

CRISIS IN CONFIDENCE:
THE DISINTEGRATING RELATIONSHIP BETWEEN AMERICANS
AND THEIR PRESIDENT

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APPROVED:

A solid black rectangular box redacting the signature of Dr. James R. Klonoski.

 Dr. James R. Klonoski

This work is dedicated to my little brother, Matthew Krick,
for his unconditional faith in me through all of my defeats
and successes.

TABLE OF CONTENTS

Chapter		Page
I.	INTRODUCTION.....	1
II.	THE IMPERFECT U.S. CONSTITUTION.....	6
	Executive Secrecy in the United States	
	Constitution.....	8
	Defining Executive Power.....	10
	Charles Pinckney on Executive Privilege..	11
	The Formation of the Executive Branch.....	15
III.	GEORGE WASHINGTON AT THE HELM.....	20
	The Creek Treaty.....	24
	The St. Claire Massacre.....	27
	Birth of Executive Privilege	29
IV.	TESTING THE PERIMETERS OF EXECUTIVE POWER.....	33
	Andrew Jackson.....	36
	Abraham Lincoln.....	41
	Theodore Roosevelt.....	46
	Franklin Delano Roosevelt.....	49
V.	THE COLD WAR.....	55
	Creation of the CIA.....	56
	Executive Order of 1951.....	60
	Covert Operations in Action.....	64
VI.	A CANCER GROWING ON THE PRESIDENCY.....	66
	U.S. VERSUS NIXON.....	73
	Excerpt from the Watergate Hearings.....	76
VII.	CONCLUSION.....	80
	BIBLIOGRAPHY.....	85

"...there has been this feeling that perhaps the government is lying..."

--Herbert G. Klein, Director of
Communications for the Executive
Branch, November 11, 1969.

INTRODUCTION

In 1987, the US Bicentennial Commission staged a lavish celebration of the 200th birthday of the framing of the US Constitution. The nation's capital draped itself in red, white, and blue in preparation for what was expected to be a record high influx of summer tourists coming to participate in the bicentennial ceremonies. The fireworks, music, and amplified speeches of success and democracy which resounded through the malls on Capitol Hill was designed to court patriotic tendencies and flatter American pride. But not every American who gathered in Washington D.C. in the summer of 1987 grew dizzy with pride when the Naval Academy Band trumpeted forth the tune of our national anthem. In fact, some 40,000 of the citizens who gathered in Washington D.C. during the summer of 1987 came for a reason quite the opposite of pride. They came to attend the Committee hearings of a Congressional inquiry into the involvement of the President, Vice-President, and top US military officials in a conspiracy to defraud the US Congress and the American people. And their motivating emotions were disgust, anger,

and wariness.

Quotes of citizens attending the Iran-Contra Hearings taken from CBS news reels:

MAN: "Not everybody tells the truth. Not everybody thinks that the public is entitled to know the truth. And not everybody thinks they should go by the law."

WOMAN: "But I don't think we'll ever know the truth about what really happened. I mean, I feel like there are still lies out there and things we still don't know."

MAN: "The thing that I started thinking was, this must happen all the time; this time they just got caught."¹

The distrust toward government officials expressed by these Americans is not a new problem. It is the logical reaction of an American public which has been openly lied to for the past four decades, and secretly lied to since this government's inception. It is the response of a public that has been promised the truth, "I'm confident we will- truth will become the hallmark of the Nixon administration...We feel that we will be able to eliminate any possibility of a credibility gap in this administration."², and then consciously cheated out of the truth time after time by administration after administration. Richard Nixon provided a documented example of one such betrayal of faith when he counseled John Dean and H.R. Haldeman on how to avoid

¹ Bill Moyers, The Constitution in Crisis, (Washington D.C.: Seven Locks Press, 1988), pp.16-17.

² Herbert G. Klein, Communications Director for the Executive Branch, at the Hotel Pierre in New York on Nov. 25, 1968.

perjury without telling the truth to a grand jury investigating the Watergate break-in: "You can say I don't remember. You can say I can't recall. I can't give an answer to that, that I can recall."³ But Richard Nixon is not the only American President responsible for making the phrase "honest politician" a national joke. Just as government deception was not invented by the perpetrators of the Iran-Contra Scandal, neither did it begin with the Watergate Affair.

Dwight D. Eisenhower was the first Chief Executive to publicly admit to lying when he conceded that the U-2 plane which was shot down over Russia on May 1, 1960, was in fact a U.S. spy flight and its pilot, Francis Gary Powers, a CIA agent.⁴ Eisenhower ushered us into a new era of recognized government lying with that admission, but then, Ike was not the first occupant of the oval office to violate the bond of trust between the President and his constituents either. For as Journalist David Wise reasoned in his chronological analysis of Presidential deception, The Politics of Lying:

*In a sense, the credibility problem is as old as government. Once man moved out of a primitive state, entered into forms of social organization, and chose or accepted leaders, the problem was inevitable. If politics is the pursuit and exercise of power over other human beings, truth is always likely to take a secondary role to that primary objective*⁵

The author's basic assertion here is a foregone conclusion:

³ Gerald Gold, ed., The White House Transcripts, (New York: Bantam Books, Inc., 1974), p.171.

⁴ David Wise, The Politics of Lying, (New York: Random House, 1973), p.33.

⁵ Ibid.

if a leader is given the wherewithal to deceive in order to conceal information which would otherwise jeopardize his power, he will do so. This conclusion is as rudimentary as Lord Acton's timeless warning that "Power tends to corrupt"⁶, and yet how is it that these elements of human nature were not fully accounted for when the Founding Fathers were hammering out the system of checks and balances of which our government is comprised?

This is just the first in a series of questions which demand the attention and concern of the American people. If the delicate balance of confidence between government and governed which is essential to democracy is to be achieved, popular involvement must move beyond expressions of dismay and on to investigating the complex issues which are central to the problem of executive secrecy. Why has the government of the most powerful democracy in the world found it necessary to mislead its own people? What are the limits of executive power and who possesses the authority to enforce them? What is the doctrine of executive privilege, what is the source of its legitimacy, and what restrictions are there to the scope of its application? How has the executive branch of our government evolved through history into what is now referred to as an Imperial Presidency?

⁶ "...and absolute power corrupts absolutely."--John Emerich Edward Dalberg-Acton in a letter to Bishop Mandell Creighton dated April 24, 1887.

"...When you assemble a number of men to have the advantage of their joint wisdom, you inevitably assemble with those men, all their prejudices, their passions, their errors of opinion, their local interests, and their selfish views. From such an Assembly can a perfect production be expected?..."

**--Benjamin Franklin in defense of the
US Constitution. Farrand, v.2, 641.**

THE MAKING OF AN IMPERFECT CONSTITUTION

It is common, and frequently instructive, to defer questions of constitutional ambiguity to the intent of the founding fathers. Constitutional scholars on both sides of a question will journey back through 200 years of history and attempt to analyze the psyches of the fifty-five men who attended Independence Hall in 1787. And at the end of their studies they will produce creative new interpretations for the phrases in the Constitution-- interpretations which support their side.

The search for the rights and restrictions which define the Presidency does not lend itself to this typical mode of historical examination. The final draft of the US Constitution offers no mention of executive secrecy and precious little in the way of guidelines for the executive branch as a whole. Herein lies the reason why the President's right to withhold information is so difficult to contest or substantiate.

This dilemma, however, has not hampered determined partisans such as former US Attorney General William P. Rogers. Despite the absence of convincing evidence, Attorney General Rogers boldly asserted in his 1957 Memorandum to the Senate that the executive's right to

withhold information is "firmly rooted in history and precedent."¹ Rogers assertion, though unfounded, is dangerous nonetheless. For as J.R. Wiggins observed, "Unless historians bestir themselves...the lawyers' (that is, Rogers') summary that has placed 170 years of history squarely behind the assertion of unlimited executive power to withhold information threatens to get incorporated into that collection of fixed beliefs and settled opinions that governs the conduct of affairs. History thereafter may become what the lawyers mistakenly said it was theretofore."²

So let us proceed with an examination of the product of the Federal Convention with respect to the discretionary right of the President to withhold information from Congress and the citizenry.

Within the several sections of article II of the US Constitution our founding fathers provided very little to guides us on the issue of executive secrecy. Article II, Section 3 of the US Constitution reads as follows: "The President shall from time to time give to the Legislature information of the State of the Union." Originally, the framers made it, "his duty to inform the Legislature of the Condition of the US so far as may respect his Department."³

¹ Raoul Berger, Executive Privilege: A Constitutional Myth, (Cambridge: Harvard University Press, 1974), p.164.

² J.R. Wiggins, "Lawyers as Judges of History," 75 Mass. Hist. Soc. Proc. 84, 104 (1963).

³ Max Farrand, The Records of the Federal Convention of 1787, (New Haven: Yale University Press, 1937), v.2, 158.

The Framers did not revise the language of this precept with the intent of diluting its force or meaning. Rather the language revision represents the goal of the Committee of Detail to use "simple and precise language, and general propositions"⁴, in the final draft of the Constitution.

It is enlightening, however, to view the more explicit (initial) version of the clause because it specifically (rather than generally) defines the obligation which it imposes on the executive branch. The President *must* inform the legislature regarding matters within the Executive Department. Nowhere in the preliminary or final drafts of the Constitution is there any mention of a qualification of any kind to this duty of the President. The executive is not given the privilege to exercise his own discretion in deciding what information to provide or when to provide it. His duty is not satisfied by an annual "State of the Union" address.

This omission of privilege is magnified by its juxtaposition with the second provision of Article II, Sec.3, which expressly states that the executive does have the right to exercise his discretion in recommending measures to the legislature: "and recommend to their consideration such measures as he shall judge necessary and expedient." Within the same breath, the Founders obliged the President with a duty to inform Congress, and conferred

⁴ 2 Farrand 137. Committee of Detail, June 19- July 23, 1787.

on him the prerogative to lobby Congress subject to his own judgment. If the Founders had intended to qualify the executive's duty to inform by making it also subject to his own discretion, it is reasonable to conclude that such an objective would have been articulated within the confines of this sentence.

More ambiguously, Article 2, Sect. 1 of the U.S. Constitution also confers "the executive power" on the President of the United States. This very vaguely articulated grant of power has been perceived by some Presidents as limitless, justifying their assumption of all kinds of powers and privileges not specifically delegated to them-- including the privilege to withhold information from Congress. But a closer look at the Founder's conception of executive power will disclose its meager scope.

In 1783, Thomas Jefferson of Virginia explained the meaning of the grant of "executive power", which had been introduced to the Convention within the Virginia Plan: "By Executive powers, we mean no reference to those powers exercised under our former government by the Crown as of its prerogative...We give to them these powers only, which are necessary to execute the laws."⁵ To assume a broader interpretation of the "executive power" is to defy the original intent of those who authored the phrase. Said Edmund Randolph in the Virginia Ratification Convention, the powers of government "are enumerated. Is it not, then,

5 Berger, 52.

fairly deducible, that it had no power but what is expressly given it?-- for if its powers were to be general, an enumeration would be needless."⁶

Not only is there no discussion of a discretionary privilege in the final copy of the US Constitution, or within the Records of the Federal Convention (which this author has thoroughly combed), but the intent to infer such a privilege was soundly denied by one of the Constitution's principle architects in 1800.

