



sidestepped open confrontations with Congress and the courts over this issue by first asserting the privilege, then producing some of the documents requested on a voluntary basis.

Jefferson set the precedent for this in the trial of Aaron Burr for treason in 1807. Burr asked the court to issue a subpoena duces tecum to compel Jefferson to provide his private letters concerning Burr. Chief Justice John Marshall, a strong proponent of the powers of the federal government but also a political opponent of Jefferson, ruled that the Sixth Amendment to the Constitution, which allows for these sorts of court orders for criminal defendants, did not provide any exception for the president. As for Jefferson's claim that disclosure of the document would imperil public safety, Marshall held that the court, not the president, would be the judge of that. Jefferson complied with Marshall's order, but claimed he was doing so voluntarily. President William Clinton did the same when agreeing to testify before the grand jury called by Independent Counsel Kenneth Starr only after negotiating the terms under which he would appear.

The Supreme Court addressed the executive privilege in *United States v. Nixon*, the 1974 case involving the demand by Watergate special prosecutor Leon Jaworski that Richard Nixon produce the audiotapes of conversations in the Oval Office of the White House in connection with criminal charges being brought against members of the Nixon Administration. Nixon invoked the privilege and refused to produce any records.

The Supreme Court did not reject that claim out of hand; it noted, in fact, "the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties." As the Court stated, "human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision-making process." This is very similar to the logic that the Court had used in establishing an "executive immunity" defense for high office-holders charged with violating citizens' constitutional rights in the course of performing their duties.

The Court did not, on the other hand, accept Nixon's privilege argument on the facts of that case. Because Nixon had asserted only a generalized need for confidentiality, the Court held that the larger public interest in obtaining the truth in the context of a criminal prosecution took precedence.

Sources:

[http://www.cqpress.com/incontext/constitution/docs/constitutional\\_powers.html](http://www.cqpress.com/incontext/constitution/docs/constitutional_powers.html)

[http://en.wikipedia.org/wiki/Executive\\_privilege](http://en.wikipedia.org/wiki/Executive_privilege)