch would impinge upon the ability of the executive branch to so function.

Many years later, Eisenhower's attorney general at the time, Herbert Brownell, called the candor rationale "a new twist to a problem that had existed since George Washington's day."[38] There is an evident partial departure from historical precedent in the May 17 letter and the candor rationale. Rozell argues that Eisenhower "effectively declared that executive privilege belonged to the entire executive branch... [when] over the course of history, the practice had been to confine its use to the president and high-level White House officials when directed by the president."[39] In past arguments for executive privilege, the public interest in knowing particular information was determinable on a case-by-case basis that depended on certain facts; i.e. *Would publicizing diplomatic secrets harm the public interest?* In Eisenhower's argument, any threat to candid internal debate within the executive would debilitate the presidency and harm the public interest. The candor rationale was based not upon facts about particular cases where executive privilege would be appropriate, but shifted the justification to a fact about the normal, everyday workings of government institutions. As political scientist P. M. Karmath explains, "what is new in the claim to withhold information by the executive... [is] making their claim to be an *inherent* aspect of government."[40] Executive privilege was suddenly an institutionalized rule rather than a case-specific exception.

The exclusivity of the candor rationale was unprecedented because it strictly attends to the internal "goods" of the deliberative process within the executive branch, *not* state secrets. As

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[38] Herbert Brownell and John P. Burke, *Advising Ike: The Memoirs of Attorney General Herbert Brownell* (Lawrence: University Press of Kansas, 1993), 257.
[39] Mark J. Rozell, ""The Law": Executive Privilege: Definition and Standards of Application," *Presidential Studies Quarterly* 29, no. 4 (December 1999): 923, accessed January 8, 2011, http://www.jstor.org/stable/27552057.
[40] Kamath, *Executive Privilege versus Democratic Accountability*, 259.

University of Virginia law professor Saikrishna Prakash notes, generally presidents prior to Eisenhower had justified executive privilege claims on the basis of state secrets and the public interest and had "nothing to do with…my aides will tell me less if I give you this information."[41] On certain occasions, Harry Truman and Franklin D. Roosevelt had prohibited the testimony of certain Cabinet members before Congress.[42] In 1943, Roosevelt instructed his budget director not to comply with a subpoena to testify; in 1944 he withheld information pertaining to the Departments of War and the Navy. Truman filed an executive order in 1948 to maintain the confidentiality of loyalty files when the House Un-American Activities Committee made a request similar to McCarthy's.[43] In 1940, Roosevelt was the first to issue executive orders granting government officials the right to classify military information. After the Second World War, Truman extended classification authority to nonmilitary national security agencies.[44] Classified information was based upon case-specific needs. Neither Roosevelt nor Truman's invocations of executive privilege approached the precedent for the modern presidency set by Eisenhower. Roosevelt and Truman justified themselves with case-specific arguments about the separation of powers. In keeping with historical precedent, the executive branch:

> "...has an undeniably legitimate interest, at least under some circumstances, in preserving the confidentiality of internal communications in order to perform its duties under Article II. Revealing specifications for, or locations of strategic military weapons could hazard national security. Disclosing diplomatic secrets

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[41] Saikrishna Prakash, "Questions on Executive Privilege," telephone interview by author, February 11, 2011.
[42] Rozell, *"The Law": Executive Privilege: Definition and Standards of Application*, 922.
[43] Rozell, *Executive Privilege: Presidential Power, Secrecy, and Accountability*, 39.
[44] "Keeping Secrets: Congress, the Courts, and National Security Information," *Harvard Law Review* 103, no. 4 (February 1990): 907, accessed February 22, 2011, http://www.jstor.org/stable/1341480.

> might endanger negotiations vitally affecting national interests. Confidentiality also may be important to effective consultation."[45]

Cox's first two examples of case-specific arguments that might be protected under Article II look more like Polk's than Eisenhower's. In the 1953 Supreme Court case *United States v. Reynolds*, a year before the Army-McCarthy Hearings, the court made its "first explicit recognition" of the legitimacy of state secrets.[46] While *Reynolds* was argued during the Eisenhower Administration, the case really represented the culmination of earlier arguments for executive privileges that circulated in earlier administrations. In contrast to these, Eisenhower's candor rationale institutionalized the practice of executive privilege and set the bar far higher for getting access to information generated by the executive branch.