Charles Pinckney is an historical curiosity. His name is seldom mentioned when the story of our government's conception is retold because he was denounced as a plagiarist in a posthumous rivalry with James Madison.

The controversy began in 1818, when Secretary of State John Quincy Adams, wrote to an ailing Pinckney, and requested a copy of the Pinckney Plan which had been submitted to the Convention. The copy which Pinckney sent to Adams was subsequently published in Adam's journal of the Convention. But then, sometime after Pinckney's death in 1824, Madison began complaining that Pinckney had falsified the draft which he sent to Adams. Madison insisted that Pinckney was attempting to claim recognition for ideas which had previously been accredited to him. These attacks on Pinckney's claim of authorship were continued after Madison's death by his admirers and subsequent generations

⁶ Jonathan Elliot, Debates in the Several State Conventions on the Adoption of the Federal Constitution, (Washington: J. Elliot, 1836), v.3, 464.

of scholars.⁷ But despite his erasure from historical accounts of the Convention, Pinckney's Plan is without a doubt the proposal which comes closest to resembling the Constitution as we know it today.

All told, Charles Pinckney is said to have suggested "some thirty-one or thirty-two provisions which were finally embodied in the Constitution"⁸; this was far more than any other member of the Convention. Among Pinckney's contributions was the concept of requiring the executive to furnish information to the legislature. On March 5, 1800, Pinckney was asked to the floor of the US Senate to clarify various questions regarding the language and intent of the Framers of the Constitution. During the course of the proceedings, the privileges of Congress were called into question, and to that query, Charles Pinckney gave this response:

I assert, that it was the design of the Constitution, and that not only in the spirit, but letter, warrant me in the assertion, that it never was intended to give Congress, or either branch, any but specified, and those very limited, privileges indeed. They well knew how oppressively the power of undefined privileges had been exercised in Great Britain, and were determined no such authority should ever be exercised here...Let us inquire, why the Constitution should have been so attentive to each branch of Congress, so jealous of their privileges, and have shewn so little to the President of the United States in this respect...No privilege of this kind was intended for your Executive, nor any except that which I have mentioned for your legislature.[emphasis added]"⁹

7 Collier, 90.

8 Andrew McLaughlin, The Confederation and the Constitution, (New York: Collier Books, 1962), 741.

9 3 Farrand 385.

This statement by Charles Pinckney makes it clear that the founding fathers specifically did not grant the executive with a privilege to withhold information. But, as with mischievous children, it is common knowledge that merely not condoning a behavior is rarely enough to deter it. Adults -even national leaders- resemble young delinquents in that substantial obstacles and the threat of punishment are sometimes required to deter a particularly naughty behavior. The Framers certainly must have understood this basic rule of human nature. And so one is compelled to ask: Why, in the absence of condoning executive privilege, didn't the founding fathers provide sufficient obstacles and threats to thwart its conception and abuse?.

The answer to this question is twofold. First, the formation of the executive branch of our government was one of the most bitterly disputed issues dealt with during the Summer of 1787. As a result, the Framers were hard put in reaching a definitive plan for the executive; the final design for the executive is far less detailed and objectionably incomprehensive, given the months of earnest consideration of the subject. Secondly, there is evidence which indicates that the Founders anticipated the legislature's power to impeach would be more frequently utilized than has been the case, and thus, a stronger threat against Presidential wrongdoing.

Arguments over the executive began on the morning of June 1 and continued in a vague and directionless manner through the last days of summer. The formation of the executive branch was a particularly worrisome task for the members of the Convention. Bitter in their memories was the oppression they had so recently suffered under the royal governors appointed by the British Crown to rule the thirteen colonies. These royal governors held sway over colonial politics by purchasing influence in the locally-elected legislatures. Corruption ran rampant and unguarded. The whole political experience of America, prior to the Revolution, had taught them to beware of tyrants and to instill their faith in the body of the people--the legislature.

This fear of tyranny pushed discussion toward the creation of a figurehead executive who would serve as "nothing more than an institution for carrying the will of the legislature into effect."¹⁰ In fact, for the majority of the convention, the President remained a weak puppet, elected and controlled by the legislature.

But the Framers fear of tyranny was tempered by their understanding for the inconsistencies of legislatures. Experiences such as Shay's Rebellion had taught them that legislatures could become too influenced by the tide of public sentiment. Additionally, service in their home

¹⁰ 1 Farrand 65. Roger Sherman speaking to the Committee of the Whole on June 1, 1787.

legislatures, not to mention the Convention itself, had impressed upon them how tediously lethargic the pace of group decision-making could be.

The Framers of the Constitution struggled to design an executive who could balance these deficiencies of Congress, without usurping the powers of Congress. They wanted a strong President. And they wanted a weak President.

Debates over the executive span all four volumes of Max Farrand's, Records of the Federal Convention, and voting on the subject dissolved any coalitions which had previously existed among members of the Convention. The statesmen were perplexed: "On July 17 they constructed a weak executive dominated by Congress. On the nineteenth and twentieth they created a strong executive independent of Congress. On the 24th they went back to the executive chosen by Congress."¹⁶ As the hot days of summer grew longer, their frustration and fatigue grew also. It is reflected in this brief and acerbic entry made by James McHenry of Maryland, cataloguing an entire days work in session:

Wednesday, September 5--

*The greatest part of the day was spent in desultory conversation on that part of the report respecting the mode of choosing the President--adjourned without coming to a conclusion--*¹¹

When the final draft of the Constitution was submitted to the Committee of the Whole on September 17, the obvious dilemmas had been resolved (i.e. method of election, term of

¹¹ 2 Farrand 516. Citation is the complete entry for Sept. 5, 1787.

service, composition of the office). At this session, however, several members complained that some of the less prominent but equally consequential elements of the presidential design had not been given sufficient consideration. These elements, they argued, demanded further attention and should therefore be submitted to a Second General Convention.

The men who aired these complaints were concerned that "the dangerous power structure of the Government...would end in monarchy."¹² They contested the President's absolute power to pardon. They wanted time to compose a Council of State which would advise and oversee the President's activities. They wanted time to further define the executive and to "consider what privileges ought to be allowed to the Executive."¹³ They did not view impeachment as a sufficient check on the executive branch.

Still, on these points Colonel Mason and Edmund Randolph were in the minority. The bulk of those in attendance saw submission to a Second Convention as certain nullification of the document they had worked months to create. They had enough faith in Montesquieu's concept of the separation of powers to believe it would preclude the demise which Mason foresaw. They perceived impeachment as being an enormous check on the executive branch--so much so that the overuse of impeachment was a major cause of concern

¹² 2 Farrand 632. George Mason seconding Edmund Randolph in session.

¹³ 2 Farrand 503. James Madison in session.

among the Framers.¹⁴ And they were tired.

The Convention had carried on much longer than anyone had anticipated when they assembled in mid-May. As early as August 15, members were emphatically complaining "of the tediousness of the proceedings. We grow more & more skeptical as we proceed. If we do not decide soon, we shall be unable to come to any decision."¹⁵ And this was, indeed, a worthy concern. Many of the Framers had private biases against the final draft of the Constitution; but after months of debating, postponing, and stalemate they became convinced that the Convention could not render a more finished product.

Moreover, the Framers believed that their country was in need of immediate direction, and their plan, though not perfect, could prevent disaster. Charles Pinckney articulated the general persuasion when he stated that "He was not without objections as well as others to the plan. But apprehending the danger of general confusion, and ultimate decision by the Sword, he should give the plan his support."¹⁶

And so, their sense of urgency, lack of consensus, extreme exhaustion, and an inflated conception of the force of impeachment in practice, led the majority to pass over the voice of the minority. A voice which, represented by

¹⁴ See statements of James Madison and James Wilson in session. 1 Farrand 86.

¹⁵ 2 Farrand 301. John Rutledge contesting postponement.

¹⁶ 2 Farrand 632.

the statements of Colonel George Mason, could not possibly have made a more astute estimation of the eventuality to which our executive branch was destined.

On the blank pages of the Constitution which he refused to sign, George Mason vented this prudent objection:

*The President of the United States has no Constitutional Council, a thing unknown in any safe and regular government. He will therefore be unsupported by proper information and advice, and will generally be directed by minions and favorites--or a Council of State will grow out of the principal officers of the great departments; the worst and most dangerous of all ingredients for such a Council in a free country; for they may be induced to join in any dangerous or oppressive measures, to shelter themselves, and prevent any inquiry into their own misconduct in office. The President has the unrestrained power of granting pardons for treason, which may be sometimes exercised to screen from punishment those whom he had secretly instigated to commit the crime, and thereby prevent the discovery of his own guilt.[emphasis added]*¹⁷

Mason's final warning did not go unobserved, ("...These declarations from members so respectable at the close of this important scene, give a peculiar solemnity to the present moment")¹⁸; nonetheless, the delegates forged ahead, caught up in a tidal wave of anxiety. They had debated the Constitutional Council on six occasions in Convention and it was an issue which had defied resolution. Although the majority of members viewed such a council as an essential check on the executive, they could not reach an agreement as to who should comprise the Council. Debates over this

¹⁷ 2 Farrand 638. Mason supplied copies of this in one form or another to several people, and it was finally printed in pamphlet form.

¹⁸ 2 Farrand 632.

relative detail led to perpetual postponements, which in effect killed the Council.

They were, in the main, proud of the plan which they had accomplished, and eager to implement it. Whatever fears they had regarding their design for the executive branch were allayed by their knowledge that George Washington would serve as the first subject of their experiment. Whatever inconsistencies or omissions which might emerge in their design for the executive during its practical application, would surely be resolved by the man who had ably presided over them during the past several months.

George Washington, who once said, "The confidence and affection of his fellow citizens is the most valuable and agreeable reward a citizen can achieve"¹⁹, was perhaps the best example of his own observation. He was loved by the populace, venerated by the delegates, and trusted by all. And so, with George Washington at the helm, the threat of despotism was the very least of their worries.

¹⁹ James Flexner, George Washington, (Boston: Little, Brown and Co., 1965), 176.

*"I hold the maxim no less applicable
to public than to private affairs,
that honesty is always the best policy."*

**--George Washington in his
Farewell Address, 1796**

GEORGE WASHINGTON AT THE HELM

George Washington had worked a miracle for the American people as Commander in Chief of the Revolutionary Army. He had taken a sickly, beaten, dispirited army, divided by provincial jealousies and plagued by quarreling generals,¹ and held them together to achieve a victory that few had believed possible. His defeat of Cornwallis at Yorktown in 1781 launched him into permanent residence in the heavens of American esteem.

To say that General George Washington was a saint in the eyes of Colonial America is not to overstate the case. A simple review of his personal history is, in fact, supportive of his own jocular claim that he was "bulletproof".² Having lived through debilitating rheumatism, the removal of an infected tumor from his right thigh without anesthesia, and a life-threatening bout with pneumonia, Washington continued on to the age of 68.³ This was quite a feat when only twenty-five percent of the people

¹ Douglas Southall Freeman, George Washington: Leader of the Revolution, (NY: Scribner's Sons, 1951), 143.

