

A Brief History of Executive Privilege in the United States

The term “executive privilege” is not mentioned in the Constitution. However, it has long been recognized that, in order for the President to get honest advice from his staff, they must be able to speak freely and in confidence. Therefore, according to the doctrine, the President must have the power to keep information secret.

Directions: Read the following examples of past Presidents’ efforts to keep certain information confidential. Discuss each situation with your group and answer the question below.

WAS THE PRESIDENT’S EFFORT TO KEEP THE INFORMATION SECRET CONSISTENT WITH HIS CONSTITUTIONAL DUTY TO “TAKE CARE THAT THE LAWS BE FAITHFULLY EXECUTED”?

	YES	NO
1. George Washington (1796) —Washington refused to provide the House of Representatives with information it requested regarding Jay’s Treaty. Washington’s reasoning was that only the Senate has a constitutional role in the treaty process. Washington provided the documents to the Senate but not the House.	_____	_____
2. Thomas Jefferson (1807) —When former Vice President Aaron Burr was tried for treason, he asked the court to require Jefferson to submit private letters that Burr believed would help his case. Jefferson at first refused, saying that release of the private letters would threaten public safety. Chief Justice John Marshall ruled that the Sixth Amendment requires that criminal defendants have access to such evidence, and that it was the Court’s job to determine whether there was any public danger involved. Jefferson complied with Marshall’s order.	_____	_____
3. Dwight D. Eisenhower (1954) —During hearings about the existence of Communists in the military, Eisenhower refused to turn over documents requested by a Senate committee and instructed all members of the Defense Department to refuse to discuss confidential matters with Sen. Joseph McCarthy’s committee. Eisenhower stated, “Any man who testifies as to the advice he gave me won’t be working for me that night.” The principle was first called “executive privilege” during Eisenhower’s term and was expanded in scope to apply to not only the President and his top advisers, but also anyone in the offices that make up the executive branch.	_____	_____

4. Barack Obama (2009)—A Virginia couple with hopes to win roles on a reality show were able to enter a state dinner at the White House even though they were not on the guest list. The two party crashers shook hands with the President and were photographed with him and the Vice President. Congress called the White House Social Secretary to testify about security processes. Obama claimed the Secretary would not testify and that she did not have to under the doctrine of executive privilege.

5. Richard Nixon

Year:

Information requested:

Nixon’s response:

Other Presidents who invoked the principle of executive privilege include Jackson, Taft, Franklin D. Roosevelt, Truman, Kennedy, Clinton, and George W. Bush.

After considering these historical situations, work with your group to compose a rule that defines in what cases the use of executive privilege is consistent with the Constitution.
