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The Confidentiality of the Presidency

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.
—President Nixon on April 29, 1974

PRESIDENT NIXON has invoked the claim of executive privilege—or occasionally "confidentiality"—increasingly from the time it became known that a secret, sound-actuated system of tape recording existed in the White House. It has become the hard core of his defense against releasing those tape recordings to the Watergate Special Prosecutor as well as to the House Judiciary Committee. In his pleadings before the American public, the President has sought on every recent occasion to implant the notion that such a constitutional doctrine in fact exists. Yet, Mr. Nixon must know that no such doctrine exists in the Constitution, and never has. With respect to impeachment in particular, his own Justice Department has had occasion to review the precedents and has reported that every past President known to have addressed the question of executive privilege in an impeachment proceeding has concluded that none exists. Moreover, when Mr. Nixon links his refusal to yield those tape recordings and documents to the stand of "every President since Washington," he does special violence to history.

Let us begin, as Mr. Nixon does, with George Washington, for the first President was, in fact, the first to make it clear that no privilege exists for a President when impeachment is at issue. Washington and seven subsequent Presidents have had occasion to speak on the subject. Each has articulated a position 180 degrees in opposition to the position Mr. Nixon seeks to maintain—while citing no instance in which any past President has supported the excessive claim he makes. To hear Mr. Nixon, and then to review the historical record compiled by the Justice Department and other authorities, is to compound the question of why Mr. Nixon finds it so necessary, at this late stage in the Watergate affair, to make claims and assertions that are so demonstrably false. Indeed, since this claim stands at the very heart of Mr. Nixon's resistance to access to evidence in his possession, the use of it merely aggravates the grave doubts that already exist about almost every other aspect of his defense.

It is interesting to note who the Presidents are that have had occasion to address the issue of privilege and impeachment. In addition to Washington, they are Andrew Jackson, James K. Polk, James Buchanan, Ulysses S. Grant, Grover Cleveland, Theodore Roosevelt—and Richard M. Nixon. Mr. Washington faced the issue with respect to the controversial treaty John Jay negotiated with Great Britain. A storm of protest threatened Washington's second administration and impeachment talk was in the air. Congress demanded the documents leading up to the agreement, and Washington refused to yield them on grounds that such action would "establish a dangerous precedent." Under the House's constitutional mandate, Washington said, the only circumstance that would justify "the inspection of the papers asked for" would be that of impeachment, which the resolution [of the House] has not expressed."

Well, on the off chance that all this time Mr. Nixon had meant to say "every President *except* Washington," we turn to the others who have expressed a view. In 1835, President Jackson was called upon by a Senate resolution to produce documents that would explain his removal of Surveyor General Gideon Fitz. Jackson refused, saying "on no principle" could he be required to give such an accounting, "save only in the mode and under the forms prescribed by the Constitution," meaning the impeachment process. He went on to say that the resolution would permit a review of his actions by the Senate "when not sitting as judges on an impeachment . . ." President Polk was even more pungent. He also refused to yield up information sought by Congress—this time by the House. If the House sought his impeachment, Polk conceded, it would have the power to "penetrate into [the] most secret recesses of the Executive departments." The issue in the Polk case was how he spent federal funds in the Northeastern Boundary dispute, and this paragraph is important to the current case. In 1846, President Polk said:

> *If the House of Representatives, as the grand inquest of the nation, should at any time have reason to believe that there has been malversation in office by an improper use or application of the public money by a public officer, and should think proper to institute an inquiry into the matter, all the archives and papers of the Executive departments, public or private, would be subject to the inspection and control of a committee of their body and every facility in the power of the executive be afforded to enable them to prosecute the investigation.*

Fourteen years later, the issue arose again in the case of President Buchanan, who was called upon by the House to account for his actions in allegedly attempting illegally to influence the Congress. Buchanan said that except in the "single case [of impeachment], the Constitution has invested the House of Representatives with no power, no jurisdiction, no supremacy whatever over the President." Just 16 years after Buchanan's statement on the subject, Ulysses S. Grant took the same stand in 1876: "What the House of Representatives may require in its demand upon the Executive for information is limited to what is necessary for the proper discharge of its powers of legislation or of impeachment." President Cleveland in 1886 denied information to the Senate, some of it confidential, declaring the Senate had no right to the material "save through the judicial process of trial on impeachment . . ." Teddy Roosevelt faced the issue in 1909, when the Senate attempted to wrest some documents from Herbert Knox Smith, head of the Bureau of Corporations. Roosevelt ordered Smith to turn the documents over to him and then informed the Senate that: "The only way the Senate can get those papers now is through my impeachment."

As for Mr. Nixon himself, he addressed the question in 1970, when he was called upon to provide information with respect to Justice William O. Douglas, then the subject of an impeachment inquiry. "The power of impeachment," the President said, is "solely entrusted by the Constitution to the House of Representatives. However, the Executive Branch is clearly obligated, both by precedent and by the necessity of the House of Representatives *having all the facts before reaching its decision,* to supply relevant information to the legislative branch . . ." (Emphasis added.)

There, then, is the record of where "every President since Washington" has stood on the right of the House to be sole judge of what information is relevant to an impeachment inquiry. As has been his wont from the outset of this affair, Mr. Nixon has sought on this question to do as he has done with so much else—twist the record and distort history to suit his own needs. The courts ruled that the tapes sought by the Watergate grand jury had to be yielded, despite Mr. Nixon's claim of privilege. Mr. Nixon eventually and reluctantly complied, but only after the outcry following his dismissing Special Prosecutor Archibald Cox. The President's claim that the courts support his notion of privilege in a case where criminal conduct is suspected is no more valid than his claim that every one of his predecessors support his tattered view of presidential privilege in an impeachment inquiry.