² Ibid.

³ J.A. Carroll & M.W. Ashworth, George Washington: First in Peace, (NY: Scribner's Sons, 1957), 629.

born in Washington's generation lived beyond the age of twenty-six.⁴ His impressive size and boundless stamina contributed to the public assessment that here was a man who could do anything.

This estimation was most particularly forwarded by his peers. One illustration of this was provided by Benjamin Franklin during a dinner honoring Washington at Versailles on March 5, 1780: "George Washington, Commander of the American Armies, who like Joshua of old, commanded the sun and the moon to stand still, and they obeyed him."

The expectations which are present in this commendation by Franklin were extended to Washington's performance as the first President of the United States. As President, Washington faced a task that few envied, and that he himself hesitated to accept, desiring instead to retire from public service and return to his beloved Mount Vernon. Instead, Washington went to New York on April 23, 1789, and with manifest embarrassment⁵, he took on the job of defining the executive office.

George Washington shied away from the title of President of the United States because--beyond the title--there was very little structure to steer its first occupant. Washington was uncomfortable with the heavy responsibility of implementing a sketchy notion of an executive which the Founders had pasted together just two weeks before the close

⁴ Collier, 54.

⁵ William Maclay, Journal of W. Maclay, ed. Edgar S. Maclay. (New York, 1890), 9.

of the Convention. He lamented the utter "lack of precedents on which to lean"⁶. Washington's grave apprehension is echoed throughout his own writings and in the journals of those closest to him. In a letter written just three days after Inauguration Day, he wrote:

I greatly apprehend that my countrymen will expect too much from me. I fear if the issue of public measures should not correspond with their sanguine expectations, they will turn the extravagant (and I may say undue) praises they are heaping upon me at this moment, into equally extravagant (though I fondly hope unmerited) censures. So much is expected, so many untoward circumstances may intervene, in such a new and critical situation, that I feel an insuperable diffidence in my own abilities.[emphasis added]

George Washington was keenly aware that his actions as the first Commander-in-Chief would shape the office of the Presidency for all of its future inhabitants ("I walk on untrodden ground. There is scarcely any part of my conduct which may not hereafter be drawn into precedent."⁸). And while some men would tremble with lust to be in a position with such powerful influence, General Washington trembled under the strain of it. After all, the opening sentence of his inaugural address began: "... no event could have filled me with greater anxiety than that of which the notification was transmitted by your order...[to fill the office of the executive]"⁹ He closed his address with a plea for guidance from the "benign parent of the human

⁶ Flexner, 192.

⁷ George Washington, Writings, ed. John C. Fitzpatrick, (Washington, D.C., 1944) v. 30, 309.

⁸ 30 Washington, 496. Letter to Catherine Graham.

⁹ 30 Washington, 291.

race".¹⁰

George Washington was charged with the mission of forging the unexplored channels of communication between his office and the legislative branch. His actions would determine the method of consultation to be used thereafter in seeking "the advice and consent of the Senate" and providing "Congress information of state of the union".

President Washington began this mission with a cooperative disposition, eager to appear before the Senate and establish active lines of communication between that body and the Chief Executive. His first opportunity to do so fell on August 7, 1790. On that occasion, Washington sought to obtain the "advice and consent" of the Senate on a treaty between the United States and the Chiefs of the Creek Indians. Unfortunately, the President had not anticipated the treatment which his proposal was to receive. After several hours of random confusion and circuitous debate, consideration of the Creek Treaty was formally postponed, resulting in Washington's indignant objection: "This defeats every purpose of my coming here!"¹¹

He returned the following Monday, with his temper sufficiently cooled to achieve the confirmation of the Creek Treaty. But this time his tone regarding executive-legislative intercommunications had changed dramatically. Whereas he had entered the Senate with a "willingness to

¹⁰ Ibid.

¹¹ Maclay, 309.

pursue a line of conduct which shall appear to be most conducive to the public good, without regard to the indulgence of my own inclination"¹², he departed the scene on August 11th, proclaiming he would "be damned if he ever went there again!"¹³

His curse still resonates some 200 years later. George Washington never consulted the Senate in person again.

The British System exemplifies that personal confrontation can be an effective mode of communication between the executive and legislative branches. In Great Britain, the Prime Minister is required to stand before Parliament and defend his/her policies for 15 minutes every Tuesday and Thursday during the "Prime Minister's Question Time". This not only provides an opportunity for structured and direct communication between the two branches of government, it also serves as a necessary accountability check on the office of the executive.

But the US Constitution does not specifically require the President to appear before Congress. Nor does the Constitution dictate (or even speak of) the manner in which the President should seek "the advice and consent of the Senate". George Washington was in an ideal and singular position to establish such a standard by regularly meeting with Congress to discuss and defend his policies. Instead, Washington's actions steered the US Presidency down a path

¹² 30 Washington, 375. Letter to James Madison.

¹³ Maclay, 310.

from which none of its subsequent occupants have deviated.

The choice not to do so was motivated by Washington's desire to avoid the tedious and time-consuming mayhem he had experienced in the Senate Chambers on August 7th. However, the disorganization of what was at that time a brand-new legislature contributed greatly to the difficulties of that first encounter. Plainly, it would have been much easier to institute meetings similar to "Question Time" after the Congress had been afforded more time to organize and mature. Unfortunately, Washington did not attempt another encounter during his administration, and those who succeeded him did not find it in their best interests to implement a provision which would, among other things, necessitate their own accountability.

Washington's first exposure to the Senate was a lesson in frustration; it served as a powerful affirmation to a decision which he had made two years earlier. The decision to circumvent the Senate. Already, Washington was discarding the overt path to attaining the approval of the Senate regarding negotiations with foreign powers, instead favoring a more informal, indeed covert, approach.

On November 27, 1788, President-elect Washington commissioned Gouverneur Morris to inquire informally whether the British were willing to lift their sanctions on American commerce. I am "Referring you to him for the state of affairs in America, I will add no more"¹⁴, wrote Washington

¹⁴ 30 Washington, 139. Letter to Thomas Jefferson.

in a letter of introduction from his desk at Mount Vernon to Thomas Jefferson in Paris.

Washington was concerned that he could not conduct negotiations freely if the Senate were given prior information as to the terms and tactics he intended to use. Biographer James Flexner reasons that Washington dreaded "being embarrassed by what seemed a public commitment, since the senators could not be counted on not to leak decisions to the newspapers."¹⁵ And so, Washington did not notify the Senate of his secret envoy to Britain. The Constitution did not explicitly require him to do so.

In this instance, Washington's actions implied a belief that the executive ought to have the prerogative about when it disclosed certain information to Congress. While experiencing the first major crisis of his Presidency, the St. Claire Incident, Washington privately maintained that some of the information possessed by the executive should be exempt from disclosure altogether.

The St. Claire Massacre was, in fact, a bitter personal disgrace to Washington and to the strategy which he had designed to contend with the Creek Indians. Washington had persuaded Congress to commission 2000 men to proceed to Kekionaga, Florida, under the leadership of Major General Arthur St. Claire. Once they arrived, they were instructed "to establish a strong and permanent military post at that place, seek the enemy, and endeavor by all possible means to

¹⁵ Flexner, 218.

strike them with great severity."¹⁶

On the evening of December 6, 1791, President Washington received a dispatch from Major General St. Claire, informing him that the expedition had stumbled into an ambush some 55 miles from their final destination. St. Clair reported a loss, in killed and wounded, of 950 men. Further reports admitted that the frightened, untrained militia had been too panicked to form ranks in, or even organize a retreat. "It was, in fact, a flight", confessed St. Claire, "The most disgraceful part of the business is that the greatest part of the men threw away their arms even after the pursuit...had ceased. I found the road strewn with them for many miles."¹⁷

Washington was outraged that St. Claire had succumbed to a surprise attack after he had worked so hard to convince Congress to fund the expedition. Congress immediately ordered an investigation into St. Claire's conduct, and the House of Representatives did not entrust Washington to conduct the inquiry. On the contrary, the House comprised its own investigative committee, and required that the documents relevant to the incident be submitted by Washington.

Formally, President Washington was very cooperative with the investigative body, producing the complete series

¹⁶ Douglas Southall Freeman, George Washington: Patriot and President, (NY: Scribner's Sons, 1954), 329. In a letter from Henry Knox to St. Claire, 9-14-1790.

¹⁷ Arthur St. Claire, Papers, ed. William H. Smith, (Cincinnati, 1882), v.2, 262-67.

of St. Claire's reports. Even those details which were most embarrassing to the Administration were submitted in full.¹⁸

Informally, however, Washington met with members of his cabinet to discuss the executive's obligation to disclose information requested by Congress. In a private meeting, documented only by the personal journals of Thomas Jefferson, Washington was the first President to express the concept which is now known as "executive privilege". In that meeting, Washington began by expressing his recognition that "1. the house was an inquest, & therefore might institute inquiries.", and thus, that "2. they might call for papers generally". Notwithstanding, he then asserted that, "3. 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."¹⁹
[emphasis added]

In the above instance, Washington's expression of executive privilege was a private one, but later in his administration, he was afforded with an opportunity to declare it publicly.

In 1795, Washington presented the Senate with a treaty which John Jay had negotiated with Great Britain to reestablish commerce between the two nations, and to compensate for the theft of American Slaves. In response to Washington's request for funds to implement the Jay Treaty,

¹⁸ 31 Washington, 15.

¹⁹ Thomas Jefferson, Writings, (NY: The Knickerbocker Press, 1904), 214.

the House of Representatives demanded to know the terms of the agreement. Washington formally refused the request stating:

It is perfectly clear to my understanding that the assent of the House of Representatives is not necessary to the validity of a treaty...It is essential to the due administration of the Government that the boundaries fixed by the Constitution between the different departments should be preserved, a just regard to the Constitution and to the duty of my office, under all the circumstances of this case, forbids a compliance with your request.²⁰

In this instance, as in every instance during which Washington was called upon to define the boundaries of executive conduct, Washington sincerely prioritized the public good. This is clearly exemplified by the forthright manner in which he relinquished papers that proved disgraceful to his Administration during the St. Claire Inquiry. Here, with regard to the Jay Treaty, it is demonstrated again.

Washington refused to divulge the terms of the treaty because the treaty did not provide just compensation for the theft which Americans had suffered at the close of the Revolutionary War. He anticipated that the omission would trigger an uproar of public sentiment against it. He also knew that the treaty did contain a fair amount of concessions on the part of the British; concessions which would put a stop to American bloodshed by dissolving Great

²⁰ George Washington, A Compilation of the Messages and Papers of the Presidents, (Washington, D.C.: U.S. Printing Office, 1896), v.1, 194.

Britain's alliance with the Creek Indians. Washington believed the treaty to be in the best interests of the American people, and that once in operation, it would grow in favor. History proved him right.

Washington developed the concept of "executive privilege" and made use of it only in those situations where he perceived it to be necessary for the public good. Many of the presidents to follow him were not as altruistic, or perhaps did not view their conduct in office to be as consequential in the pages of history. Chapters four and five will demonstrate that many of those who followed him took the privilege of which he conceived, and transformed it from a vehicle designed to protect the public interest, into a personal shield from public inspection. They stretched the meaning of "executive privilege" until it grew comprehensive enough to shelter them from investigations into theft, incompetence, bribery, and lies.

