this, just as many of the other inflation-control policies he has put forth, is shortsighted. If farmers' subsidies are taken away from them completely, then they could resort to producing less on their own to artificially jack up prices. The current farm subsidy program already does this under the aegis of the law. We see at every grocery store that the current farm subsidy program operates directly against the interests of the consumer. What is needed, then, is not a total abandonment of the farm subsidy program, but a whole new approach in the way that the program is to be used to benefit both farmers and consumers.

Rather than pay farmers for not producing, why not pay them for producing as much as possible? The current price support program sets a parity price, which the Government has arbitrarily established as the level below which prices for certain commodities may not fall. The difference between the market price and the parity price is paid to the farmer as a subsidy. If the farmer cannot sell his produce at the current market price, or does not sell all of it, the Government will purchase it at the subsidy price. In addition, the farmer is also paid for letting his fields lie fallow, and he is given instructions by the Department of Agriculture on how much acreage to allow for certain kinds of crops.

Rather than have this kind of system, why not design a subsidy system that would keep the parity price and the subsidy payments, but that would encourage farmers to use as much of their acreage as possible, and a plan that does not dictate the kinds and amounts of crops to grow?

Once the crops are grown, the Department of Agriculture has a continuing responsibility to the consuming public to see to it that farm products are distributed in this country first. How much was the price of bread, of beef cattle, of milk, raised last year because of the massive grain sales to the Soviet Union, China, and India? I by no means wish to begrudge our largesse to other nations. However, I question the motives of our own Government when this largesse means that the American consumer will have to pay more for his commodities. The Government's first obligation is here at home.

There is no easy answer to the problem of rising food prices. No matter what is done, someone will be unhappy. However, something must be done, and done soon. What you are doing, boycotting meat, shopping carefully and counting every penny. That is good for the moment, but that alone will not change the situation for more than a few weeks or months. What is needed is a radical new approach.

We must start with a complete wage, price and profits freeze for a minimum of 6 months. That would allow time to redesign agricultural programs to insure enough food is produced to feed all the people in this country at prices which they can afford, and at prices which will give farmers, middlemen, and market owners a fair return on investments.

Part of the problem we see today is that nobody really understands how the decisions are made that affect our food supply and the prices we pay for it. We need the breathing space that a 6-month freeze would provide in order to figure out just what happens between the time the seed is put into the ground and the loaf of bread reaches our dinner table. We do not possess that information now, and must have it in order to adequately provide for the needs of the American people. We need time to see whether the Department of Agriculture is working on behalf of both the farmer and the consumer. We need time to see if middlemen are unnecessarily jacking up their prices and passing on too much of their own costs. We need the time to see whether people who work in the food industries are as productive as they could be, and if they are not, how to make them more so. All of these things would result, if not in lowered costs, at least in costs that do not rise at the near light-speeds which we have witnessed lately.

Anything short of a full price, wage, and profits freeze will simply not be enough. We have already been victims of over 2 years of President Nixon's caution, and it has been far too costly. We must put a halt to this—absolutely and unequivocally—before food and shelter become luxuries for only the wealthy.

EXEMPTION OF PUBLIC SERVICE RETIREMENT INCOME FROM FEDERAL INCOME TAX

(Mrs. MINK asked and was given permission to extend her remarks at this point in the RECORD and to include extraneous matter.)

Mrs. MINK. Mr. Speaker, the burden of the heavy inflation of the past few years bears most heavily on our retired workers whose sole source of income is a small pension or annuity. Yet under our Federal income tax system, we continue to take away a substantial portion of the meager income of retired Government workers.

This inequity should be redressed. Currently, we exempt social security retirement income from tax, and I believe we should do as much for civil service workers at the Federal, State, and municipal levels. I do not see why employees who have devoted their careers to public service should have to pay taxes on their retirement income while those who worked for the private sector do not.

One of my constituents recently pointed out to me that with a State civil service pension of $4,400 per year he had to pay $571 in Federal taxes. Obviously the remaining $3,829 is not sufficient to provide an adequate living, especially in a high cost area such as Hawaii. The ability to retain the full amount of pension income would mean a great deal to a retired Government employee.

The average Federal civil service retirement annuity as of last June was only $338 a month, for the 758,496 retirees. This is inadequate, and even more so if the Federal tax bite takes away a sizable portion. A similar situation exists with respect to State and local employee pensions.

To correct this situation I have introduced legislation today to exempt from Federal income tax any pension or annuity received under a public retirement system. My legislation provides for a complete exemption regardless of the amount of the annuity, or whether it is received from a State, Federal, or local civil service or similar pension system.

It seems to me that we should reward the years of public service devoted by our governmental employees, instead of taxing their small pensions. Certainly most have faced hardship as a result of the rapidly escalating cost increases over the past several years. Many can no longer afford adequate diets, housing, or other necessities. Often their income falls below the official poverty level. Because of advanced age they cannot work to supplement these pensions. By ending this unfair taxation, we can enable former governmental employees to live more rewarding lives during their retirement years.

Presently, all they receive is a partial tax credit for their public service retirement income. Equity demands that they receive total exemption from taxation instead. I hope that this legislation receives the prompt attention of my colleagues.

A section-by-section analysis follows:

SECTION-BY-SECTION ANALYSIS

Section 1. Part (a) adds a new Section 124 to the Internal Revenue Code setting forth a general rule that gross income does not include amounts received by an individual as a pension, annuity, or similar retirement benefit under a public retirement system. A public retirement system is presently defined under section 37(f) as a pension, annuity, retirement, or similar fund or system established by the U.S., a State, a Territory, a possession of the United States, any political subdivision of the foregoing, or the District of Columbia.

Part (b) is a conforming amendment to the code adding the new Section 124 to the table of sections.

Section 2. Parts (a) and (b) terminate the existing partial credit for public service retirement income under Section 37 of the code effective January 1, 1973, so that Section 37 will be compatible with the new Section 124 which completely excludes all such income from taxation effective on that date.

Parts (c) and (d) are conforming changes to cross-reference the new Section 124.

