EQUAL RIGHTS AMENDMENT

In 1923, three years after women won the suffrage in the United States, the first Equal Rights Amendment (ERA) to the Constitution of the United States was introduced in the US Congress. Its primary proponents were the professional and upper-middle-class suffragist militants of the National Women's Party. The amendment was opposed by "social feminists," Progressives, and union leaders, who, in the absence of a strong labor movement in the United States, were trying to institute protections for at least women workers—special protections that would have had to be dropped, or else extended to men by an ERA's requirement of formal equality.

By the 1960s, a number of professional associations and both political parties supported the ERA; however, Democratic President John Kennedy's Commission on the Status of Women concluded that such a "constitutional amendment need not now be sought." One year later, opponents of the Civil Rights Act added "sex" as a protected category to the proposed act, hoping to induce some representatives to vote against it. But the Act passed as amended. By 1970, the federal Equal Employment Opportunity Commission (EEOC) had interpreted the 1964 Act to forbid precisely those special protections for women (in most cases extending the protections to men) that had made the unions oppose the ERA.

In 1970, therefore, the Pittsburgh chapter of the newly formed National Organization for Women (NOW) took direct action to promote the ERA, which NOW had given first place on its Bill of Rights for Women. After two years of controversy, the ERA passed in the House of Representatives with a vote of 354 to 23, and it passed in the Senate with a vote of 84 to 8. The amendment's substantive clause read "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."

The Wisconsin Benton immediately to the states, with Hawaii ratifying it on 22 March 1972, the very day the Senate passed the amendment. Twenty-nine more states ratified in 1972 and early 1973, the earliest with unanimous or nearly unanimous yes votes. By 1973, however, the opposition had begun to organize, led by Phyllis Schlafly, a maverick from the right of the Republican Party. A skilled political entrepreneur, Schlaflay tied the ERA to fears of the cultural upheaval entailed by the growing number of women in the paid labor force, the increasing rate of divorce, and other larger social changes that had emerged along with the growing women's liberation movement in the United States. She tied the ERA as well to conservative and mainstream legislators' anger at the Supreme Court's liberal decisions, and to state legislators' fears of losing control over most issues regarding women, which the US federal system allocates primarily to the states. Nevertheless, five more states ratified in 1974, 1975, and 1977. However, none ratified after 1977, despite the triumph of ERA proponents in 1978 in getting Congress to extend the original 1979 deadline to 1982. On 30 June, the final deadline for ratifying the ERA passed, with only thirty-five of the required thirty-eight states having ratified.

In public opinion polls, a majority of the US public (57 percent in the "average" survey) always supported the ERA. Men were as likely to support it as women, the working class as likely as the middle class, blacks somewhat more than whites, and Catholics somewhat more than Protestants. Fundamentalist and evangelical Christians, frequent churchgoers, parents with large families, older people, and rural residents tended to oppose the amendment.

The amendment lost because it came to be linked with abortion (the Supreme Court decision in Roe v. Wade had legalized abortion in 1973), and could be portrayed as dividing women (housewives versus women in the paid labor force). Its proponents failed to overcome objections that the amendment would force changes that most Americans disapproved (e.g., drafting women for combat in the armed forces). It stopped being a nonpartisan issue (the right wing came to power in the Republican Party with the candidacy of Ronald Reagan). Last, it withdrew the ERA from its platform, and it had to be ratified by states with fewer than 15 percent women legislators (in the states that did not ratify, 79 percent of the women legislators, but only 39 percent of the men legislators, favored the amendment).

Although feminists criticized it for detaching from other causes, in the long run the struggle for the ERA helped build the prestige and budget of NOW (its budget rose from $700,000 in 1977 to $8.5 million in 1982), making the organization the strongest independent feminist organization in the world, and putting it in a position to demand successfully that the Democratic Party run a woman for vice president of the United States in the 1986 election. The ERA struggle also helped build the feminist movement in the United States, to the point at which, by 1989, one out of three women in the United States was reporting to poll takers that she considered herself a "feminist"—about the same percentage as considered themselves Democrats or Republicans.

Argentina (1853) and Iran (1907) were the first countries to guarantee in their constitutions equality for "all inhabitants," including women. After 1945, when the United Nations (UN) Charter affirmed the "equal rights of men and women," many of the world's nations adopted similar clauses in their constitutions. In 1962, the Charter of Rights in Canada's new constitution guaranteed "the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on... sex," generating litigation under that clause that has greatly extended women's rights. The impact of each of these constitutional clauses, including the "equal protection" clause of the US constitution, which now governs legislation affecting women in the absence of an ERA, must be judged by the policy decisions reached under it.