The scope of application, and the frequency of presidential claims of executive privilege, dramatically increased with the advent of the Cold War. Communism provided a sufficient percieved risk to our national security to justify the rapid growth of executive secrecy. This transformation of the doctrine of executive privilege commenced during the Truman Administration (1945-1953), but the leverage which enabled Truman and his successors to re-define executive privilege in broader terms was put into place well before the 1950's. Jackson, Lincoln, the

Roosevelts, and Wilson, did the ground-breaking for their modern counterparts by invigorating the office of the presidency and enhancing the general powers of the executive. Their contributions provide necessary context for a complete understanding of the assertions of executive privilege which followed.

"God, what a job!"

--Warren G. Harding
in W.A. White, Masks in a Pageant

TESTING THE PERIMETERS OF THE OVAL OFFICE

The Constitution of the United States, as written, provides only the barest outline of the duties and responsibilities of the President of the United States. By stating that "the Executive Power shall be vested in a President of the United States," and that "he shall take care that the laws be faithfully executed", without explicitly detailing what those executive and administrative powers and responsibilities should be, the Constitution has provoked almost two centuries of furious debate and struggle to hammer out just what those words mean, and what are the thrust and parameters of presidential power.¹ Consequently, each tenant of the Oval Office has played a part in constructing the framework which our Founders built for the executive branch.

In some instances, men have seized the Presidency with dynamism, responded to national crises with aggressive leadership, and have, as a result, left the office politically stronger than they found it. Men such as Andrew Jackson, Abe Lincoln, "Teddy" Roosevelt, and FDR have united

¹ William M. Goldsmith, The Growth of Presidential Power, (New York: Chelsea House Publishers, 1974), v.1, 11.

with events such as The Bank War, the secession of the Confederacy, the Coal Strike of 1902, and the Great Depression--collectively rattling the cage of alleged limitations circumscribing the office. Each of the aforementioned administrations, as well as several other administrations, have contributed to the progressive dilation of the parameters of presidential power.

In other instances, the men who swore the Inaugural Oath found the Presidency overwhelming and terribly burdensome: "I knew that this job would be too much for me. ...this job of being President is one that makes almost inordinate demands upon a man's time."², confided a haggard Warren G. Harding.

These men were bound to inaction by a variety of factors. Some men won office by a very narrow margin, and this made them hesitant to disrupt the status quo or to assert a bold style of leadership. Others, such as Rutherford Hayes, believed themselves to be caught in an era of political stalemate. Hayes justified his inaction reasoning that "we are in a period where old questions are settled and new ones are not yet brought forward. Moderation is the only chance."³

Still others simply lacked the charisma, personal ambition, or political courage required to initiate change.

² Arthur Tourtellot, The Presidents on the Presidency, (New York: Doubleday and Company Inc, 1964), 365.

³ Philip Dolce, Power and the Presidency, (New York: Charles Scribner's Sons, 1976), 59.

These Presidents interpreted "the Executive Power...vested in the President" to be a very limited dominion; and they respectfully abided by the restrictions which tradition placed on them.

The men who served from 1797 to 1945 each brought their own definition of "executive power" to the Presidency. Their contributions are relevant to the issue of "executive privilege", not because executive privilege was a recurring issue during these years, but because their collective expansion of executive power poured the foundation for the assertions of executive privilege which followed. This period witnessed the development of the executive branch from "an essentially passive office"⁴, into a commensurate, if not the dominant, arm of government. In the interest of brevity, this study will highlight only those administrations between 1797 and 1945 which were responsible for the most crucial contributions to the development of executive power.

The survey of high-impact presidents begins in 1829 with a man known as "Old Hickory". Andrew Jackson grabbed the reigns of national leadership with gusto and personal assurance. His gritty personality was conceived in "the humblest of circumstances, having been orphaned at 14 when the plague struck down his mother as she nursed his cousins wounded in the Revolutionary War."⁵ The courage which life

⁴ Dolce, 36.

⁵ 1 Goldsmith, 170.

demanding of Jackson during his formative years later distinguished him as the young hero of New Orleans. And so it was, in part, his military success in the War of 1812, which inspired the length of his strides into office as the seventh President of the United States.

Jackson's political chutzpah was further encouraged by his sweeping victory in the 1828 election. This was the first Presidential election in U.S. history in which presidential electors were chosen by popular vote, and, in it, Jackson carried everything except New England and three middle Atlantic states.⁶

Andrew Jackson caught the groundswell of public sentiment which had buttressed his candidacy, shrewdly converting it into the currency of political clout. He then embarked on an eight year assertion of presidential authority, effecting a bold renovation of the US Presidency, and earning the caustic nickname "King Andrew the First."⁷

Jackson approached the tasks of executive office with the self-righteousness of a self-made man. He was not obligated to Congress for his presence in office, and although he perceived himself as a man of the people, his actions and policies in office were not unduly influenced by public opinion either. Andrew Jackson did what he thought was right--whether or not Congress and the American people agreed. This propensity was [repeatedly] exemplified in the

⁶ Ibid.

⁷ Dolce, 42.

the Bank War of 1832.



KING ANDREW THE FIRST.

King Andrew the First.
Library of Congress

In January 1832, Nicholas Biddle, the President of the Bank of the United States, requested that Congress consider the Bank's application for recharter. Congress easily passed this proposal to continue with the system of nationalized banking, but was unable to command the votes necessary to override President Jackson's resolute veto. His plan was to decentralize the U.S. banking system by withdrawing all federal monies from the national bank, and depositing them in state financial institutions.

Jackson was obsessed with the bank war--so obsessed that he was willing to fight it with or without the support of Congress, the Secretary of the Treasury, or his constituency. This conviction is candidly expressed in the

opening lines of a paper which he submitted to his cabinet on in March of 1833, outlining his bank policy:

A few days ago I took the liberty of submitting to the Secretary of the Treasury... my views on this [the bank issue] and other points. I will add only this point, that if the people of the United States are so corrupt or deluded, that they will not sustain their government in taking the public money out of the hands of an institution proved by indubitable evidence to be guilty of almost every crime which a bank can commit [i.e. imposing tight money restrictions, maintaining a monopoly for private profit at the expense of a destabilized national economy], then they are prepared for the yoke of a master.⁸

Jackson did, in fact, enjoy a significant measure of public support for his banking policies, as was indicated by his re-election in 1832. The Secretary of the Treasury, however, did not concur with Jackson's banking plan, and refused to authorize the removal of government funds from the U.S. Bank. Devoid of the spirit of compromise, Jackson swiftly removed his treasurer, Louis McClane, from office. But lo and behold, the next man to assume the treasurer's chair, William J. Duane, also refused Jackson's request, and indignantly charged the President with "interfering with the independent exercise"⁹ of the Secretary of the Treasury. Not surprisingly, Duane was also unceremoniously dismissed. Jackson finally secured the pawn he was looking for in his Attorney-General, Roger Taney. Taney resigned from his legal post and obediently set into motion the banking plan which Jackson had spent eight months trying to launch. A

⁸ John Spencer Basset, ed., Correspondence of Andrew Jackson, (Washington, D.C., 1931) v.5, 42-43.

⁹ Ibid., 113.

President *does* have the power under the Constitution to appoint and to dismiss the members of his Cabinet. In exercising this legal right Andrew Jackson reduced his Secretary of the Treasury from a subordinate into a puppet.

The dismissal of Duane for his refusal to submit to Jackson's dictate met with angry opposition in Congress. On March 5, 1834, Congress passed the Clay Resolution in condemnation of the President. It read, "Resolved, that the President, in the late Executive proceedings in relation to the public revenue, has assumed upon himself authority and power not conferred by the Constitution and laws, but in derogation of both."¹⁰

This censure was eventually stricken from the Senate records at Jackson's behest, but this did not prevent the President's Congressional adversaries from voicing protests over what they perceived to be the continuous abuse of executive powers. Admittedly, "King Andrew's" actions during this period supplied plenty of volatile fuel to feed the fire.

Duane and McClane were not the only executive officers to suffer dismissal by the seventh President of the United States. When the families of his Cabinet persisted in socially ostracizing the wife of his friend and Secretary of War, John Eaton, Jackson fired the entire Cabinet!¹¹ When South Carolina refused to abide by the federal tariff laws

¹⁰ Calvin Colton, ed., The Works of Henry Clay, (New York: G.P. Putnam's Sons, 1904), v.8, 45.

¹¹ Dolce, 37.

of 1828 and 1832, claiming that as a party to the ratification of the Constitution it had a right to "nullify" laws which it judged to be against its interests, Old Hickory threatened to occupy the state with federal troops until South Carolina complied.¹² To the chagrin of Congress, Jackson practiced his constitutionally guaranteed veto more times (twelve) than all of his predecessors combined¹³, thus, amplifying the veto power "from a modest form of Constitutional review...into an effective instrument of presidential power and influence."¹⁴ Jackson also fathered the "spoils system"--the use of executive appointments in exchange for political support.

Perhaps the events which confronted Jackson between 1829 and 1837 elicited the bold choices which he made during his Presidency. Nonetheless, it seems likely that without these events, Jackson's aggressive personality and ambition would have motivated a search for these and other vehicles through which he could mold the Presidency into an office more compatible with his conception of executive power. Whichever the case, Andrew Jackson endowed the executive branch with far greater potential than he had found it. That potential was left dormant for the next twenty-five years, until a desperate President, facing grievous circumstances, induced its realization.

¹² 1 Goldsmith, 257.

¹³ Robert J. Spitzer, The Presidential Veto: Touchstone of the American Presidency, (Albany: State University of New York Press, 1988), 33.

¹⁴ Ibid., 330.

Abraham Lincoln entered office under the most extraordinary of circumstances. History did not afford him the traditional Presidential "honeymoon"-- a period during which to ease into office and orient oneself while still riding high on the post-election tide of public approval. Instead, Lincoln, a novice, was welcomed into office by a full-blown crisis. It was a job that nobody envied, and Lincoln knew it: "In God's name! if any one can do better in my place than I have done, or am endeavoring to do, let him try his hand at it, and no one will be better contented than myself."¹⁵

Unlike his predecessor, James Buchanan, Abraham Lincoln immediately took the bull by the horns, addressing the secession of the Confederate States of America in his Inaugural Speech. Lincoln believed the dissolution of the Union to be an emergency requiring powerful leadership- a type of leadership that he knew he could not provide without reaching beyond the accepted realm of executive authority. This President saw the violation of several legal precepts, and a disruption of the balance of power as necessary sacrifices in the interest of a larger priority, the immediate preservation of the Union. Lincoln conveyed this message to the American people on his first day of service:

No state, upon its own mere motion, can lawfully get out of the Union--that resolves and ordinances to that effect are legally void. I therefore consider that, in view of the Constitution and the laws, the Union is

¹⁵ Tourtellot, 353.

unbroken; and to the extent of my ability, I shall take care, as the Constitution itself expressly enjoins upon me, that the laws of the Union be faithfully executed. Doing this I deem only to be a simple duty on my part; and I shall perform it, so far as practicable, unless my rightful masters, the American people, shall withhold the requisite means, or, in some authoritative manner, direct the contrary[emphasis added].¹⁶

Lincoln tempered this pronouncement of his intention to enlarge the powers of the executive branch, reasoning that:

While the people retain their virtue, and vigilance, no administration, by any extreme of wickedness or folly, can very seriously injure the government, in the short space of four years.¹⁷

At the time of this speech, it is unlikely that even Lincoln recognized how much he would need to augment the powers of the President to address the crisis of the Civil War effectively. During the famous eighty days between April 12, 1861 and July 4, 1861, Lincoln stood alone at the helm of the Republic, and failing to call Congress into special session, he preceded to plot a bold path of action without legislative approval. Among his acts of dubious constitutionality were congressionally unauthorized expenditures of public funds¹⁸, widespread censorship and suppression of the press¹⁹, and the enlargement of the regular army by 81,000 volunteers.²⁰ But perhaps the most brazen of the steps which Abe Lincoln took was his decision to suspend the writ of habeas corpus.