DETAILED STUDY SHOWS NIXON SETS NEW ONE-TERM "EXECUTIVE PRIVILEGE" RECORD

(Mr. MOORHEAD of Pennsylvania asked and was given permission to extend his remarks at this point in the RECORD and to include extraneous matter.)

Mr. MOORHEAD of Pennsylvania. Mr. Speaker, I am sorry to report that the Nixon administration has set a new one-term record in Government-by-secrecy, using the claim of an executive privilege to hide the facts of Government from the Congress in 19 instances during these first 4 years.

This record is detailed in a study by the Government and General Research Division of the Library of Congress. For the first time since the use of executive privilege supposedly was limited to a claim of Presidential power in 1962, we have a complete record of how executive privilege actually has been used against the Congress. Not only has President Richard M. Nixon wielded this claim of power as a personal weapon at a rate far in excess of his predecessors, but he has

permitted administrative officials far down the line from the President to withhold information from the Congress. The Library of Congress study shows:

President Nixon personally used the claim of executive privilege to hide information from the Congress in four instances during the first 4 years of his administration, not three instances as the President and his congressional apologists have claimed.

Nixon administration officials in agencies directly responsible to the Congress have refused testimony or documents to congressional committees in 15 additional instances since President Nixon promised to limit the claim of power to withhold information from Congress to a personal, Presidential use.

These Nixon administration officials who have wrapped themselves in the cloak of executive privilege 15 times were either appointed with the advice and consent of the Senate to run agencies created by the Congress or they held jobs in agencies created by Congress, serving under officials appointed with the Senate's consent.

Not even included in this sorry record of secrecy are at least eight instances in which White House aides appointed by the President have refused testimony or documents to the Congress. Certainly a problem arises when the President's personal White House aides withhold information from the Congress, but an even more pressing problem is posed by officials throughout the executive branch claiming that they have a privilege to refuse information to the Congress.

The 15 instances of executive branch secrecy reported in the Library of Congress study are not minor cases where an individual Member of Congress has been refused information. They are major cases where a committee of Congress has officially requested testimony or documents and has been turned down.

And they are in addition to the four instances—not three as the President and his supporters claim—in which President Richard M. Nixon has personally hidden information from the Congress. To come up with its phony figure of "three," the White House cleverly lumped two cases together by refusing both of the requests on a single day.

On March 15, 1972, a memorandum from President Nixon directed the State Department to withhold studies of the fiscal year 1973 AID program which had been requested by the House Foreign Operations and Government Information Subcommittee. The same memorandum directed the U.S. Information Agency to withhold all USIA country program memoranda which had been requested by the Senate Foreign Relations Committee. Thus, two clear and separate congressional requests for information were covered by one Presidential memorandum, just as two other clear and separate requests for information had earlier been refused by President Nixon—a total of four Presidential assertions of Executive privilege, not three.

The two earlier instances were on November 21, 1970, when President Nixon directed the Department of Justice to withhold evaluations of potential appointees which had been requested by the House Intergovernmental Subcommittee and on August 30, 1971, when President Nixon directed the Department of Defense to withhold foreign military assistance plans which had been requested by the Senate Foreign Relations Committee.

But these four Presidential assertions of Executive privilege are merely the tip of the secrecy iceberg in the Nixon administration, when you look at the 15 other refusals of information to congressional committees outlined in the Library of Congress report.

I do not mean to imply that the Nixon administration is the only administration which has wrapped itself in the broad cloak of executive privilege, claimed as a power to withhold information from the Congress. The Eisenhower administration holds the unenviable record—so far with 34 instances of the use of "executive privilege" in two terms. And even the Kennedy and Johnson administrations, in which both Presidents promised to limit the use of the claim to a personal, Presidential power, did not actually limit the claim. The Library of Congress study above shows that President John F. Kennedy personally claimed Executive privilege against the Congress in one instance, but information was refused to the Congress by executive branch officials in the Kennedy administration three additional times after he promised to limit executive privilege to a Presidential power. Although President Lyndon B. Johnson did not personally use the claim of executive privilege against the Congress, in two instances executive branch officials in the Johnson administration refused information to the Congress after he said executive privilege would be used only as a Presidential power.

Presidents in earlier administrations have, of course, claimed a power rooted in the Constitution to withhold information from the Congress, but this has most often been a personal exercise of a Presidential power, not a broad cloak of executive privilege wrapping all of the executive branch in secrecy. And often the historic claims of executive privilege cited by modern administrations as precedents for secrecy have not, in fact, been exercises of the claim.

As the Library of Congress study points out, the first instance of executive privilege in President Washington's first administration did not result in withholding information from Congress. Although President Washington claimed a power to withhold information about General St. Clair's military disaster from the Congress he did not, in fact, use that power but turned over all of the information to the Congress.

There will be additional studies of the conflict between the executive branch and the legislative branch over access to Government information, and they will cover additional areas—for instance, the refusal of White House aides to testify before Congress, or the withholding of documents from the General Accounting Office serving as the auditing arm of Congress—but the current study by the Library of Congress highlights the seriousness of the problem, pointing out the extent to which Nixon administration officials throughout the executive branch claim an immunity from congressional scrutiny. Following is the complete study:

THE PRESENT LIMITS OF "EXECUTIVE PRIVILEGE"

(A study prepared under the guidance of the House Foreign Operations and Government Information Subcommittee)

May 17, 1954, was an important day on Capitol Hill. On that day, two separate political battles shifted emphasis, and the new emphasis of each controversy still is causing political problems.

In the Supreme Court Building Chief Justice Earl Warren issued the court's unanimous decision in *Brown* v. *Board of Education* holding that separate education is not equal education. In the Senate Office Building John Adams, the Army's general counsel, delivered a copy of a letter from President Dwight D. Eisenhower to Secretary of Defense Charles Wilson directing the Secretary to tell all his subordinates not to testify about advisory communications during the hearings of a special subcommittee of the Senate Government Operations Committee.[1]

Both important developments of May 17, 1954, had roots deep in the history of the United States. In the future both would effect the political development of the nation. The results of the Supreme Court's school desegregation decision are widely discussed in popular literature and scholarly studies and have become a part of current history. But there is comparatively little current knowledge about the developments that flowed from President Eisenhower's May 17, 1954, letter. Possibly, that letter and the political conflict of which it is part are more important to the study of the American form of democratic government with three branches than is the widely studied school desegregation issue.