Eisenhower's expansion of executive privilege in response to McCarthyism showed the strength of his hidden-hand approach to government and also demonstrated the increasing power of the presidency in general. Eisenhower was famous for never attacking Senator McCarthy publicly. Stephen Ambrose calls the "denial of access to executive personnel and records... [Eisenhower's] sole significant action against McCarthy."[47] For Eisenhower, refusing to upbraid the outspoken bully, McCarthy, preserved the dignity of the presidency. According to executive privilege scholar Louis Fisher, it was a "pretty complicated tactic hoping the Senate would take care of its own problem and at the same time protecting the executive branch... Eisenhower was much more assertive [than his predecessors] but in a subtle way."[48] But far from refusing to take up the responsibilities of the presidency, as some of his critics claimed, Eisenhower helped to

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[45] Archibald Cox, "Executive Privilege," *University of Pennsylvania Law Review* 122, no. 6 (June 1974): 1386, accessed August 4, 2010, http://www.jstor.org/stable/3311504.
[46] Kitrosser, *"Supremely Opaque? Accountability, Transparency, and Presidential Supremacy,"* 20.
[47] Ambrose, *Eisenhower: Soldier and President*, 349.
[48] Louis Fisher, "Questions on Executive Privilege," telephone interview by author, February 9, 2011.

invent the modern presidency with its consolidated powers to become "the leading instrument for popular rule."[49]

The May 17th letter and its expansion of executive privilege had not so much to do with Eisenhower's proactive presidency; for Emily Berman it has more to do with the "unreasonable intrusiveness" of McCarthyism.[50] Taking a stand here was the only response open to Eisenhower to push back against McCarthy, at least the only one consistent with his vision of the presidency. The move was quintessential Eisenhower, coming from a man who was "a product of the organizational revolution that had transformed American life in the twentieth century, a member of the new managerial class that led the nation's great public and private bureaucracies."[51] Without publicly chastising the excesses of McCarthyism, Eisenhower charged Charles Wilson and Herbert Brownell with protecting the White House. Under a president who put a high premium on organizational efficiency, the candid interchange doctrine became a cover-all defense of the modern executive branch. Eisenhower's tactic worked perfectly; McCarthy was censured by the Senate in 1954 and ceased to be a force in national politics. Modern executive privilege, however, has had more enduring impact on American politics.

The Institutionalization of the Candor Rationale

The Army-McCarthy Hearings provided the most important and dramatic precedent for the new scope of executive privilege, but they were not the last one. Overall, the Eisenhower Administration claimed executive privilege more than forty times, more than any other president

[49] Milkis & Nelson, *The American Presidency: Origins and Development, 1776-2007*, 315.
[50] Emily Berman, "Questions on Executive Privilege," telephone interview by author, February 4, 2011.
[51] Robert Griffith, "Dwight D. Eisenhower and the Corporate Commonwealth," *The American Historical Review* 87, no. 1 (February 1982): 88, accessed March 15, 2011, http://www.jstor.org/stable/1863309.

and close to the number all of his predecessors' invocations combined.[52] Two of the more brazen invocations surrounded the 1955 Dixon-Yates Contract and the 1957 Gaither Report.

In 1955, Democrats attacked the Eisenhower Administration over a contract between the Atomic Energy Commission and two private energy companies represented by Edgar Dixon and Eugene Yates. Senator Estes Kefauver chaired a Senate Judiciary Committee panel to investigate an apparent administration cover-up and the allegedly controversial role of Adolphe H. Wenzell, who was both a consultant to the Bureau of the Budget and an adviser to both Dixon and Yates. Eisenhower "raised eyebrows" by withholding information that "included staff memoranda that represented conflicting points of view"[53] about the Dixon-Yates contract. Once again, Eisenhower cited the candid interchange doctrine, lecturing the senators, "If any commander is going to get the free, unprejudiced opinion of his subordinates... he had better protect what they have to say to him on a confidential basis."[54] Fortunately for Eisenhower, the city of Memphis decided to construct its own power plant, which allowed the president to cancel the contract with Dixon-Yates in July 1955, just as the scandal reached a high point. Executive privilege had been justified according to the candor rationale once again.

In the immediate aftermath of the Soviets' November 1957 launch of *Sputnik II*, an unflattering top-secret report about the nation's nuclear capabilities was issued by the President's Science Advisory Council, "Deterrance and Survival in the Nuclear Age." Better known as the Gaither report after its principal author H. Rowan Gaither, Jr., it coincided with widespread fears of America's security in the event of a Soviet ICBM attack. President Eisenhower was forced to go on television twice in the weeks that followed, but critical Democrats noted that

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[52] Mark J. Rozell, "The Looming Battle Over Executive Privilege" (lecture, Miller Center Forum, Miller Center of Public Affairs, Charlottesville, October 8, 2007), http://millercenter.org/scripps/archive/forum/detail/3835.
[53] Pach, Jr. & Richardson, *The Presidency of Dwight D. Eisenhower*, 108.
[54] Ibid.