¹⁶ Roy Basler, ed., The Collected Works of Abraham Lincoln, (New Jersey: Rutgers University Press, 1953), v.4, 262-271.

¹⁷ Ibid.

¹⁸ Dolce, 44.

¹⁹ John Terbel, The Presidents and the Press, (New York: Charles Scribner's Sons, 1976.), 239.

²⁰ 2 Goldsmith, 959.

The most renowned instance of arbitrary arrest during the Lincoln Administration was that of a secessionist-minded Marylander, John Merryman. Merryman was held at Fort McHenry on charges of treason. His attorneys denied this charge and prayed for a writ of habeas corpus, which was subsequently issued by Chief Justice Roger Taney. Lincoln ignored Taney's opinion and denied the writ: "...it was considered a duty to authorize the Commanding General, according to his discretion, to suspend the writ of habeas corpus, or, in other words, to arrest, and detain without resort to the ordinary processes and forms of law."²¹ At that point, Chief Justice Taney was left with little recourse other than a frustrated expression of his own impotence in office at the conclusion of his opinion: "I have exercised all the power which the constitution and the laws confer upon me, but that power has been resisted by a force too strong for me to overcome."²²

The treatment of John Merryman was typical in that he was detained for a relatively short period of time, and then released without ever going to trial. However, a fraction of those detained for disloyal activities were put to trial, and under Lincoln's sanction, they were brought before military tribunals rather than civilian courts. While Lincoln's general decision to suspend the writ of habeas

²¹ Carl Sandburg, Abraham Lincoln, (New York: Harcourt Brace and Co., 1954), 247-248.

²² Clinton Rossiter, The Supreme Court and the Commander in Chief, (New York: Cornell Univerisity Press, 1951, 23.

corpus later met with congressional approval, his right to try civilians in military courts did not.

The opinion in Ex Parte Milligan soundly denied the executive's right to ever force a civilian to stand before a military tribunal if "its courts are open to hear criminal accusations and redress grievances", regardless of the "great exigencies of government".²³ Lambdin P. Milligan was arrested under charges of conspiring to overthrow the US government, disloyal practices, and violations of the laws of war.²⁴ His trial resulted in a death sentence, handed down by a military commission from the Military District of Indiana. In this 1866 case, the US Supreme Court found that Milligan was a civilian who had "lived in Indiana for the past twenty years, and had not been a resident of any of the states in rebellion."²⁵ Therefore, as a citizen, his constitutional rights of due process necessitated a trial by the proper organs of government (in this instance the circuit court). In an opinion delivered by Justice David Davis, Milligan was immediately granted a writ of habeas corpus and set free.

Abraham Lincoln justified his dictatorial stance in the Merryman case, and his colossal expansion of executive authority by arguing that the Constitution gave him, and not Congress, the authority to act in a time of emergency. He

²³ Ex Parte Milligan (1866), 71 US Supreme Court Reports, (Newark: Lawyer's Co-Operative Publishing Co., 1884), 281-301.

²⁴ Ibid.

²⁵ Ibid.

was careful to differentiate his conduct in office from that of peacetime leaders. This distinction which Lincoln carved out for himself was dramatically underscored when his successor, Andrew Johnson, was subjected to an impeachment trial for continuing similiar policies, but after the war. "Honest Abe" had reasoned that the suspension of the writ of habeas corpus was an essential step in fighting for the survival of the Union. When Congress finally convened in July of 1863, Lincoln was adamant, demanding "are all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?"²⁶

The majority in Congress were persuaded by Lincoln's logic, or perhaps in the absence of a more promising course of action, they submitted to Lincoln's strategy. In the interest of a short and successful war, Congress removed their bridle from the Presidential jaw, ratifying all of Lincoln's previous actions.

Abraham Lincoln had the Civil War as an impetus for his expansion of executive power; Theodore Roosevelt had nothing of the kind. He was not forced by the circumstances of history to act in a major national crisis, and he did not possess the loathing despair which Jackson and Lincoln so often expressed for their duties as President. "Teddy" loved it all. He was inspired by an opportunity for power and influence, and through that inspiration he ferreted out the means and the method for expanding the reach of the

²⁶ 4 Basler, 430.

Presidential office. "No President has ever enjoyed himself as much as I have, and for the matter of that, I do not know any man of my age who has had as good a time...it is fine to feel one's hand guiding great machinery."²⁷, were his sentiments at the conclusion of his two-plus terms in office. He was a man of boundless energy.

There was a paternal bent to Roosevelt's brand of leadership. He stepped into the type of conflicts in which Presidents would not normally choose to involve themselves, and tried to mediate. In May of 1902, fifty thousand of the nation's coal mine workers went on strike, demanding an empowered union and higher wages. Roosevelt summoned both the mine owners and the United Mine Workers Union to the White House and attempted to negotiate a settlement. When his attempt failed, unlike Andrew Jackson, who immediately dispatched troops to break a strike of workers against a corporation owned by his friend John Eaton, TR backed the workers instead by threatening to send in troops to dispossess the *operators* and run the mines.²⁸

"Teddy" Roosevelt's approach to the Coal Strike of 1902 is one of many examples which demonstrate his adherence to the "stewardship theory". In this excerpt from his autobiography, TR explains his theory of stewardship and his broad interpretation of the Constitutional phrase "the executive power is vested in the President".

²⁷ Tourtellot, 361.

²⁸ Dolce, 70.

My view was that every executive officer, and above all every executive officer in high position, was a steward of the people bound...to do everything he could for the people. I declined to adopt the view that what was imperatively necessary for the Nation could not be done by the President unless he could find some specific authorization to do it. Under this interpretation of executive power I did and caused to be done many things not previously done by the President. I did not usurp power, but I did greatly broaden the use of executive power.²⁹

This concept of "stewardship" was more than an eloquent expression of Roosevelt's commitment to public service; it was also a superbly engineered two-way street between the Oval Office and the populace. Just as the American people benefited from Roosevelt's instinctive and responsive awareness to their concerns, Roosevelt benefited from the enthusiastic public approval which ensued. TR took clever advantage of this alleyway.

Roosevelt aroused popular demand for reform, and then used those popular sentiments to buttress his goals as Chief Legislator. An excellent example of Roosevelt's grass-roots politicking is found in the pure-food-and-drug legislation of 1906. Frustrated with the Congress's lethargic pace on the issue of food and drug regulation, Roosevelt threatened to publicize his own report³⁰ on the filthy conditions in Chicago's meatpacking houses.³¹ Within three months Congress had passed the Meat Inspection Act and the Pure Food and Drug Act. Roosevelt's other victories include, but

²⁹ Theodore Roosevelt, An Autobiography, (New York: Charles Scribner's Sons, 1920), 388.

³⁰ in reference to: Upton Sinclair, The Jungle (1906) (Urbana: University of Illinois Press, 1988).

³¹ Dolce, 72.

are not limited to, the dissolution of the Northern Securities Corporation (albeit a limited victory since most of the stock remained in the hands of original shareholders)³², establishment of the Medicine Bow Forest Reserve³³, and acquiring American control over Panama.

Clearly, Theodore Roosevelt took the Presidency as it was and turned it inside out. Nary a tactic in the Presidential bag of tricks was left idle. Roosevelt was an innovator who brilliantly developed those power-wielding techniques on which modern Presidents rely. His "news leaking" technique, his practice of drafting and submitting his own bills to Congress, his ingratiating treatment of the press corps--from these and other revolutionary contributions, Theodore Roosevelt shaped the contemporary Presidency.

The use of the executive office as a "bully pulpit" through which to persuade and mobilize the people originated with the first Roosevelt and was continued, although not nearly as effusively, by Woodrow Wilson. Yet it was 1933 before history and chance identified the greatest master of the art of public appeal. "Franklin Delano Roosevelt went beyond his two brilliant predecessors in establishing a human bond between himself and the people...he used this relationship more effectively than any inhabitant of the White House in its long history."³⁴

32 2 Goldsmith, 1163.

33 Ibid., 1180.

34 3 Goldsmith, 2041.

In every pot he said "a chicken"
 But Herbert Hoover he forgot!
 Not only don't we have the chicken,
 we ain't got the pot!

We'd like to thank you Herbert Thank you Herbie
 For really showing us the way.
 You dirty rat, you bureaucrat,
 you made us what we are today!³⁵

The nasty cynicism of Charin's lyrics is a potent reflection of the negativism and hopelessness felt by Americans at the onset of Roosevelt's Presidency. It was a thick malaise to cut through. Franklin Roosevelt chose to approach it with a combination of vigorous action and uplifting rhetoric.

FDR's first Inaugural Address was a message infused with hope. The inspirational effect of his speech was only partially due to his use of optimistic language. After all, Americans had spent the last four years listening to cheerful predictions for the future. No, in Franklin Delano Roosevelt, Americans had found a new source of energy to nourish those fragile glimmers of hope that hunger and misery had yet to extinguish. This man was willing to bear the enormous yoke of economic disaster. He stood before the American people on a dreary Saturday afternoon in the very worst of times, and he told them not to be afraid. And the most encouraging thing was...he didn't seem to be afraid:

Nor need we shrink from honestly facing conditions in our country today. This great nation will endure as it has endured, will revive and will prosper. So, first of all, let me assert my firm belief that the only thing we have to fear is fear itself--nameless,

³⁵ Martin Charnin, Vocal Score from Annie, (Edwin H. Morris & Co., 1977), 35-39.

unreasoning, unjustified terror which paralyzes needed efforts to convert retreat into advance. In every dark hour of our national life a leadership of frankness and vigor has met that understanding and support of the people themselves which is essential to victory.

Roosevelt seemed to know exactly what he wanted to do. He rushed all kinds of shot-in-the-arm recovery legislation through Congress during his famous first "one hundred days of action". He hurried to present a "Bill to Maintain the Credit of the United States Government", which, upon completion, came to be known as the Emergency Banking Bill. He targeted farmers and homeowners threatened by foreclosure as priority groups, requiring immediate relief. He sponsored what was perhaps the most effective program to emerge from the New Deal-- principally for its psychological benefits-- the National Recovery Administration.