President Eisenhower's May 17, 1954, letter brought a new dimension to the interactions between the Legislative and Executive Branches of the Federal government which are part of our separate-but-coordinate system. His letter, and its accompanying memorandum purporting to list historic examples of Presidential assertion of the right of "executive privilege," became the basis for an extension of the claim of "executive privilege" far down the administrative line from the President.[2] Eight years later there was an attempt to bring "executive privilege" back into proper perspective, but the effort has not been a complete success even though it involved three Presidents.

There are many privileges exercised by the executive head of the United States Government, ranging from the free use of the mountain retreat at Camp David (or Shang-ri-la as President Franklin D. Roosevelt christened it) to a funeral with full military honors. But *the* "executive privilege" has come to mean a claim of authority to control government information.[3] This "executive privilege" to control the dissemination of information has been asserted against the public[4] and against the courts,[5] but the claim of an "executive privilege" which was the basis of the President's May 17, 1954, letter is the claim of authority to withhold information from the Legislative Branch of the Federal government. And the authority claimed in President Eisenhower's May 17, 1954, letter was extended throughout the Executive Branch to include agencies administered by persons appointed by the President with the advice and consent of the U.S. Senate. This claim of control over government information is in addition to the power exercised by Presidents to protect their immediate White House staff—their personal advisers, in effect, over whose appointment the Congress has no confirming power.

Footnotes at end of article.

The Separation of Powers and the Control of Information.

The conflict between the Legislative and Executive Branches of the Federal government over access to information begins with the first clause of the first section of the first article of the Constitution of the United States. Article I, Section I states that "all legislative Powers herein granted shall be vested in a Congress of the United States. . . ." The power to legislate carries with it the power to investigate [6] and the clash between the executive and the legislature over access to information almost always has occurred in connection with a Congressional investigation.

In fact, the earliest attempt by the Congress to investigate brought on a conflict over the authority of the executive to withhold information. The House of Representatives in 1792 appointed a committee to investigate General St. Clair's military disaster in the Northwest and empowered the committee to "call for such persons, papers, and records, as may be necessary to assist their inquiries." [7] This demand for information by the first Congress and the reaction to it by the first President was brought up 162 years later in connection with President Eisenhower's letter of May 17, 1954. A memorandum from the Attorney General which accompanied the letter listed the call for information in the St. Clair caper as the first example of Presidential assertion of "executive privilege." [8] The memorandum states that President Washington called a Cabinet meeting and the group decided that "neither the committee nor House had a right to call upon the head of a Department who and whose papers were under the President alone." [9]

Not only did this first Congressional investigation result in a confrontation over legislative access to Executive Branch information but it also provided a vehicle for the first major factual error in the memorandum accompanying the May 17, 1954, letter, discussing what has come to be called "executive privilege." Far from being an example of Presidential assertion of "executive privilege", the St. Clair episode was an example of Congress effectively asserting its right of access to information. A Cabinet meeting was held and the question of Presidential power over records was discussed, as reported in the memorandum, but the full text of Thomas Jefferson's notes of that meeting shows that it was decided "there was not a paper which might not be properly produced." [10] In fact, an historian-newsman who analyzed the precedents listed in the memorandum for withholding information from the Congress concluded that, in most of the examples, "the Congress prevailed, and got precisely what it sought to get." [11]

The assertion of an "executive privilege" to withhold information from the legislature is rooted in the opening words of Article II of the Constitution: "The executive power shall be vested in a President of the United States of America" and in the last clause in Section 3 of Article II: "He shall take care that the laws be faithfully executed." [12]

This Constitutional grant of power is both vague and complicated, the language raising more questions of how the power shall be exercised than it answers.[13] In the past 18 years, however, there have been some major changes in Congressional-Executive relationships which clarify the practice—if not the principle—of "executive privilege".

THE RECENT GROWTH OF "EXECUTIVE PRIVILEGE"

After May 17, 1954, the Executive Branch answer to nearly every question about the authority to withhold information from the Congress was "yes", they had the authority. And the authority most often cited was the May 17, 1954, letter from President Eisenhower to Secretary of Defense Wilson.[14] Not only was the letter cited, but usually the claim of authority included the accompanying memorandum from Attorney General Herbert Brownell, supposedly prepared in the Department of Justice.

The letter and the memorandum were involved in a controversy between Senator Joseph McCarthy (R., Wis.) and the United States Army over the propriety of the Senator's pressure tactics as chairman of the Permanent Subcommittee on Investigations of the Senate Committee on Government Operations. During two days of testimony at special hearings called to give McCarthy and the Army a forum for their fight, Army Counsel John Adams mentioned a meeting in the Attorney General's office attended by top White House staff members.[15]

When Subcommittee members tried to get more information from Adams about what went on at the high-level meeting, Joseph N. Welch of Boston, the Army's special counsel for the Army-McCarthy hearings, said Adams had been instructed not to testify any further about the meeting.[16] That was on Friday, May 14, 1954. When Subcommittee members insisted that Adams testify, Welch asked for and was granted a recess until the following Monday.

On Monday, Adams gave the Subcommittee the letter of instructions from the President to the Secretary of Defense, accompanied by a memorandum supposedly prepared officially in the Department of Justice over the weekend. In fact, the memorandum consisted only of excerpts and paraphrases from a 1949 article printed in the *Federal Bar Journal* and written by Herman Wolkinson, a Justice Department research lawyer.[17] Two years later the Justice Department presented to another Congressional subcommittee what appeared to be an expanded memorandum supporting their position on "executive privilege",[18] but it was merely the text of the Wolkinson article.[19]

There was a favorable public response to President Eisenhower's firm stand against disclosing conversations in his official family. Newspapers which were later to inveigh against the excesses of "executive privilege" praised the President's letter of May 17, 1954. The *New York Times*, for instance, editorialized against Senator McCarthy's use of legislative powers to encroach upon the Executive Branch "in complete disregard of the historic and Constitutional division of powers that is basic to the American system of Government." [20] And the *Washington Post* called the memorandum which was made public in connection with the President's letter "an extremely useful document," concluding that the President's authority under the Constitution to withhold information from Congress "is altogether beyond question." [21]

But the May 17, 1954, letter from the President, with its accompanying memorandum, soon became the major vehicle for spreading a claim of Presidential authority throughout the Executive Branch. The letter referred only to a specific series of conversations between Presidential appointees, restricting access to information about those conversations only to one specific Subcommittee of the Congress. Four months later, however, the May 17, 1954, letter was extended to cover more than the President's personal appointees and more than the specific Subcommittee's hearings.