"Eisenhower's reassuring words were contradicted by the apocalyptic rhetoric of the Gaither Report... the Gaither Report concluded that the United States stood at the edge of doom."[55] Gaither recommended a $10 billion defense budget increase and a $25 billion, five-year program to build fallout shelters. Eisenhower, however, objected to the panel's recommendations. Senate Majority Leader Lyndon B. Johnson called for the document to be released to Congress. Intent on saving himself political embarrassment, Eisenhower refused, again claiming executive privilege and Johnson backed down.

The term "executive privilege" made its appearance in the following year, in *Kaiser Aluminum & Chemical Co. v. United States* (1958). In this case before the United States Court of Claims, the judiciary finally weighed in on the conflict over executive privilege. Retired Supreme Court Justice Stanley Forman Reed had been specially assigned to hear the case, which involved a breach of contract action by a private company against the federal government regarding the post-World War Two sale of aluminum plants by the government. Reed, linking the concept of executive privilege with other evidentiary privileges, such as the attorney-client privilege, declared that "the power must lie in the courts to determine *executive privilege* in litigation" and observing, "the privilege for intra-departmental advice would very rarely have the importance of diplomacy or security."[56] In *Kaiser Aluminum*, Reed argued that executive staff members' opinions regarding the sale of aluminum plants could be subject to subpoena by the courts, but that the company in question had not made a sufficient showing to justify such action. *Kaiser Aluminum* pushed back against the notion that the president enjoyed absolute executive privilege, but also recognized that the candor rationale had legitimacy in other contexts. So while

[55] Ibid, 172.
[56] *Kaiser Aluminum & Chemical Co. v. United States* (January 15, 1958) (LexisNexis, Dist. file), 157 F. Supp. 939, 946.

the judiciary would assert itself as the final arbiter of the scope of executive privilege, executive privilege itself gained judicial legitimacy.

Congress tried to push back against the administration at the end of Eisenhower's term in 1959 in a struggle over the Mutual Security Act, but to no avail. When the Mutual Security Act was up for renewal in 1959, Congress passed an amendment stipulating a cutoff of funds for the International Cooperation Agency if the agency did not cooperate with congressional investigations. Eisenhower regarded this action to be "an unconstitutional encroachment on his prerogative"[57] and ordered his Treasury Secretary Robert B. Anderson to ignore it. In a letter to Comptroller General Joseph Cambell, Eisenhower explained the candid interchange doctrine one last time:

> "Employees of the Executive Branch [must] be in a position to be fully candid in advising with each other on official matters... such disclosure has therefore been forbidden in the past, as contrary to the national interest... Since the disclosure of the reports requested by you would not be compatible with the national interest, I have forbidden that they be furnished pursuant to your request."[58]

Herbert Brownell's successor, Attorney General William P. Rogers, advised his boss that this strong defense of executive privilege was Eisenhower's "constitutional duty."[59] Eisenhower left office without budging on the candid interchange doctrine, leaving a widened scope of executive privilege to Presidents Kennedy and Johnson.

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[57] Berger, *Executive Privilege: A Constitutional Myth*, 239.
[58] "Responce to a Request for an Evaluation Report on the International Cooperation Administration's Programs in Iran and Thailand," Dwight D. Eisenhower to Joseph Campbell, December 15, 1959, Dwight D. Eisenhower Presidential Library and Museum, Abilene, Kansas.
[59] "Regarding the Constitutionality of Section 113 of H.R. 8385," William P. Rodgers to Dwight D. Eisenhower, September 1, 1959, Dwight D. Eisenhower Presidential Library and Museum, Abilene, Kansas.