FDR sponsored nearly half of all the bills which passed through Congress from 1933 through 1945.³⁶ His ability to elicit cooperation from the Congress traced directly back to his ability to rally the people behind his cause. His rich tenor voice spoke through the newest invention of the media -the radio- and established direct and instantaneous contact between the White House and the American People. Herein lay the means for Franklin Roosevelt's massive expansion of executive power.

Bolstered by the euphoria of a colossally lopsided victory in the 1936 election, Roosevelt took steps to remove

³⁶ Lawrence Chamberlain, The President, Congress, and Legislation, (New York: Columbia University Press, 1946), 450.

the only cloud on his political horizon. FDR perceived the Supreme Court to be anti-New Deal determined to block domestic reform. With a Democratic majority in Congress, and the roar of public approval at his back, Franklin Roosevelt became brazen. He attempted to cancel out the revisionary power of the judicial branch by packing the Court with "one additional judge" for every sitting justice "to have attained the age of seventy".³⁷ This maneuver would have created the potential for FDR to make up to six appointments.

Roosevelt sustained a complete and humiliating defeat on his "Reorganization Plan for the Judiciary". The proposal died in the Senate when only twenty loyal supporters voted for it in its original form. FDR was at the pinnacle of his power, and yet he found himself alone on this issue. It seemed that everyone, even his own party in Congress, believed he had gone too far. Rather than abiding by the accepted precedent of filling only those vacancies which occurred as a result of death or resignation, FDR had devised a plan which would bring the judiciary within the Presidential sphere of influence, and America was not willing to allow this violence to be done to the separation of powers. In this reassuring episode, "the restraints within the American constitutional system had been tested

³⁷ Samuel Rosenman, ed., The Public Papers and Addresses of Franklin D. Roosevelt, (New York: Russell and Russell Publishers, 1938), v.8, 66.

and Presidential power had been checked."³⁸ Roosevelt's defeat was an important lesson: even when operating with veiled intentions (FDR claimed he wanted to infuse the Court with new blood) and widespread popular support, the threat of public vigilance is everpresent.

Andrew Jackson, Abraham Lincoln, Teddy Roosevelt, and FDR are not a complete representation of the men who contributed to the expansion of executive power during their term in office. Such a detailed listing would be far beyond the scope of this endeavor. Rather, these four Administrations describe the high points in the development of the Presidency from a passive office into the dominant branch of government.

Collectively, these Presidents read the Constitutional phrase "The executive power shall be vested in the President" as carte blanche. They assumed powers not directly conferred upon them in the Constitution, and by exercising them in a judicious (for the most part) manner, they secured those powers for the use of future Presidents. Whether or not their successors exercised judiciousness in applying this power is another story.

³⁸ Dolce, 109.

"The real is the known: if you can keep secrets, you can determine reality. If no one knows we tried to kill Castro, then we did not do it."

--Thomas Powers describing CIA Director Richard Helms' view of secrets in Rolling Stone, December 16, 1976, p.54.

THE COLD WAR

On January 24, 1946, President Truman furnished Sidney W. Souers with a black hat, trenchcoat, and wooden dagger, and playfully appointed him the "Chief of the Gestapo" and "leader of centralized snooping".¹ Truman's "Dick Tracy" antics were in fact the light-hearted portion of a larger ceremony. The National Security Act was in its final stages of formulation, and government leaders were gathered to witness the beginning of the interim Central Intelligence Group-- America's first peace-time intelligence service.

Sidney Souers, the founding director of the CIG, assumed the duties of his office with prudence. He chose to store the symbolic toys he had received, along with their potential for mischief, in the agency's closet for the duration of his term. While future directors would participate in the "cloak and dagger" operations represented by Truman's gifts, Souers' service was characterized by a disciplined adherence to the original goals and intent of the agency as outlined in the National Security Act of 1947.

¹ Rhodri Jeffreys-Jones, The CIA and American Democracy, (New Haven: Yale University Press, 1989), 35.

As a result, Souers not only prevented the CIG from outgrowing its modest dimensions, he also convinced the knowing members of a wary public that the CIG was an agency to be trusted rather than feared. By demonstrating that America's new peacetime intelligence service was well-controlled and judiciously managed, Souers communicated a message of reassurance that sheltered the CIA through its first 20 years of operation--the golden age.

The CIG was the immediate precursor to the American institution now known as the Central Intelligence Agency. Established by the Arms Unification Act of 1947, it was created "to advise the National Security Council on intelligence, make recommendations on related matters, produce intelligence estimates and reports, and to perform such other functions and duties related to intelligence as the National Security Council may direct"² The National Security Council was simultaneously created to act as a parenting committee, screening the activities of and providing direction for the CIG as an agency of the executive branch.

Despite Truman's facetious tone, the concept of a peacetime intelligence service was not well received by the President. In the words of his aide, George Elsey, Truman "wanted to be certain that no single unit or agency of the Federal Government would have so much power that we would

² John Prados, President's Secret Wars, (New York: William Morrow and Company, Inc, 1986), 21.

find ourselves, perhaps inadvertently, slipping into a police state".³ He vacillated between adamant opposition to the CIA and resigned acceptance.

On September 20, 1945, Truman issued an executive order demanding the rapid dissolution of the Office of Strategic Service (the war-time intelligence service founded by FDR). Two years later he assented to the National Security Act of 1947. By the 1950's, Truman was criticizing the CIA, calling for a "campaign of truth" against CIA propaganda being beamed to the Eastern bloc in 1950⁴, and then urging the Dulles-Jackson-Correa investigation of the CIA following the Bogota riots. His criticisms became less guarded after he left office: in 1963, the Evansville Courier published an essay in which Truman openly attacked the CIA for its "cloak and dagger" operations and their effect on the foreign opinion of the United States.⁵ Truman spoke disparagingly of the covert operations of CIA, citing their negative impact on America's image abroad and the absence of imminent danger (Japan and Germany had surrendered, and Truman did not yet perceive the Soviet Union as being genuine threat) as justifications for his stance. Nevertheless he welcomed the many advantages which the executive office enjoyed as a result of the creation of the CIA.

³ Jeffreys-Jones, 29.

⁴ Ibid., 60.

⁵ Harry S. Truman, "Truman Deplores Change in CIA Role," Evansville Courier, December 21, 1963.

The Central Intelligence Agency was added to the ranks of the executive branch, and by its presence the President was furnished with information to which Congress did not have access. Executive proposals on foreign affairs were thus rendered much more difficult to refute, given the disparity between congress and the executive branch in their ability to obtain intelligence information. Harry Truman felt no compunction in having this advantage. In fact, while he contested, and on several occasions, blocked CIA plans precisely because of their secretive nature, he defended his own right to conceal secrets from the press and the American people.

On September 24, 1951, President Truman issued an executive order which expanded the government secrecy network to include nonmilitary bureaus and departments within the executive branch. Prior to that date, under FDR's executive order of 1940, only the Navy and War Departments were allowed to shelter documents from public inspection by labeling them "Secret", "Confidential", or "Restricted". FDR provided this classification system in order to protect the national security during World War II. Truman's order permitted every agency within the executive branch to classify documents, whether or not they handled defense information, and whether or not the United States was in a state of war.

Harry Truman was aware that this veil of secrecy could potentially arouse public suspicion toward the government.

Ironically, his concern for maintaining the image of the US Government did not extend into his own backyard. Truman objected to the CIA's clandestine maneuvers in foreign countries because he feared such secrecy would damage the integrity of the US Government in the those countries.⁶ Yet HST was willing to infringe on the citizen's "right to know" and risk damaging the integrity of the US Government in the eyes of its own citizens, in the interest of establishing a domestic system of secrecy.

The creation of the Central Intelligence Agency lends additional credence to presidential claims of executive privilege. Now, when the president chooses to withhold information, alleging that its "disclosure would injure the public"⁷, his discretionary claim is strengthened by his privileged access to CIA reports that Congress cannot readily procure. Unseen evidence is difficult evidence to refute. Additionally, the Executive Order of 1951 removed a large portion of executive documents and communications from public view, thus officializing the system of government secrecy. Together the creation of the CIA and the Executive Order of 1951 converted information which had previously been regarded as public property into the private property of the president. The decision as to whether that information can again be released into the public sphere without adversely effecting national security is subject to

⁶ Ibid.
⁷ Jefferson, Writings, 241.

the president's judgment.

President Truman's expansion of the government secrecy system was motivated, in part, by Fortune Magazine's publication of aerial maps of a number of major US cities, with arrows pointing to the locations of the atomic energy plants within those cities.⁸ Truman was furious with the Defense Department for having released the maps, and he perceived his plan for "tightening up" security as an essential measure "to prevent us from being wiped out."⁹ But even Truman admitted that his broad expansion of the classification system would render it vulnerable to abuse. Truman asserted that he would stand guard to prevent such corruption of the system, "I expect to watch it closely, to see that it is not used as an excuse for withholding information to which the public is entitled."¹⁰ Still, as one press correspondent in the audience astutely pointed out, Truman was only one person, and "no one human being can watch everything."¹¹

Truman proved on several occasions that he could be trusted to correct abuses of the secrecy system when he found them (i.e. just two days after he issued his Executive Order, Truman dismissed an official from the Office of Price Stabilization for defining "security information" as

⁸ The President's News Conference of October 4, 1951 in : Public Papers of Harry S. Truman, (Washington: US Government Printing Office, 1965), 556.

⁹ Ibid., 559.

¹⁰ Ibid., 555.

¹¹ Ibid.

"anything which is embarrassing to the OPS".)¹²

Nevertheless, it was unrealistic for Truman to expect that all future occupants of the White House would be as vigilant as he was-- or as honest.

President Truman responded to this concern by suggesting that the classification system could be modified if it came to be used as a shield for corruption. And while Dwight Eisenhower did in fact reduce the number of agencies authorized to classify information in 1953, his alterations did not significantly curb the potential for abuse. Not surprisingly, subsequent presidents who employed the classification system as a barrier behind which to hide their own wrongdoing were not eager to dismantle the very system which protected them.

This new classification system grew to mean more than simply not releasing data labeled "Top Secret" or "Confidential". The CIA instructs its officials and US Presidents that "No comment." is not an appropriate response when fielding inquiries into classified information. "You don't say "No comment", because that is an answer. To protect the secret you have to lie and say, "No, I don't know that." You learn the technique of lying in a way that seems entirely legitimate."¹³ And so, from the executive's legislated right to withhold information was derived the

¹² Ibid., 556.

¹³ Daniel Ellsberg, "The Ellsberg Perspective" in None of Your Business: Government Secrecy in America, (New York: Penguin, 1975.), 284.

right to also lie about whether or not he possessed the knowledge or information in the first place.

Arthur Sylvester, John F. Kennedy's assistant secretary of defense for public affairs, openly defended the president's right to lie to a UPI reporter on December 6, 1962: "It is inherent in the government's right, if necessary, to lie to save itself when it's going up into a nuclear war. That seems to me basic--basic."¹⁴ Sylvester openly articulated a sacred (previously unspoken) tenet in the presidential secrecy system. No president has ever claimed the right to lie, but many have exercised it.