In August, 1954, the U.S. Senate established a select committee to determine whether Senator McCarthy was guilty of conduct "unbecoming a member of the United States Senate" and asked two Army generals to testify about their conversations in connection with McCarthy's activities. Major General Kirke B. Lawton refused to testify on the advice of counsel that the May 17, 1954, "directive" applies to "this or any other" committee.[22] Senator Arthur V. Watkins (R., Utah), the chairman of the select committee, asked Secretary of Defense Charles Wilson for clarification and received a letter stating:

"As a matter of legal application, the Attorney General advises me that the principles of the Presidential order of May 17, 1954 are as completely applicable to any committee as they were to the Committee on Government Operations.[23]

Telford Taylor, in his study of Congressional investigatory powers at the time of the Army-McCarthy controversy, commented:

"If President Eisenhower's [May 17, 1954] directive were applied generally in line with its literal and sweeping language, congressional committees would frequently be shut off from access to documents to which they are clearly entitled. . . . It is unlikely, therefore, that this ruling will endure beyond the particular controversy that precipitated it." [24]

He proved a poor prophet, in this case. President Eisenhower's May 17, 1954, letter became the major authority cited for the exercise of "executive privilege" to refuse information to the Congress for the next seven years of his administration [25] and it established a pattern which the three Presidents after Eisenhower have followed.

"EXECUTIVE PRIVILEGE" LIMITED

President John F. Kennedy bent, although he did not break, the pattern of "executive privilege" claims by officials far down the administrative line from the President. He had been in office for one year when a special Senate subcommittee held hearings on the Defense Department's system for editing speeches of military leaders. When the Subcommittee asked the identity of the military editors who had handled specific speeches, President Kennedy wrote a letter to Secretary of Defense Robert S. McNamara directing him and all personnel under his jurisdiction "not to give any testimony or produce any documents which would disclose such information." [26] The similarity of President Kennedy's letter of February 8, 1962, and President Eisenhower's letter of May 17, 1954, stopped there, for Kennedy added:

"The principle which is at stake here cannot be automatically applied to every request for information. Each case must be judged on its own merits." [27]

There was no legal memorandum attached to President Kennedy's letter, although one was available. A 169-page study of "executive privilege" cases through 1960 had been prepared by two lawyers in the Department of Justice and printed in two issues of the *George Washington Law Review*.[28] The study, reminiscent of Herman Wolkinson's article in the *Federal Bar Journal* which was used as the back-up memorandum for President Eisenhower's May 17, 1954, letter, discussed executive responses to legislative inquiries from 1953 through 1960 and described some of the cases in which "executive privilege" was claimed. The new study called the exercise of "executive privilege" awkward and embarrassing—but not improper—and concluded:

"This power, like most other Presidential powers, therefore, must be delegated to other officials. The question is how far down the administrative line can this delegation proceed.[29]

President Kennedy's answer was: it cannot. His position was clarified in an exchange of correspondence with Congressman John E. Moss (D., Calif.) who, as chairman of the Foreign Operations and Government Information Subcommittee and its predecessor special subcommittee, had been leading the fight against government secrecy for nearly six years. Moss wrote that President Kennedy's letter of February 8, 1962, "clearly stated that the principle involved could not be applied automatically to restrict information", but he urged clarification "to prevent the rash of restrictions on government information which followed the May 17, 1954, letter from President Eisenhower." [30] President Kennedy, whose staff had gone over

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Footnotes at end of article.

a draft of the Moss letter before it was sent formally, replied on March 7, 1962:

"Executive privilege can be invoked only by the President and will not be used without specific Presidential approval." [31]

Soon after Lyndon B. Johnson was elected President, Congressman Moss asked him to limit the use of "executive privilege" as had President Kennedy. In a letter of March 31, 1965, Moss discussed the spread of the use of "executive privilege" following President Eisenhower's letter and contended that, as a result of President Kennedy's limitation of the use of the authority, "there was no longer a rash of 'executive privilege' claims to withhold information from the Congress and the public." Moss expressed to President Johnson the hope that "you will reaffirm the principle that 'executive privilege' can be invoked by you alone and will not be used without your specific approval." [32] President Johnson, in a letter of April 2, 1965, to Congressman Moss, reaffirmed the principle, stating flatly that "the claim of 'executive privilege' will continue to be made only by the President." [33]

Congressman Moss repeated the procedure soon after President Richard M. Nixon took office, asking him to "favorably consider a reaffirmation of the policy which provides, in essence, that the claim of 'executive privilege' will be invoked only by the President." [34] Two months after receiving the letter from Congressman Moss, President Nixon issued a memorandum to the heads of all executive departments and agencies stating that "executive privilege will not be used without specific Presidential approval." He buttressed his memorandum with a letter to Congressman Moss stating:

"I believe, as I have stated earlier, that the scope of executive privilege must be very narrowly construed. Under this Administration, executive privilege will not be asserted without specific Presidential approval." [35]

President Nixon's memorandum of March 24, 1969, spelled out procedural steps to govern the invocation of "executive privilege". First, he stated, anyone who wanted to invoke "executive privilege" in answer to a request for information from a "Congressional agency" had to consult the Attorney General. If the Attorney General and the department head agreed that "executive privilege" should not be invoked, the information requested should be released to the Congress. If, however, either or both of them wanted the issue submitted to the President, "the matter shall be transmitted to the Counsel to the President, who will advise the department head of the President's decision." If the President decided to invoke "executive privilege", the memorandum concluded, "the department head should advise the Congressional agency that the claim of Executive privilege is being made with the specific approval of the President." [36]

This was the first time that a step-by-step procedure was set up for invoking "executive privilege" against Congressional inquiries. It was not, of course, the first time that a President had promised to make the final decisions on the use of "executive privilege", but neither was President Kennedy's decision that only he should refuse information to the Congress, a Presidential first. On April 14, 1909, President William H. Taft issued Executive Order 1062 stating:

"In all cases where, by resolution of the Senate or House of Representatives, a head of a Department is called upon to furnish information, he is hereby directed to comply with such resolution, except when, in his judgment, it would be incompatible with the public interest, in which case he should refer the matter to the President for his direction."