[See also Congress, US; Federalism; Feminization of Poverty; Gender and Politics; and Kennedy, John Fitzgerald.]
of the executive branch. Since that time, however, the president's right to withhold classified information from the courts has come to be discussed under a different heading, namely, the "state secrets privilege." In addition, even though a number of presidents have invoked executive privilege to withhold information about internal deliberations and operations—most notably in the context of Senator Joseph McCarthy's hearings in 1954 and the Supreme Court's demand for White House tape recordings in United States v. Nixon (1974)—the president's right to withhold this category of information has begun to be discussed under a new heading, namely, the "deliberative process privilege." Although these terminological developments complicate discussions of executive privilege, they are welcome for two reasons. First, using the term "executive privilege" to refer to the president's right to withhold both classified and nonclassified but confidential information invites analytical confusion, since the justification offered on behalf of the former differs from that offered on behalf of the latter. Indeed, it is not uncommon to encounter arguments that claim to vindicate "executive privilege" but that in fact defend the president's right to withhold only one of these categories of information. Second, the right to withhold information relating to internal deliberations, which is justified by concerns for the candor and privacy of officials, is not claimed by the executive branch alone; it is also claimed by a variety of other institutions including central banks, courts, and legislatures. Therefore, it is not clear why this right should be discussed under the heading of "executive privilege." By contrast, the right to withhold classified information on grounds of national security is claimed by the executive branch alone. Hence, it seems more fitting to use the term "executive privilege" to refer to this right alone.

The complications surrounding executive privilege are not only terminological, but also substantive. In particular, there are deep disagreements over whether the president really has the right to withhold classified information from Congress. Broadly, three defenses have been offered. The first, put forward by successive attorneys general, and championed by Abraham Sofer and Mark Rozell, rests on precedent.

The emphasis here is on identifying instances, stretching back to the early Republic, where presidents have successfully withheld information from Congress. However, the utility of this evidence has been called into question by Bernard Schwartz and Sakirshana Prakash, both of whom have persuasively argued that Congress's failure to challenge the president cannot be interpreted as establishing the constitutionality of the practice. A second defense of executive privilege rests on claims about the intellectual and political context in which the Constitution was framed. The argument here, developed by Rozell again, is that the political turmoil associated with the post-Revolutionary period convinced the Framers of the Constitution of the importance of secrecy in government. Unfortunately, the constitutional evidence in favor of this claim is thin. For instance, there is no discussion of the privilege in the debates of the Constitutional Convention. Furthermore, the diverse and often contradictory intellectual and political movements that characterized the late eighteenth century make it difficult to discern exactly how context affected the Framers. Thus, Raoul Berger has drawn on historical materials to argue that the Framers actually intended for Congress to exercise a check on executive overreach. A third defense of executive privilege rests on the doctrine of implied powers. The claim here, put forward by David Crockett and Gary Schmitt, is that even though the Constitution does not explicitly authorize an executive privilege, this privilege can nevertheless be derived from the president's responsibilities as commander in chief and chief executive. However, this claim too has encountered stiff resistance. For instance, Louis Fisher has argued that Congress has an independent right to national security information because it is vested with its own national security powers and responsibilities.

There is little prospect of the debate over the constitutionality of executive privilege being resolved any time soon. The relevant materials—precedents, intentions, and historical texts—are simply not amenable to conclusive interpretation. To make matters worse, the courts have shied away from the issue. Citing in United States v. AT&T (1977) the need to "avoid a resolution that would disturb the balance of power between the two branches and inately reflect their true needs," the court indicated that it would not take up the issue. Given the circumstances, scholars have begun to focus less on questions about strict constitutionalality and more on the general arguments for and against allowing the president to control the flow of national security information to Congress. Perhaps the most promising such argument in favor of executive privilege points to structural differences between the executive branch and Congress that make the former less susceptible to making damaging, unauthorized disclosures of classified information. This argument, made by George Callahan and Stephen Knott, draws attention to the manner in which the hierarchical structure and more ideologically cohesive membership of the presidency make it less vulnerable to insubordination (a point brought home by President Dwight Eisenhower's oft-cited warning to his Cabinet that any official who violated the confidentiality he wanted to protect "won't be working for me that night.") This argument has been countered by the claim, made recently by Heidi Kitrosser, that executive privilege threatens the separation of powers. The idea behind the separation of powers is that governmental authority should be allocated to the political branch in a way that makes the exercise of power dependent on the mutual consent of the other branches. The point of this argument is to prevent any branch from exercising unchecked power. It is not difficult to see that executive privilege threatens this arrangement because it compromises Congress's ability to mount an informed challenge to the president's policies.

Unfortunately, arguments about the broader merits of executive privilege have failed to provide a conclusive answer either. In the interim, a number of scholars, most notably Neal Devins and Peter Raven-Hansen, have drawn attention to the means by which Congress can obtain access to information regardless of whether the privilege is ultimately determined to be constitutional or not. These means include withholding appropriations, refusing to confirm nominees, and using Congress's subpoena power. In practice, there has been little need for such measures, because unauthorized disclosures from the executive branch have routinely brought wrongdoing to the attention of Congress, for instance recently in the case of flawed intelligence on Iraq's purported weapons of mass destruction program. In other words, informal transfers of information have thus far precluded the president and Congress from demanding a formal answer to the question of whether executive privilege is constitutional or not. Whether scholars, lawyers, and judges will be forced to provide such an answer remains to be seen; it depends on whether the president and Congress can make their peace with the current arrangement, or if they decide to press for a resolution of the matter.

[See also State Secrecy.]