The United States Congress did little to question the broad expansion of executive power which occurred as a result of the birth of the CIA and Truman's development of the classification system. At the onset of the Cold War, communist expansionism posed enough of a perceived threat to seemingly justify the extreme measures which were taken to combat it. America was not engaged in active combat with the USSR, but the mentality of martial law prevailed nonetheless. Truman, and presumably Congress, knew that removing so much of the president's decision-making process from public inspection would inevitably infringe on the citizen's "right to know", and thus, the democratic character of our government. It is generally accepted that in a time of war the rights of the individual must be temporarily subordinated in order to preserve the viability

¹⁴ Wise, The Politics of Lying, 39.

of the nation as a whole. This rationale appears to have also operated during the Cold War years.

Harry Truman, Dwight Eisenhower, John Kennedy, and Lyndon Johnson each embraced this national deference to their discretion during their successive administrations. Institutionalized secrecy, on the one hand, allowed them to direct the course of national affairs according to their own design, circumventing the potential obstacles of congressional and public disapproval. On the other hand, those executive decisions which were arrived at and implemented without ever being submitted to congressional or public scrutiny were deprived of a valuable revisory tool.

Each of the aforementioned presidents made autonomous policy decisions and were later criticized for the independence they assumed by enacting their policies without Congressional approval. In some instances, as was the case with Harry Truman's decision to commit US troops to the Korean War, the president returned to Congress and requested ex post facto approval of the action he had taken.¹⁵ In other instances, presidents chose to conceal their policy decisions from Congress and the American people.

John Kennedy and Lyndon Johnson proved that it is possible for a president to effectively conceal information from Congress and the public with Operation Mongoose and the Gulf of Tonkin. Under Kennedy's directive, the CIA attempted to "cripple Fidel Castro with exploding

¹⁵ Schlesinger, The Imperial Presidency, 143.

clamsells, to slip him a pen with a poison tip, to provide him with a scuba diving suit impregnated with tubercule bacillus"¹⁶-- activities which clearly violated the National Security Council Charter and the Neutrality Act. These frustrated attempts to assassinate Castro were not uncovered until the mid-1970's, long after Congress or the American people could do anything to stop them. President Johnson's blatant manipulation of the facts surrounding the bombing of the U.S.S. Maddox¹⁷ also remained secret until after Johnson's death. This was years after the Gulf of Tonkin Resolution had passed giving Johnson the power to escalate the Viet Nam War.

Neither Kennedy or Johnson could have reasonably expected congressional cooperation had Congress been aware of the objectives of Operation Mongoose or the facts in the Gulf of Tonkin incident. Clearly, that is why they worked so hard to conceal the truth. Kennedy and Johnson did not have to openly assert the right of executive privilege to hide the facts in these two instances,; their skills in deception precluded that necessity.

Circumstances prevented Dwight Eisenhower from being as fortunate. Eisenhower personally approved the flight schedule of the U-2 plane which flew over Russia on May 5, 1960, in order to gather photographic intelligence about Soviet strategic missiles.¹⁸ Then when Soviet Premier Nikita

¹⁶ Prados, 215.

¹⁷ Goldsmith, 2036.

¹⁸ Wise, 34.

Khrushchev announced that the plane had been shot down inside Soviet territory, Eisenhower denied ever having authorized it. In a move that he which he grew to bitterly regret, President Eisenhower handled the U-2 episode by exercising that derivative of executive privilege which Arthur Sylvester would later articulate as the president "right to lie". The lie was openly exposed when Khrushchev announced that he had captured the plane's pilot, Gary Powers, and Eisenhower was forced to reverse himself. After Dwight Eisenhower left office he was asked to cite his greatest regret as president by reporter David Kraslow. Eisenhower confided, "The lie we told about the U-2. I didn't realize how high a price we were going to have to pay for that lie."¹⁹

President Eisenhower suffered a loss in his personal credibility as a result of his conduct during the U-2 crisis. However, his conduct, and the conduct of his successors, Kennedy and Johnson, exacted great costs from society. Excessive presidential secrecy enables leadership by coercion rather than persuasion. In the American system of government, information is power. Whenever citizens are deprived of their "right to know", they are severely limited in their ability to actively participate in the government which rules over them.

¹⁹ Ibid., 35.

"these are men trying to save their skins, to beat the "rap", as the President says at one point, to find ways to avoid jail or disgrace, with very little consideration for the good of the country."

R.W. Apple, Jr. in his introduction to The White House Transcripts (New York: Viking Press, 1973), p.5.

A CANCER GROWING ON THE PRESIDENCY

In his testimony to the Senate Select Committee on Presidential Campaign Activities in 1973, John W. Dean III referred to governmental deception as "a cancer growing on the Presidency."¹ The New York Herald Tribune introduced the term "credibility gap" in 1965 to define the widening chasm of distrust separating Americans and the Johnson Administration.² Both of these phrases work to describe an American political crisis in confidence--the slow disintegration of that essential bond of trust and respect between the leader and the people.

The "credibility gap" first yawned during the Presidency of Lyndon Baines Johnson, but it was by no means a temporary phenomenon. In the words of journalist Tom Wicker, the events of Watergate in 1973 further deprived Americans of "their reverence and childlike dependence on the President."³

Americans began to suspect the integrity of their

¹ The Watergate Hearings: Proceedings of the Senate Select Committee on Presidential Campaign Activities, ed. John Lubell, (New York: Bantam Books, Inc., 1973).

² Robert A. Caro, Means of Ascent, (New York: Alfred A. Knopf, 1990), 435.

³ Tom Wicker, "Hey, Hey, LBJ, How Many Kids Have You Killed Today?", in Esquire Magazine, December 1983.

president--and for good reason. The doctrine of executive privilege, which had been revitalized to protect US security interests during the Cold War, had become the very blanket rationale for wrongdoing that Truman had expressed his desire to avoid.

Richard Nixon construed it to be "in the best interests of the Nation"⁴ to suppress information detailing the sabotage of the 1972 Presidential election by his administration. Ronald Reagan asserted that the doctrine of executive privilege precluded his testimony before the Select Committee on Intelligence regarding his involvement in the illegal sale of weapons to the Nicaraguan Contra rebels. The American people had a right to be disillusioned as they sat before their television sets on those two degrading occasions, not 15 years apart, and watched Congress explore evidence confirming that it had been deceived.

The Watergate break-in and cover-up were the result of Richard Milhous Nixon's intense personal paranoia. Most political scientists agree that Richard Nixon would have walked away the clear victor of the 1972 Presidential election with or without his illegal surveillance of the Democratic National Committee Headquarters.⁵ Nixon himself, however, was too preoccupied with his negative treatment by

⁴ The Watergate Hearings, 676. Excerpt from Richard Nixon's Farewell Address on August 8, 1974.

⁵ Theodore White, Breach of Faith, (New York: Atheneum Publishers, 1975), 169. See also Schlesinger, 255.

the press and citizens' protestation of his handling of the Vietnam War to perceive the reality of his impending landslide.

Nixon felt that he suffered under the persecution of "one of the most hostile and unfair presses any president has ever had"⁶, and to fight that persecution, he leveled illegal guns at individual members of the press. David Wise, the former Chief of the Washington Bureau of the New York Herald Tribune, charged that "As President, Richard Nixon unleashed, and personally participated in, the strongest, most highly coordinated, and ultimately, the most dangerous attack on the nation's constitutionally protected free press since the Alien and Sedition Act of 1798."⁷ In 1972, Nixon instructed John Dean to "keep a good list of the press people giving us trouble," because he intended to "make life difficult for them"⁸ after the election. Indeed, he had already made life difficult. In 1971, the Nixon Administration used the FBI as an instrument of intimidation against CBS correspondent Dan Schorr. The FBI attempted to discredit Schorr first by investigating his personal life, and then, when that failed to produce embarrassing secrets, by running a check on his tax returns through the IRS.⁹

Dan Schorr's ordeal is representative of the harrassment which hundreds of press corp members experienced

⁶ Allen Drury, Courage and Hesitation, (New York: Doubleday, 1971), 395.

⁷ Wise, 229.

⁸ The Watergate Hearings, 277.

⁹ Wise, 264.

during the Nixon Administration. Nixon did not hesitate to use institutions, originally designed to safeguard the American people, for his own ends. In fact, he expressed his annoyance to Dean that "the IRS was a Democratically-oriented bureaucracy" and was therefore harder for the Republican Party to manipulate.¹⁰

President Nixon interpreted any opposition (real or imagined) to his political policies as a personal affront. One early example of this occurred in the wake of his defeat in the 1962 California gubernatorial race. As reporters gathered in the lobby of his campaign hotel, Nixon reacted to their routine requests for a concession speech as if those in attendance were actually gratified by his defeat. In this now famous attack, Nixon unburdened himself of his innermost feelings, revealing the true dimensions of his paranoia:

...now that all the members of the press are so delighted that I have lost, I'd like to make a statement of my own. For once gentlemen--I would appreciate if you would write down what I say. For sixteen years you've had a lot of fun--a lot of fun--that you've had the opportunity to attack me. But as I leave you I want you to know--just think how much you're going to be missing. You won't have Nixon to kick around anymore, because, gentlemen, this is my last press conference.¹¹

Richard Nixon's paranoia extended to civilian demonstrators, as did his willingness to silence them by illicit means. While testifying, John Dean conveyed his

¹⁰ The Watergate Hearings, 277. Dean relating a conversation with Nixon which took place on September 15, 1972.

¹¹ Wise, 288.

surprise at the President's "strong feelings about even the smallest of demonstrations". Late in the winter of 1971, it seems, the President caught sight of a lone man out in Lafayette Park, protesting the Vietnam War. According to Dean, the President directed his appointments secretary, Dwight Chapin to "get some thugs to remove that man".¹² The White House was continuously seeking information about demonstration leaders and their supporters that would either discredit them personally or attribute the demonstration to the influence of some foreign enemy.¹³

Richard Nixon transfigured those who demonstrated on the White House lawn, and the members of the press, into his own personal nemeses. In his estimation, they were enemies powerful enough to threaten his 1972 bid for the Presidency, and worthy of the infamous weaponry he used to evade their influence. President Nixon wanted an absolute guarantee that he would emerge from the 1972 election with the people's mandate. The President, and those advisors closest to him, believed that "the re-election of Richard Nixon was so much more important..than principle"¹⁴ that they were willing to compromise the integrity of the election.

The Watergate Scandal first hit the newspapers in the Spring of the 1972. Nixon dodged questions for almost a year before he issued a public refusal to cooperate with the

¹² The Watergate Hearings, 268.

¹³ Ibid., 266.

¹⁴ Ibid., 39. John Mitchell testifying to the Senate on July 15, 1973.