No information is available on the results of President Taft's Executive Order 1062, but there is information from public sources on the results of the Kennedy-Johnson-Nixon limitation of the use of "executive privilege."

THE LIMITS OF LIMITATION

Has the Executive Branch claim of power to refuse information to Congress been severely limited since President Kennedy exercised "executive privilege" but said it would be used only by the President, judging each case on its merits? To answer the question, public sources were researched from 1962 through 1972 to determine the instances in which the Executive Branch refused documents or testimony to Congressional committees. The instances of invocation of "executive privilege" covered might or might not involve the issuance of a subpoena or a formal resolution requesting information. What has been focused upon is a publicly-recorded request for information by a Congressional committee and a publicly-reported refusal by an Executive Branch official to grant that request. That which was sought might be a document, a witness, or both. The refusal may or may not have been accompanied by a reason for the denial. The invocation of "executive privilege" has been interpreted for the purposes of this study to refer to a refusal of information to a Congressional committee or subcommittee by an Executive Branch agency or official. It does *not* include instances in which Presidential aides, serving in the White House Office, have refused to appear before Congressional committees.

Sources used in this study were the *New York Times*, the *Washington Post*, the *Washington Evening Star*, the *Congressional Record*, the *Congressional Quarterly* reports and almanacs, and printed hearings of Congressional committees. Following is the result:

Kennedy administration

Exercise of "executive privilege" by the President:

1. State and Defense Department witnesses directed not to give testimony or produce documents at hearings of the Senate Special Preparedness Subcommittee on Military Cold War Education which would identify individuals who reviewed specific speeches. (Committee on Armed Services, United States Senate, *Military Cold War Education and Speech Review Policies*, 87th Congress, Second Session, pp. 338, 369–370, 508–509, 725, 730–731 and 826).

Refusal by Executive Departments and Agencies To Provide Documents or Testimony

1. The Food and Drug Administration refuses to comply with a request from the House Interstate and Foreign Commerce Committe for files on MER–29 drug (*New York Times*, 6/21/62).

2. The State Department refuses to provide a copy of a working paper on the "mellowing" of the Soviet Union to the Senate Foreign Relations Committee (*New York Times*, 6/27/62).

3. General Maxwell D. Taylor appears before the House Subcommittee on Defense Appropriations and refuses to discuss the Bay of Pigs invasion as "it would result in another highly controversial, divisive public discussion among branches of our Government which would be damaging to all parties concerned." (*Congressional Record* 4/4/63, p. 5817).

Johnson administration

Refusals by Executive Departments and Agencies to provide documents or testimony

1. The Department of Defense refuses (April 4, 1968) to supply a copy of the Command Control Study of the Gulf of Tonkin incident to the Senate Foreign Relations Committee (Committee on the Judiciary, United States Senate, *Executive Privilige: The Withholding of Information by the Executive*, 92nd Congress, First Session, p. 39). This source hereafter cited as Senate Judiciary Committee hearings, *Executive Privilege*.

2. Treasury Under Secretary Joesph W. Barr refuses to testify before Senate Judiciary Committee on the nomination of Abe Fortas to be Chief Justice (CONGRESSIONAL RECORD, vol. 114, pt. 21, p. 27518, and *Washington Post*, 9/17/68).

Nixon administration

Exercise of "executive privilege" by the President:

1. The Attorney General refuses (November 21, 1970) to give Congressman L. H. Fountain, chairman of the Intergovernmental Relations Subcommittee of the House Government Operations Committee, reports furnished by the Federal Bureau of Investigation to evaluate scientists nominated to serve on advisory boards of the Department of Health, Education and Welfare (Committee on Government Operations, U.S. House of Representatives, *U.S. Government Information Policies and Practices—The Pentagon Papers*, Part 2, 92nd Congress, First Session, pp. 362–363).

2. The Department of Defense refuses (August 30, 1971) to supply foreign military assistance plans to the Senate Foreign Relations Committee (Senate Judiciary Committee hearings, *Executive Privilege*, pp. 45–46).

3. The State Department refuses (March 15, 1972) to give the House Foreign Operations and Government Information Subcommittee the Agency for International Development country field submissions for Cambodian foreign assistance for the fiscal year 1973 (*New York Times*, 3/17/72; CONGRESSIONAL RECORD, vol. 118, pt. 7, pp. 8694–8695).

4. The United States Information Agency refuses (March 15, 1972) to give the Senate Foreign Relations Committee all USIA Country Program Memoranda (CONGRESSIONAL RECORD, vol. 118, pt. 7, pp. 8694–8695).

Refusals by Executive Departments and Agencies To Provide Documents or Testimony

1. The Department of Defense refuses (June 26, 1969) to supply the five-year plan for military assistance programs to the Senate Foreign Relations Committee (Senate Judiciary Committee hearings, *Executive Privilege*, p. 40).

2. The Defense Department refuses to provide a copy of "Commitment Plan 1964" between U. S. and Thailand to the Senate Foreign Relations Committee (*New York Times*, 8/9/69).

3. The Department of Defense refuses (December 20, 1969) to supply the "Pentagon Papers" to the Senate Foreign Relations Committee (Senate Judiciary Committee hearings, *Executive Privilege*, pp. 37–38).

4. Secretary of Defense Melvin Laird declines invitation to appear before Senate (Foreign Relations) Disarmament Subcommittee (*New York Times*, 3/19/70).

5. Department of Defense General Counsel J. Fred Buzhardt refuses in hearings (March 2, 1971) to release an Army investigation report on the 113th Intelligence Group requested by Senate Constitutional Rights Subcommittee (Senate Judiciary Committee hearings, Executive Privilege, pp. 402–405).