Although Kennedy and Johnson had been irritated as senators by Eisenhower's expansion of executive privilege, both reaffirmed the candid interchange doctrine. Clearly marking a difference from Eisenhower's approach, Kennedy made public statements to the effect that executive privilege would have to be balanced with the needs of the public for information.[60] Kennedy only claimed executive privilege twice: once to order General Maxwell Taylor not to testify before a Congressional committee and, again to protect Robert McNamara's subordinates from an investigation into the expurgation of bellicose rhetoric in military leaders' speeches.[61]

Kennedy was insistent that *he alone,* as president, could claim executive privilege. On the second occasion, Kennedy's reasoning sounds very much like candid interchange. He told McNamara, "it would not be possible for you to maintain an orderly Department and receive the candid advice…of your subordinates, if they, instead of you and your senior associates, are to be individually answerable to the Congress, as well as to you, for their internal acts and advice."[62] Kennedy felt strongly that diplomatic secrecy meant executive branch deliberations would have to increase their secrecy at every stage of the process of foreign-policymaking, a standard that Johnson would follow.[63] Despite his opposition to the widespread invocation of executive privilege in the Eisenhower years, Kennedy's private correspondence reveals the attractiveness of the candor rationale. It may not have been apparent, but the rationale that subtended modern expanded executive privilege had already been adopted by America's chief executives.

President Johnson would claim to follow Kennedy's policy in theory, but in practice he would allow his subordinates to claim executive privilege. Neither Johnson nor Kennedy

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[60] Rozell, *Executive Privilege: Presidential Power, Secrecy, and Accountability*, 42.
[61] Rozell, *Executive Privilege: Presidential Power, Secrecy, and Accountability*, 42. Arthur M. Schlesinger claims he only invokes it "once", but is contradicted by Rozell. Arthur M. Schlesinger, *The Imperial Presidency* (Boston: Houghton Mifflin, 1973), 171.
[62] Schlesinger, *The Imperial Presidency*, 171.
[63] Kamath, *Executive Privilege versus Democratic Accountability*, 259.

approached Eisenhower's extensive use of executive privilege, Rozell concludes, but both "clearly accepted the validity of this presidential power."[64] In the aftermath of the Gulf of Tonkin incident, two members of the Johnson Administration, Treasury Undersecretary Joseph W. Barr and Associate Special Counsel to the President DeVier Pierson, both claimed executive privilege on the basis of their role in the intra-executive deliberative process, not to protect diplomatic or military secrets.[65] The candor rationale widened the scope of who could claim executive privilege, and why.

Nixon, Watergate, & the Defeat of "Absolute Executive Privilege"

A young congressman from California recognized that executive privilege was undergoing an alarming development *even before* the Eisenhower years. In 1948, when President Truman withheld the findings of civil service loyalty investigations from Congress, Representative Richard Nixon, who was launching a national career as a vigilant anti-communist at the same time as McCarthy, stated:

> "The point has been made that the President... has issued an order that none of this information can be released and that, therefore, the Congress has no right to question the judgment of the President. I say that the proposition cannot stand from a constitutional standpoint."[66]

This was not only the immature political opinion of a young Nixon in the legislature; campaigning for president, Nixon made the same plea for "open government." Moreover, early in his presidency, in 1969, he advised the chairman of the House Subcommittee on Government

[64] Rozell, *Executive Privilege: Presidential Power, Secrecy, and Accountability*, 43.
[65] Ibid.
[66] 94 Cong. Rec. 4783 (1948).

Information, John E. Moss, that "the scope of executive privilege must be narrowly construed."[67] The policy of his administration, Nixon announced in a 1969 memorandum to the heads of executive branch departments, was "to comply to the fullest extent possible with Congressional requests for information."[68] When Nixon was asked to pledge to follow the stated policy of Kennedy to allow only the president, and never his staffers, to invoke executive privilege,[69] the new president eagerly complied. In particular, the young Representative Nixon had worried that executive privilege could be invoked arbitrarily in the case of a scandal involving the president like Teapot Dome.[70] Undoubtedly these are among the most ironic words spoken in the history of executive privilege.

Before Watergate, Nixon used executive privilege three times. He directed Attorney General John N. Mitchell to withhold FBI reports from a congressional committee in 1970, told Secretary of State Rogers to invoke the privilege regarding military assistance programs in 1971, and prevented a White House adviser from testifying about the ITT scandal when Richard Kleindienst was nominated for attorney general in 1972.[71] Of these, the first two did not deviate in any way from the practices established by his predecessors, although the invocation of executive privilege at the Kleindienst hearing foreshadows the abuse of executive privilege that the country would see in Watergate.[72]