Senate Select Committee on Presidential Campaign Activities. The President cited the doctrine of executive privilege as justification for his denial of the the Senate's request to hear testimony from John Dean, the President's former Counsel:

The doctrine of executive privilege is well established. The doctrine is rooted in the Constitution, which vests the 'executive power' solely in the President. Under the doctrine of the separation of powers, the manner in which the President personally exercises his assigned executive powers is not subject to questioning by another branch of government. What is at stake, therefore, is not simply a question of confidentiality but the integrity of the decision-making process at the highest levels of government.¹⁵

The President's counsel defended this claim to unreviewable executive privilege before the U.S. Supreme Court in U.S. v. Nixon (1974). They motioned to squash the Special Prosecutor's subpoena *duces tecum* for the production before trial of certain tapes and documents relating to precisely identified conversations and meetings between the President and others. "The judiciary", they argued, "lacked authority to review the President's assertion of executive privilege" on the grounds that "the dispute between the President and the Special Prosecutor was an 'intra-executive' conflict".¹⁶

The judiciary has traditionally taken great pains to avoid entering into the political thicket, preferring to leave it up to the executive and legislative branches to

¹⁵ Ibid., Nixon's statement to the press on March 12, 1973.

¹⁶ United States vs. Nixon, President of the United States, et al. (1974), 418 US Supreme Court Reports 683.

resolve their own conflicts. For example, the courts allowed the battle over the removal power of the President to rage for almost 100 years before addressing the issue in Myers v. United States (1926)¹⁷ This hesitancy to rule on matters of a political nature is reflected in the opinion of Marbury v. Madison (1803):

The province of this court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have discretion. Questions, in their nature political, or which are, by the constitution and laws submitted to the executive, can never be made by this court.¹⁸

In US v. Nixon, however, the courts found President Nixon's claim of absolute or unqualified privilege to be in direct conflict with the fair administration of criminal justice. If the courts did not enter the dispute, then the prosecution would be deprived of some very relevant, very incriminating evidence against Nixon and his subordinates. The US Supreme Court responded to this dilemma by writing a very narrow decision.

First, the Court demanded that Nixon relinquish the tapes stating that "the Special Prosecutor has made a sufficient showing to justify a subpoena for production before trial."¹⁹ But the Court did not stop there. It attempted to narrow the application of the decision with this qualification:

¹⁷ Myers v. United States (1926). 272 US Supreme Court Reports 138-39.

¹⁸ Marbury v. Madison (1803). 1 Cranch 165.

¹⁹ US v. Nixon (1974), 615.

We are not here concerned with the balance between the President's generalized interest in confidentiality and the need for relevant evidence in civil litigation, nor with the President's interest in preserving state secrets. We address only the conflict between the President's assertion of a generalized privilege of confidentiality against the constitutional need for relevant evidence to criminal trials.²⁰

The Court went still further to affirm the constitutional basis for executive privilege:

A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for presidential communication. The privilege is fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution.²¹

In this way, the Court succeeded in denying Nixon's absolute claim of executive privilege, without using language which would frustrate future claims of executive privilege in other circumstances. In fact, the Supreme Court's ruling on executive privilege in US v. Nixon contributed to establish a broader conception of executive privilege, rather than to significantly limit its scope.

Ironically, Nixon was fighting to protect the integrity of a decision-making process which had been used by his administration to generate a blueprint for deceiving the American people. In this candid interchange, (contained in the tapes which Nixon fought so valiantly to withhold), the President and his aides arrived at a scheme to prevent incriminating evidence regarding the Ellsberg burglary from

²⁰ Ibid., 616.

²¹ Ibid., 613.

entering the Watergate Hearings:

President: What's the answer on this? How you can keep it out I don't know. You can't keep it out if Hunt talks.

Dean: You might put it on a national security grounds basis...

Haldeman: It absolutely was.

Dean: Ah--

Haldeman: Seriously,

President: National security. We had to get the information for national security grounds. With the bombing coming out and everything coming out, the whole thing was national security.

Dean: I think we could get by on that...²²

What began as the "right to lie" to protect the nation's security interests against the threat of Communist expansionism became, simply, the right to lie. Richard Nixon exploited that right for all it was worth. He lied when he swore to "faithfully execute the office of the President of the United States". He lied when he promised that "executive privilege would not be used as a shield to prevent embarrassing information from being made available."²³ Admission would have brought the kiss of death to the his administration even sooner than it was delivered by his earnest disclaimers. Nixon even lied to appease the American people because by his own twisted but strangely accurate estimation, "there's still a hell of a lot of people out there, and from what I've seen, they're-- you know, they want to believe, that's the point, isn't it?"²⁴ He was right. That was the point. Nobody wanted to

²² Gold, The White House Transcripts, 163.

²³ The Watergate Hearings, 676.

²⁴ John Orman, Presidential Secrecy and Deception, (Connecticut: Greenwood Press, 1980) 125.

believe that they had been consciously deceived by the man they had elected into office. And so, their very natural inclination to resist the ugly face of reality plunged American's headlong into another national nightmare--the Iran-Contra Scandal.

Ronald Reagan played what was essentially the same game of deception that had left Richard Nixon politically bankrupt. His administration consciously defied the Boland Amendment by engaging in the covert solicitation and delivery of aid to the Nicaraguan Contra Rebels. Reagan, however, held a considerably better hand of cards than did Nixon.

This President did not possess tapes which proved his involvement in the illegal activities of the enterprise. He had deniability--deniability which was supported by his own loyal staff members' willingness to accept the blame. Admiral John Poindexter and Colonel Oliver North were constantly rebuffing congressional attempts to implicate President Reagan. In this segment of his testimony before the Senate Committee on Intelligence, Poindexter states, "I made a very deliberate decision not to ask the president, so that I could insulate him from the decision and provide some future deniability for the president if it ever leaked out."²⁵

Reagan repaid this fealty in subtle ways, so as not to jeopardize his own absolution from guilt. He publically

²⁵ Moyers, The Secret Government, 20.

requested his aides to cooperate in disclosing facts to Congress and the country.²⁶ He judiciously avoided the option to confer a Presidential pardon on either Poindexter or North (despite the zealous entreaties of Olliemaniacs), because he knew that such preemptive action would shift responsibility onto himself. But President Reagan did lend his cheerleading skills to the cause of those defendants facing criminal charges in the Iran-Contra Hearings. He stood watching from the sidelines, a careful distance away from the wildly splashing mud, and said things like, "So I guess in a way they are counter revolutionary [North and Poindexter], and God bless them for being that way. And I guess that makes them contras, and it makes me a contra too."²⁷ He tried to rally public sympathy for the defendants in the hope that public pressure could somehow affect the outcome of the trial.

Reagan cultivated a far less antagonistic relationship with the media than Nixon had been able to achieve. Reagan employed the same tactics which Nixon had used to stonewall the press, only he tempered them by his ingratiating treatment of the press corps. In fact, Reagan's smooth manipulation of the press and his winning charisma combined to earn him the title, "The Teflon President".

Ronald Reagan attempted to use these talents to guide his administration through the firestorm of the Iran-Contra

²⁶ Senators William S. Cohen and George Mitchell, Men of Zeal, (New York: Viking Press, 1988), 295.

²⁷ Moyers, 20.

Scandal--and, to an extent, he succeeded. Reagan was never conclusively proven to have had prior knowledge of the diversion of funds from Iran arms sales to the Contra Rebels. He had not been impeached, or subjected to an impeachment trial. But then, he had not been proven innocent, either.

Reagan did not walk away from the Contragate ordeal unscathed. The nation had "finally opened a crack in the President's teflon political shield"²⁸, and through that chink Americans caught a glimpse of the ugly truth. They saw that they had been tricked again. Whether Ronald Reagan was directly involved in Contragate, or completely ignorant of it, was secondary. Either way, he had failed to stand accountable for transgressions of the law which had occurred during his administration at the hands of his staff. Once again, American citizens were walking away from the US Senate Caucus Room, shaking their heads in disgust--only this time their frustration began waning into apathy.

²⁸ Jonathan Marshall, The Iran-Contra Connection: Secret Teams and Covert Operations in the Reagan Era. (Boston: South End Press, 1987), 2.

"Executive Poppycock"

--Senator Ervin in reponse to Nixon's offer to allow closed-door testimony by his aides (in Gold, 845.)

CONCLUSION

When executive privilege precludes presidential accountability, it has gone too far. The doctrine of executive privilege was conceived nearly 200 years ago to protect this country in times when the disclosure of national foreign policy secrets would significantly threaten the wellbeing of these United States. The doctrine was revitalized during the Cold War Years because, for a number of those years, the Communist bloc did, in fact, pose a significant threat to US security.

During the course of its first two centuries of development, this country has struggled through a civil war, two World Wars, and numerous confrontations with other governments around the world. The circumstances of these struggles have at times demonstrated a real and legitimate need to withhold U.S. security information. The doctrine of executive privilege, however, has become so embroiled in the assumed rights and privileges of the executive branch that it has been invoked on occasions which clearly lacked the presence of imminent danger. It has been invoked too often to protect the duplicity of our highest government officials.

The first reaction of the American people was that of shock. The shock was followed by anger, followed by disgust, then by frustration. Now they are apathetic. In the last Presidential election, Americans demonstrated their collective complacency by regressing to a 51% voter turnout, the lowest national turnout since 1924.¹

The people have repeatedly witnessed blatant lying by the governments they voted into office. Americans have learned through the lessons of the U-2 Incident, the Bay of Pigs, the Vietnam War, Watergate, and the Iran-contra Scandal not to trust their political leaders. They are cashing in their most valuable instrument of political influence, their vote, for the relative comfort of ignorance. And by doing so, American voters are preventing the best possible solution to the problem of governmental deception.

A democratic community must be educated about the candidates, must be politically active, and must be very perceptive, to elect a leader with integrity. To place a leader of integrity in the Oval Office is clearly the easiest and most effective way of ensuring that the privileges of that office are not abused. Ideally, Americans should be able to rely on the character of their president to discern the instances when it is necessary to invoke the doctrine of executive privilege. They should be

¹ Richard Berke, "Eligible Voter Participation Slumps to Record Low Ebb in 1988 Presidential Election," The Sunday Oregonian, November 13, 1988, Sec.A, 19.

able rely on him, but history has demonstrated that they cannot.

The restructuring of our election process to include greater substantive discussion of the issues, and less vulnerability to the influence of the campaign dollar would greatly improve this nation's capacity for electing good leaders. Such improvements of the electoral process would probably limit the proliferation of government deception. But that is not enough.

The American people must communicate, through Congress, their legislative body, that they are no longer willing to tolerate presidential deceit. The British Prime Minister's Question Time provides one example of a practice through which to signal the people's demand for executive accountability. When an executive is required to stand the legislative branch, instead of choosing to do so, the expectation of executive candor is heightened. Congressional inquiries into the corruption of the executive branch cannot be thwarted by arbitrary claims of executive privilege. Congress is the "body of inquiry"² in the American Government and, if necessary, its proceedings can be conducted in camera, to prevent the public disclosure of any real national security risks.

The events of Watergate and the Iran-Contra Scandal have wounded this nation. If the American people do not act to reform the democratic institutions of this government,

² Berger, 37.

their complaisance will rend the wounds even further. Each added measure of secrecy exacts a price from our political freedom. If we, as Americans, do not fight to retain our political influence through the democratic tools of reform which still remain viable in this country, then our own inaction will render those methods impotent. Our Founding Fathers laid the groundwork, but it is each individual's responsibility to stand up and be heard.

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