6. The Department of Defense refuses (April 10, 1971) to supply continuous monthly reports on military operations in Southeast Asia to the Senate Foreign Relations Committee (Senate Judiciary Committee hearings, Executive Privilege, p. 47).

7. The Department of Defense refuses (April 19, 1971) to allow three designated generals to appear before the Senate Constitutional Rights Subcommittee (Senate Judiciary Committee hearings, *Executive Privilege*, p. 402).

8. The Department of Defense refuses (June 9, 1971) to release computerized surveillance records and refuses to agree to a

Footnotes at end of article.

Senate Constitutional Rights Subcommittee report on such records (Senate Judiciary Committee hearings, *Executive Privilege*, pp. 398–399).

9. The State Department refuses (March 20, 1972) to supply Senate Foreign Relations Committee with a copy of "Negotiations, 1964–1968: The Half-Hearted Search for Peace in Vietnam" (*Washington Post*, 3/20/72).

10. Treasury Secretary John Connally refuses to testify before Joint Economic Committee on matter of the Emergency Loan Guarantee Board refusing to supply requested records on the Lockheed loan to the Government Accounting Office (*Washington Evening Star*, 4/27/72).

11. Benjamin Forman, Department of Defense Assistant General Counsel, appears before the Senate Foreign Relations Committee but refuses to discuss weather modification efforts in Southeast Asia (Washington Post, 7/27/72).

12. Henry Ramirez, chairman of Cabinet Committee on Opportunities for the Spanish Speaking, refuses to testify before House Judiciary Subcommittee on Civil Rights (*Congressional Quarterly*, 8/12/72, p. 2017).

13. SEC Chairman William J. Casey refuses to turn over Commission investigative files on ITT to the House Interstate and Foreign Commerce investigative subcommittee (*Washington Evening Star/Daily News*, 11/1/72).

14. HUD Secretary George Romney declines invitation to appear before the Joint Economic Committee to testify on Federal housing subsidies (*Washington Post*, 12/6/72).

15. Department of Defense refuses to turn over documents requested by the House Armed Services Committee on unauthorized bombing raids of interest to the committee as part of hearings on the firing of Gen. John D. Lavelle (*Washington Post*, 12/19/72).

CONCLUSIONS

President Kennedy exercised the Presidential claim of "executive privilege" one time when he directed witnesses not to identify speech reviewers in testimony before the Senate subcommittee investigating military cold war education policies. Six separate refusals to provide information to the subcommittee were involved in the President's single action.

After the Kennedy directive, however, Executive Branch officials in his administration refused to provide information to Congressional committees three times, apparently without Presidential authority.

In the Johnson Administration "executive privilege" was not claimed by President Johnson, but there were two refusals by appointees in his administration to provide information to Congressional committees after President Johnson's letter of April 2, 1965, stating that "the claim of 'executive privilege' will continue to be made only by the President."

President Nixon personally and formally invoked the claim of "executive privilege" against Congressional committees four times after his memorandum of March 24, 1969, stating that "executive privilege" will not be used without specific Presidential approval. After the memorandum was issued there were, however, 15 other instances in the Nixon Administration in which documents or testimony were refused to Congressional committees without Presidential approval.

This public record of the controversies over Congressional access to Executive information after three Presidents limited the use of "executive privilege", raises a number of questions. Were the Executive Branch officials who apparently refused information to Congressional committees 20 times in violation of the orders of three Presidents, actually acting under orders? Is it possible that three Presidents ordered information withheld 20 times from Congressional committees and left no evidence of their orders?

Contrariwise, is it possible that, in 20 instances, Executive Branch officials were ignoring the clear orders of three Presidents? Or possibly, is there some of both: Executive Branch officials refusing information to Congressional committees with the tacit understanding—at least by the White House staff if not the President, himself—of what was going on?

There are many other problems which can be raised in addition to these three alternatives, such as the question of what formal action the Congress or one of its constituent units must take to assert the Legislative Branch's right of access to information by the Constitution, and the question of whether the Legislative vs. Executive conflict over access to government information may be regarded as a partisan political fight having little to do with the evolution of a system of government based on three coordinate branches.

The fact that there is much more conflict over Congressional access to Executive Branch information when the two branches are controlled by different political parties gives substance to the view that "executive privilege" is a partisan problem. There were, for example, 19 cases of refusal of information to Congressional committees under the first four years of the Republican Nixon Administration working with a Democratic Congress, but there were only six refusals of information in seven years of the Kennedy and Johnson Administrations when both branches were controlled by the same political party. An additional indication of the partisan nature of the conflict is that there were some 34 instances of information refused in response to Congressional requests during the last five years of the Eisenhower Administration, after he issued his letter of May 17, 1954.[37] In that period, the Executive and Legislative Branches were under control of different political parties.

Partisan the problem is, but not purely partisan. It can come up when both branches are under control of the same political party—witness the six cases in the Kennedy and Johnson Administrations—and the partisan makeup of the two branches may merely sharpen the conflict and not make it less of a problem to be solved as the governmental system evolves.

President Nixon, in fact, did more to regularize the flow of information to Congress on controversial subjects than did his predecessors. He issued the first orders setting up a step-by-step procedure to be followed in his administration before "executive privilege" could be invoked. And his memorandum of March 24, 1969, moved toward an answer to the question of what type of formal action the Congress must take to demand information before "executive privilege" would be asserted.

His memorandum referred throughout to a "Congressional agency"[38] requesting Executive Branch information. By this language, apparently he was recognizing that a Congressional committee or subcommittee—or, possibly, the chairman of either—could make a formal request for information that might result in the claim of "executive privilege". He did not require a resolution of the House or Senate, as did President Taft, nor did he leave the problem completely in limbo, as did Presidents Kennedy and Johnson.

There is some additional information to indicate which of three alternatives—violation of a Presidential order, secret Presidential approval or both—explain the fact that the limitation on the use of "executive privilege" apparently has been ignored. It is possible that the five cases in the Kennedy and Johnson Administrations in which information was refused, apparently without Presidential approval, in fact had Presidential approval but this fact has been kept from public knowledge.