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[67] Quoted in Berger, *Executive Privilege: A Constitutional Myth*, 253.
[68] Congressional Quarterly, *Historic Documents of 1973* (Washington, D.C.: CQ Press, 1974), 340.
[69] Rozell, *Executive Privilege: Presidential Power, Secrecy, and Accountability*, 56.
[70] 94 Cong. Rec. 4783 (1948).
[71] Morton Rosenberg, *Presidential Claims of Executive Privilege: History, Law, Practice and Recent Developments*, CRS Report for Congress (Washington, D.C.: Congressional Research Service, 2008), 37.
[72] During Kleindienst's Senate confirmation hearings in March 1972, he was asked whether the White House had improperly pressured the Justice Department to drop it's antitrust lawsuit against the International Telephone and Telegraph Corporation. Though Kleindienst denied any improper action on the part of the White House, it was later revealed in a taped conversation that Nixon had explicitly asked Kleindiest to get the Justice Department to drop the case, which he agreed to do. On May 16, 1974, Kleindiest pleaded guilty to a misdemeanor charge in connection with his improper testimony and received a fine and a suspended sentence. An excerpt from the transcript of the incriminating conversation can be found at: Isabel Kershner and Mark Landler, "Richard G. Kleindienst, Figure in

Watergate is certainly "the most celebrated case in history of the executive privilege controversy."[73] The scandal spawned three major court cases, *Nixon v. Sirica* (1973), *Senate Select Committee on Presidential Campaign Activities v. Nixon* (1974) and finally *United States v. Nixon* (1974), which was decided by the Supreme Court. Nixon's attorney was James D. St. Clair, a prominent Boston lawyer who just two decades earlier had assisted Head Counsel for the Army, Joseph Welch, during the Army-McCarthy Hearings. *United States v. Nixon* was immediately preceded another executive privilege case, *Environmental Protection Agency v. Mink* (1973), which also came before the Supreme Court. The body of jurisprudence generated by Watergate would end the 1954-1974 era of largely unrestricted executive privilege, but the cases also confirmed some of the gains made by the Eisenhower and Nixon for the secret-keeping power of the presidency.

In the earliest Watergate case, *Nixon v. Sirica*, a panel of the Court of Appeals for the District of Columbia rejected Nixon's argument that he was absolutely immune from all investigations by the formal invocation of executive privilege. The court struck down the unlimited power of executive privilege. The D. C. court cited the compliance order Marshall issued Jefferson, the *Kaiser Aluminum* case, and the *Reynolds* case among many others to show that the presidency was subject to the judiciary. It also cited the then-recent *EPA v. Mink*, in which the Supreme Court determined that a court could order *in camera* inspections of evidence to determine if there was sufficient evidence to abrogate executive privilege. Despite striking down Nixon's absolutist arguments, the Court, leaving an important piece of Eisenhower's legacy

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Watergate Era, Dies at 76," The New York Times, February 4, 2000, section goes here, http://www.nytimes.com/2000/02/04/us/richard-g-kleindienst-figure-in-watergate-era-dies-at-76.html?pagewanted=2.

[73] Rozell, *Executive Privilege: Presidential Power, Secrecy, and Accountability*, 61.

intact, held presidential conversations were "presumptively privileged" unless proven otherwise by the branch seeking access to these documents.[74]

As Watergate spiraled out of Nixon's control, his administration erroneously believed it could fall back upon the bedrock of executive privilege, which Nixon had primarily attacked up to this point in his entire political career. On March 20th, for example, Nixon's Chief of Staff Bob Haldeman could refer to the president's "new, current executive privilege rules."[75] One of the first Nixon staffers to be subpoenaed, John W. Dean III, remembers:

> "...they always thought they could beat this on executive privilege. I think there was this belief for a long time that this magic of executive privilege would somehow prevent all this from coming out. What they didn't anticipate there was that there was also evidence of criminal behavior and that the court would pierce executive privilege for the purposes of a subpoena on a criminal matter."[76]

Candor rationale permeated the absolutist interpretation of executive privilege in the Nixon White House. Dean himself had this understanding, or so he told Nixon on February 27, 1973; "The staff can't operate if they're going to be queried on every bit of communication they had with the President."[77] Speaking to Nixon on February 14, 1973, Charles W. Colson reasoned, "the president cannot have immediate advisers and a confidential relationship unless he is assured that confidentiality can be preserved, like a law clerk with a judge... It makes a

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[74] *Nixon v. Sirica*, 159 U.S. App. D.C. 58, 487 F. 2d 700 (1973).
[75] United States, Watergate Special Prosecutor Force, Department of Justice, *Transcript of a Recording of a Meeting Between the President and H.R. Haldeman in the Oval Office, On March 20, 1973, From 6:00 to 7:10 PM*, 5, http://whitehousetapes.net/info/watergate-special-prosecutor-force-transcripts.
[76] Gerald S. Strober and Deborah H. Strober, eds., *Nixon: An Oral History of His Presidency* (New York: HarperCollins, 1994), 408.
[77] United States, Watergate Special Prosecutor Force, Department of Justice, *Transcript of a Recording of a Meeting Between the President and John Dean on February 27, 1973, From 3:55 to 4:20 PM*, 8, http://whitehousetapes.net/info/watergate-special-prosecutor-force-transcripts.

very, very good case."[78] The mistaken air of invincibility in the Nixon White House was expressed in the same language of Eisenhower's articulation of executive privilege twenty years prior, the candid interchange doctrine.

The Nixon White House mistook a twenty year-old precedent that began in the Eisenhower administration grounding executive privilege in presumptive confidentiality for a constitutional touchstone. On April 29, 1974, Nixon would defend his actions to the American people as if the candor rationale was a deep constitutional principle. In an Oval Office address to the nation addressing presidential tape recordings, Nixon firmly stated:

> "Unless a President can protect the privacy of the advice he gets, he cannot get the advice he needs…. This principle is recognized in the constitutional doctrine of executive privilege, which has been defended and maintained by every President since Washington and which has been recognized by the courts, whenever tested, as inherent in the Presidency."[79]

Speaking with John Ehrlichman, Haldeman complained that they stood upon "tradition and constitutional grounds... but to the guy sitting at home watching [NBC Nightly News anchor] John Chancellor say that the president is covering up... the widest exercise of executive privilege in American history and all that."[80] In reality, Haldeman had it backwards. Nixon's Watergate defense would ultimately rely on an exercise of absolute executive privilege, a claim that would have been scarcely comprehensible to the courts prior to the establishment of the candor rationale.

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[78] United States, Watergate Special Prosecutor Force, Department of Justice, *Transcript of a Recording of a Meeting Between the President and Charles Colson In the Oval Office on February 14, From 10:13 to 10:49 AM*, 5, http://whitehousetapes.net/info/watergate-special-prosecutor-force-transcripts.

[79] Richard M. Nixon, "Nixon Address to the Nation on Presidential Tape Recordings" (address, The White House, Washington D.C., April 29, 1974), http://millercenter.org/scripps/archive/speeches/detail/3872.

[80] United States, Watergate Special Prosecutor Force, Department of Justice, *Transcript of a Recording of a Meeting Among the President, John Dean, John Ehrlichman, H.R. Haldeman and John Mitchell on March 22, 1973, From 1:57 to 3:43 PM*, 48, http://whitehousetapes.net/info/watergate-special-prosecutor-force-transcripts.

Did Nixon opportunistically use prior arguments for executive privilege to cover-up Watergate knowing that they were false? Or did the Nixon White House, as Dean suggests and Nixon's advisers constantly tell him, actually believe they could appeal to a deep constitutional principle? The answer is unclear. According to Rozell, Nixon intentionally abused the candid interchange doctrine, but to no avail as the Supreme Court simply didn't buy Nixon's absolutist arguments.[81] After all, in 1948, Nixon was attacking Truman's absolutist idea of executive privilege. But much transpired between the presidencies of Truman and Nixon. In the meantime, Nixon had been Eisenhower's vice-president charged with engineering McCarthy's downfall.[82] Since 1954, Eisenhower's expanded notion of executive privilege – presumptive confidentiality to allow the normal operations of deliberation by the candor rationale – had never been taken head-on by the courts. It is possible in the meantime that Nixon and his advisers may have come to believe that a strong doctrine of executive privilege really did have a defensible constitutional basis. Nixon's biographer Keith W. Olson argues "Nixon believed that he would not have to surrender the tapes – no other president had been forced to disclose White House communications."[83] If the Nixon White House genuinely believed they were safeguarded by sound constitutional doctrine, this would explain why it let Watergate snowball, and why Nixon and his advisers continued to record incriminating evidence even once the trials were well underway. Kennedy and Johnson also had acknowledged the candor rationale. While Nixon

[81] Rozell, "Questions on Executive Privilege."
[82] Herman, *Joseph McCarthy: Reexamining the Life and Legacy of America's Most Hated Senator*, 417.
[83] Keith W. Olson, *Watergate: The Presidential Scandal That Shook America* (Lawrence: University Press of Kansas, 2003), 178. However, while Nixon might have believed that claiming executive privilege would allow him to beat back any attempts by Congress or the courts to access recorded White House conversations, it's clear that he had reservations about keeping such tapes around. In a conversation with Halderman on April 9, 1973, Nixon discusses his desire to dispose of certain recordings pertaining to Watergate, remarking, "what the hell…I don't want to have in the record discussions we've had in this room on Watergate." From, "Transcript of a Conversation between Richard Nixon and Bob Haldeman on 4/9/1973 Regarding Destroying the Watergate Tapes," Miller Center Presidential Recordings Program, section goes here, http://whitehousetapes.net/transcript/nixon/destroying-watergate-tapes.

admittedly remains a more complicated and troubling figure, there is at least a possibility that he was convinced as well. More cynically, he at least thought he could use it to shield evidence of malfeasance.