This is not the case in the Nixon Administration. President Nixon's memorandum requires a potential "executive privilege" case to go through the Office of Legal Counsel in the Department of Justice. The "executive privilege" expert in that office is Herman Marcuse, one of the authors of the *George Washington Law Review* study of "executive privileges" from 1953 to 1960 (see footnote 28). Marcuse has stated that only the cases of "executive privilege" listed above were handled in the office and approved by President Nixon since his memorandum.[39]

There is a possibility that, in all three administrations, the cases of refusal of information to Congress, apparently in violation of Presidential orders, did not result from formal confrontations between the two branches of government. Assistant Attorney General William H. Rehnquist, who was in charge of the Office of Legal Counsel, testified after two years' experience under President Nixon's "executive privilege" memorandum that "agencies which seek to withhold information are complying with the procedures set forth in the memorandum."[40] By the time of his testimony, there already had been one formal Presidential use of the claim of "executive privilege" and eight other cases in which, public records show, testimony or documents had been refused to Congressional committees.

Rehnquist downgraded refusals of information to Congress which had not had the stamp of Presidential approval, arguing that no real confrontation over access to information occurs in many cases because they are mere discussions at the staff level between Executive agencies and Congressional committees. And in other cases, he testified, a witness would mention the possibility that a request for particular information might raise the spectre of "executive privilege." Rehnquist added:

"But such a statement, of course, is by no means tantamount to the President's authorizing the claim of privilege. It is simply a statement by a department head or his representative that he is prepared to recommend a claim of privilege to the President should the demand for information not be settled in a mutually satisfactory manner to both the agency and the chairman of the committee or subcommittee involved."[41]

None of the 15 Nixon Administration cases of refusal of information to a Congressional committee without the formal, Presidential citation of "executive privilege" seems to fit the Rehnquist criteria. While the committees or subcommittees involved may not have taken a formal vote to demand the testimony or documents in each case the request for information did come up in hearings or as part of a formal request from the chairman.

If the 15 Nixon Administration cases involved formal, direct requests for information and if there are no secret Presidential orders directing the invocation of "executive privilege", it seems that Executive Branch officials violated the Presidential directive 15 times. When interpreting orders in government administration, however, one bureaucrat's violation may be another bureaucrat's compliance. Those who want to withhold information from the Congress will do everything possible to make it difficult for Congress to get what it needs. That is apparent from the 34 instances occurring in five years when the Executive Branch wrapped itself in President Eisenhower's letter of May 17, 1954, as a cloak of "executive privilege". That cloak no longer exists, but the bureaucracy that used it is little changed. And the top-level policy makers apparently are happy to use the bureaucracy's tactics of delay and obfuscation to prevent Congress from getting at information which might embarrass their agency or their administration.

While the Kennedy-Johnson-Nixon statements limiting the invocation of "executive privilege" may state clearly to Congressional readers that information will not be refused

without specific Presidential approval, they may also state to Executive Branch readers that they should be careful when claiming "executive privilege" but they can use other techniques to block Congressional access to information.

Thus, the use of the claim of "executive privilege" has been severely limited but the limitation has not opened new file drawers to Congress. In fact, the Presidential statements have been limitations in name only.

FOOTNOTES

[1] U.S. Congress. Senate, Committee on Government Operations. Special Subcommittee on Investigations. *Special Senate Investigation on Charges and Countercharges Involving: Secretary of the Army Robert T. Stevens, John G. Adams, H. Struve Hensel and Senator Joe McCarthy, Roy M. Cohn, and Francis P. Carr.* Hearings, 83rd Congress, 2d session. Washington: U.S. Govt. Print. Off., 1954, pp. 1169–1172.

[2] H. Rept. 84–2947, p. 90.

[3] H. Rept. 86–2084, p. 37.

[4] *Ibid.*, p. 36.

[5] *Marbury v. Madison* (1 Cranch 137) and the conspiracy trial of Aaron Burr are the classic historical cases. *Kilbourn v. Thompson* (103 U.S. 168), *McGrain v. Daugherty* (273 U.S. 135), *ex rel. Touhy v. Ragan* (340 U.S. 462) and *U.S. v. Reynolds* (345 U.S. 1) are modern cases which have considered court access to Executive Branch information. When President John F. Kennedy limited the use of "executive privilege" to the President alone (see below), he was asked by the Attorney General whether the limitation applied only to congressional requests for information. Theodore C. Sorenson, Special Counsel to the President, replied in a letter of March 30, 1962, to the Attorney General that the policy "relates solely to inquiries directed by the Congress or its committees to the Executive Branch" and does not have any application to "demands, made in the course of a judicial or other adjudicatory proceeding, for the production of papers or other information in the possession of the Government."

[6] Library of Congress. Legislative Reference Service. *The Constitution of the United States of America—Analysis and Interpretation.* Washington: U.S. Govt. Print. Off., 1964, p. 105.

[7] *Ibid.*

[8] U.S. Congress. House. Committee on Government Operations. Special Subcommittee on Government Information. *Availability of Information from Federal Departments and Agencies.* Hearings, 85th Congress, 2d session. Washington: U.S. Govt. Print. Off., 1958, p. 3911.

[9] *Ibid.*

[10] J. Russell Wiggins, "Government Operations and the Public's Right to Know," *Federal Bar Journal,* XIX (January, 1959), p. 76.

[11] *Ibid.*, p. 82.

[12] Senator Sam Ervin (D.-N.C.), the United States Senate's acknowledged constitutional expert, explains:

"Although the Constitution is silent with regard to the existence of executive privilege, its exercise is asserted to be an inherent power of the President. Its constitutional basis allegedly derives from the duty imposed upon the President under article II section 3 to see that the laws are faithfully executed. The President claims the power on the grounds that it is necessary in order to provide the executive branch with the autonomy needed to discharge its duties properly. Inasmuch as the "President alone and unaided could not execute the laws * * *" but requires "the assistance of subordinates" (*Myers* v. *U.S.*, 272 U.S. 117 (1926)), the alleged authority to exercise executive privilege has thereby been extended in practice to the entire executive branch." *

* U.S. Congress. Senate. Committee on the Judiciary. Subcommittee on Separation of Powers. *Executive Privilege: The Withholding of Information by the Executive.* Hearings, 92d Congress, 1st session. Washington: U.S. Govt. Print. Off., 1971, p. 2.

[13] Edward S. Corwin. *The President: Office and Powers.* New York: New York University Press, 1968, pp. 4 and 5.

[14] H. Rept. 86–2084, p. 117.

[15] U.S. Congress. Senate. Committee on Government Operations. Special Subcommittee on Investigations. *op. cit.*, p. 1059.

[16] *Ibid*, pp. 1169–1172.

[17] H. Rept. 86–234, p. 64, note 1.

[18] U.S. Congress. House. Committee on Government Operations. Special Subcommittee on Government Information. *op. cit.*, p. 2894; another, modified version and the original also found in U.S. Congress. Senate. Committee on the Judiciary. Subcommittee on Constitutional Rights. *Freedom of Information and Secrecy in Government.* Hearings, 85th Congress, 2d session. Washington: U.S. Govt. Print. Off., pp. 63–270.

[19] Herman Wolkinson, "Demands of Congressional Committees for Executive Papers," *Federal Bar Journal,* X (April, July, October, 1949), pp. 103–150.

[20] New York *Times,* May 18, 1954, p. 28.

[21] Washington *Post,* May 18, 1954, p. 14.

[22] U.S. Congress. Senate. Select Committee to Study Censure Charges Against Senator Joe McCarthy. *Hearings, Select Committee to Study Censure Charges Against Senator Joe McCarthy, August 31 through September 17, 1954.* 83rd Congress, 2d session. Washington: U.S. Govt. Print. Off., 1954, p. 167.

[23] *Ibid.*, p. 434.

[24] Telford Taylor. *Grand Inquest.* New York: Simon & Schuster, 1955, p. 133.

[25] H. Rept. 86–2084, p. 177.

[26] U.S. Congress. Senate. Committee on Armed Services. Special Preparedness Subcommittee. *Military Cold War Education and Speech Review Policies.* Hearings, 87th Congress, 2d session. Washington: U.S. Govt. Print. Off., 1962, pp. 508 and 509.

[27] *Ibid.*

[28] Robert Kramer and Herman Marcuse, "Executive Privilege—A Study of the Period 1953–1960," *George Washington Law Review,* XXIX (April, June, 1961), pp. 623–718, 827–916.

[29] *Ibid.*, p. 911.

[30] U.S. Congress. Senate. Committee on the Judiciary. Subcommittee on Separation of Powers. *op. cit.*, p. 34.

[31] *Ibid.*

[32] *Ibid.*, p. 35.

[33] *Ibid.*

[34] *Ibid.*, p. 36.

[35] *Ibid.*

[36] *Ibid.*, p. 37.

[37] H. Rept. 86–2084, pp. 5–35.

[38] U.S. Congress. Senate. Committee on the Judiciary. Subcommittee on Separation of Powers. *op. cit.*, p. 36.

[39] Telephone interview, August 22, 1972.

[40] U.S. Congress. House. Committee on Government Operations. Foreign Operations and Government Information Subcommittee. *U.S. Government Information Policies and Practices—The Pentagon Papers.* Hearings, 92d Congress, 1st session. Washington: U.S. Govt. Printing Office, 1971, p. 365.

[41] *Ibid.*, p. 366.

WHAT TO DO TOGETHER

(Mr. SYMINGTON asked and was given permission to extend his remarks at this point in the RECORD and to include extraneous matter.)

Mr. SYMINGTON. Mr. Speaker, as SALT II proceeds and the peace dividend for our tortured economy is absorbed by the requirements of World War III, we should be moved to new reflections. For a number of years it has seemed to me that peace would be better served if the superpowers agreed not merely what not to do, separately, but what to do, together.

In 1962, as Deputy Director of Food For Peace, I prepared for the Director GEORGE MCGOVERN, a memorandum for President Kennedy on the eve of his historic meeting in Vienna with Premier Khrushchev. At that time Laos appeared to be the bone of great power contention, Vietnam being buried a little deeper. The memorandum, detailing the joint efforts of the American Relief Commission and Soviet authorities to alleviate hunger in Russia in the early twenties, suggested a similar coordinated program of developmental assistance to the Laotian people. Recalling the success of negotiations leading to the end of the four-power occupation of Austria, we suggested that the Vienna talks would provide an ideal opportunity to consider a two, three, or four power economic development effort in Indochina. It was an initiative that might have been called at another time an investment in peace. But the tense confrontation with Khrushchev was unrelieved by speculation of this kind. And the Laotian accords of 1962 contained no such provision. Instead, they embodied pledges of mutual noninvolvement in Laotian affairs which were mutually breached in short order. Our view was dismissed as perhaps impractical, if not wholly naive. As the "practical" approach has cost 55,000 American lives, many times that figure in wounded, $150 billion, a dislocated economy, inflation, neglect of domestic priorities, a balance of payments deficit, dollar devaluation, citizen distrust, and the sorrow and contempt of a good many friends abroad, it is sobering to consider what impracticality might have brought upon us.

In any event, finding myself a decade later as chairman of the recently established House Subcommittee on International Cooperation in Science and Space, I decided to nail down as firmly and quickly as possible bureaucratic, congressional, and public support for the truly nonnuclear agreements concluded last May. Accordingly, with Congressman LOUIS FREY of Florida, the ranking Republican member of the subcommittee, and with the approval of Chairman George Miller of the parent Committee on Science and Astronautics, I scheduled a series of hearings on these accords, 2 weeks following the President's return from Moscow. The hearings are concluded and the report printed.

What do the agreements say? Briefly, in addition to broadened exchanges of scientists, they provide for joint studies and projects in basic and applied sciences, cancer and heart research, public health methods, air and water pollution control, including preservation of the marine environment, earthquake prediction, arctic and subarctic ecological systems, space biology and medicine, exploration of near earth space, and a space docking mission between Soviet and U.S. manned spacecraft in 1975. To spur implementation of the agreements, joint commissions are established for each area of endeavor excluding space where such a working committee already exists. These commissions will meet annually and alternately in Moscow and Washington for review and planning purposes.