The argument of this paper suggests that the dramatic expansion of executive privilege from 1954 to 1974 might have simply meant that the Nixon presidency took for granted this new projection of presidential power. For all his quirks, Nixon was too savvy a political operator to knowingly provide the Watergate investigators and prosecutors with a smoking gun whose bullets were daily conversations with his aides. But Nixon was a strange character; Rick Perlstein suggests that Nixon "began seeing 1972 in apocalyptic terms: if he lost the presidency, America might end."[84] A similar psychological explanation put forward by Eli Chesen is that Nixon was "not merely a President invoking his appropriate legal powers... [but] an inwardly insecure (and now highly threatened) personality, attempting to protect itself with consoling, illusory grandiosity."[85] Perhaps some combination of these views explains Watergate. It is difficult to find decisive evidence against an account that speculates on the causal effects of Nixon's psychology in these three or four years. Suffice it to say that the common opinion about appropriate presidential powers may have been very different before *United States v. Nixon* and afterwards.

United States v. Nixon (1974) is the landmark case that ended the expansion of executive privilege, which had been initiated by Eisenhower, but that also gave judicial recognition to some of the expansions of the power. Rozell calls the result "a defeat for Nixon and a victory for

[84] Rick Perlstein, *Nixonland: The Rise of a President and the Fracturing of America* (New York: Scribner, 2008), 538.
[85] Eli S. Chesen, *President Nixon's Psychiatric Profile: A Psychodynamic-Genetic Interpretation* (New York: P. H. Wyden, 1973), 181.

executive privilege."[86] The eight justices (then Associate Justice Rehnquist recused himself) labored for more than two weeks before coming to a unanimous decision. Philip Lacovara, counsel to the Watergate special prosecutor Leon Jaworski, remembers that there was a worry that Nixon "would not necessarily be intimidated by a six-to-three decision."[87] St. Clair had a tall order as well, admitting that the President wanted him to argue "that he is as powerful a monarch as Louis XIV, only four years at a time, and is not subject to the processes of any court in the land except the court of impeachment."[88] The case was preceded by the October 1973 "Saturday Night Massacre," in which Nixon ordered Attorney General Elliot Richardson to fire special prosecutor Archibald Cox, prompting Richardson and Deputy Attorney General William Ruckelshaus to resign. Because of the tense political atmosphere, the Supreme Court was under intense political pressure to deliver a moderate ruling.

The opinion of the court, delivered by Warren E. Burger, allowed for "presumptive privilege," but added it was not unlimited and was legally overridden by the evidence provided by the special prosecutor. In striking down the notion of an absolute executive privilege, Burger wrote:

> "Neither the doctrine of separation of powers nor the generalized need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances."[89]

The Supreme Court limited executive privilege but gave the highest judicial sanction to the presumptive confidentiality, the candid interchange doctrine was called "fundamental to the

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[86] Rozell, *Executive Privilege: Presidential Power, Secrecy, and Accountability*, 72.
[87] Stober & Stober, *Nixon: An Oral History of His Presidency*, 456.
[88] Michael G. Trachtman, *The Supremes' Greatest Hits: The 34 Supreme Court Cases That Most Directly Affect Your Life* (New York: Sterling Publishing Company, 2007), 131.
[89] *United States v. Nixon*, 418 U.S. 683 (1974).

operation of Government."[90] Still, the blow against Nixon was such that after his resignation, his successors were far less likely to invoke executive privilege as freely as his immediate predecessors. While the defeat of Arthur St. Clair on the Wabash River in 1791 began the ill-defined practice of executive privilege by the American presidency, the defeat of the case presented by James St. Clair over 180 years later gave the definitive judicial definition of executive privilege, its extents and limitations.

A Tarnished Doctrine Endures: Executive Privilege in the Wake of Watergate

In 1975, then Assistant Attorney General Antonin Scalia told a Senate subcommittee that, "I realize that anyone saying a few kind words about executive privilege after the events of the last few years is in a position somewhat akin to the man preaching the virtues of water after the Johnstown flood, or the utility of fire after the burning of Chicago."[91] Understood to be a core concept of presidential power before Nixon, Watergate not only gave executive privilege a bad name,[92] but in the decades following Nixon's resignation, "executive privilege and Watergate were almost seen as interchangeable."[93] As noted in the Miller Center's Separation of Power's Report, Watergate "substantially enhanced the moral status of Congressional investigations,"[94] making Nixon's successors more acutely aware of the potential political repercussions of initiating an executive privilege showdown with Congress. An internal memorandum in the Ford White House explained that the "present mood" would necessitate a shift away from "traditional

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[90] Ibid.
[91] *Executive Privilege: Secrecy in Government - Hearings Before the Subcommittee on Intergovernmental Relations of the Senate Commitee on Government Operations*, 94th Cong. (1975) (testimony of Antonin Scalia, Assistant Attorney General, Office of Legal Counsel).
[92] Rozell, "Questions on Executive Privilege."
[93] Berman, "Questions on Executive Privilege."
[94] The Miller Center of Public Affairs, *The Separation of Powers: The Roles of Independent Counsels, Inspectors General, Executive Privilege and Executive Orders*, report (Charlottesville, VA: Miller Center, December 7, 1998), 6.

practice."[95] In October 1974, after pardoning his predecessor, President Ford became the first and only sitting president to testify before a congressional inquiry, which was investigating the pardon.

However, the shift really never took place and despite its newfound unpopularity, executive privilege has persisted in practice. Mark Rozell argues that Nixon "made it politically difficult, almost impossible for his immediate successors to even utter those words." But it was only a cosmetic change, as presidents in the post-Watergate era used "different phrases [and] different justifications for exercising what had been known as executive privilege."[96] As executive privilege scholar Heidi Kitrosser notes, Nixon's abuse of executive privilege during Watergate did not really decrease presidential secrecy, rather "it just steered presidents away from the words." [97] More recent presidents from Clinton to Obama, have been more wiling to explicitly assert executive privilege.[98] But the legal limits of the privilege, regardless of internal administration rules, are more clearly defined. There was no hesitation on the part of the courts, for instance, to force Clinton to back down from dubious citations of executive privilege in the 1998 Monica Lewinsky affair.[99] The brazen reliance on executive privilege that was possible until *United States v. Nixon* did not return after 1974, suggesting that with regards to executive privilege "the modern presidents have had to walk in the shadow of Richard Nixon."[100]

Did the decision in *United States v. Nixon* finally solve the fundamental dilemma of balancing the secrecy that is necessary for good government with the political accountability

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[95] Brian D. Smith, "A Proposal to Codify Executive Privilege," *George Washington Law Review* 70, no. 3 (June 2002): 578.
[96] Rozell, "Questions on Executive Privilege."
[97] Kitrosser, "Questions on Executive Privilege."
[98] Rozell, *Executive Privilege: Presidential Power, Secrecy, and Accountability*, 208.
[99] Rosenberg, *Presidential Claims of Executive Privilege*, 38., Rozell, *Executive Privilege: Presidential Power, Secrecy, and Accountability*, 141-144.
[100] Mark J. Rozell, "Executive Privilege and the Modern Presidents: In Nixon's Shadow," *Minnesota Law Review* 83, no. 5 (May 1999): 1070.

necessary for democracy? The simple answer is no – argument over the scope of executive privilege continues. But the basic position taken by Eisenhower in 1954, claiming presumptive confidentiality for deliberations within the executive, has been accepted as American law. The current debate about executive privilege centers on how far presumptive confidentiality ought to extend. But the major issues were created and resolved in those first twenty years of modern executive privilege. In December 2009, two reality television aspirants gate-crashed a state dinner to shake President Obama's hand, slipping by Secret Service personnel. The House Homeland Security Committee invited Obama's Social Secretary, Desirée Rogers, to testify before the committee. In response, White House spokesman Nick Shapiro sent an e-mail explaining that, "The job of White House staff must be to provide confidential advice... having to testify before Congress... the general rule has long been that White House staff do not appear before Congress."[101] Rogers was not subpoenaed, only invited to attend; she faced no legal repercussions. It appears that the candor rationale underlying executive privilege persists, but it has certainly has seen more spirited contestation in its history.

[101] Michael Scherer, "No Testifying for Social Secretary Desiree Rogers?," *TIME*, December 3, 2009, section goes here, accessed April 02, 2011, http://www.time.com/time/politics/article/0,8599,1945192,00.html.

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