

Presidents: Executive Privilege

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Abstract

Executive privilege is an implied constitutional power of the presidency. It is the right of the president and some high level executive branch officers to withhold information from Congress, the courts, and ultimately the public. Executive privilege is a controversial power, as it is nowhere explicitly mentioned in the U.S. Constitution. Furthermore, not all presidents have exercised this power judiciously. Nonetheless, there is established case law and many precedents for a limited and constrained use of this power, when exercised in the public interest.

Executive privilege is the constitutional principle that permits the president and high-level executive branch officers to withhold information from Congress, the courts, and ultimately the public. Executive privilege is controversial because it is nowhere mentioned in the U.S. Constitution, leading some scholars—most notable Raoul Berger^[1]—to conclude that this power is not legitimate and that Congress’s power of *inquiry* is absolute. Yet others counter that executive privilege is a recognized, *implied power* that has obtained legitimacy through judicial decisions and many precedents for its exercise.

Controversies over executive privilege date back to the earliest years of the Republic. Although the phrase “executive privilege” was not a part of our common language until the 1950s, almost every president since George Washington has exercised some form of this presidential power.

There is no doubt that presidents and their staffs have secrecy needs and that these decision makers must sometimes be able to deliberate in private without fear that their every utterance may be made public. Over the years, presidents have made their strongest cases for executive privilege to meet certain national security needs, protect confidential deliberations when it is in the public interest to do so, and to properly enforce criminal justice.

The power of executive privilege is not absolute. Like other constitutionally based powers, it is subject to a balancing test. Just as presidents and their advisers have needs of confidentiality, Congress must have access to executive branch information to carry out its investigative function. Therefore, claims of executive privilege often are weighed against Congress’s legitimate need for information to fulfill its own constitutional role. The power of inquiry is not absolute, whether it is wielded by Congress or by prosecutors.

Most fundamentally, executive privilege exists to protect the public interest. The weakest claims of executive privilege involve administrations attempting to cover up

embarrassing or politically inconvenient information, or even outright wrongdoing. President Richard M. Nixon’s use of executive privilege to try to conceal incriminating evidence of White House wrongdoing in the Watergate scandal is the most notable example of the misuse of this power.

In our constitutional system, the burden is on the executive to prove that it has the right to withhold information and not on Congress to prove that it has the right to investigate. Executive privilege therefore exists to be used for compelling reasons—primarily to protect the public interest. It is not a power that should be routinely used to deny those with compulsory power the right of access to information. Short of a strong showing by the executive branch of a need to withhold information, Congress’s right to investigate generally weighs most heavily in this balancing test of interbranch powers.

As the Nixon example demonstrates most clearly, numerous presidents have exercised executive privilege, but not all have done so judiciously. As with all other grants of authority, the power to do good is also the power to do bad. The only way to avoid the latter—and consequently eliminate the ability to do the former—is to strip away authority altogether.

A LANDMARK EXECUTIVE PRIVILEGE CONTROVERSY AND ITS RESOLUTION

The George W. Bush administration made a number of far-reaching efforts to expand the scope of presidential powers, including executive privilege. In one such case, the administration expanded executive privilege to limit public access to presidential papers. Congress passed the Presidential Records Act in 1978 to establish procedures for the release of such records. The Act allowed for the public release of presidential papers 12 years after an administration had

left office. The principle being furthered by the law was that these presidential records ultimately belong to the public and should be made available for inspection within a reasonable period.

In 1989, President Reagan issued an executive order that gave a sitting president primary authority to assert privilege over the records of a former president. Furthermore, although Reagan's EO recognized that a former president has the right to claim executive privilege over his administration's papers, the Archivist of the United States did not have to abide by his claim. The incumbent president could override the Archivist with a claim of executive privilege, but only during a 30-day limit time period for review. After that period, without a formal claim of executive privilege, the documents were to be automatically released.

On November 1, 2001, President George W. Bush issued Executive Order 13223 to supercede Reagan's EO and thus vastly expanded the scope of privileges available to current and former presidents. Under the Bush EO, former presidents could assert executive privilege over their own papers, even if the incumbent president disagrees. Indeed, Bush's EO also gave a sitting president the power to assert executive privilege over a past administration's papers, even if the former president disagrees. The Bush standard therefore allowed any claim of privilege over old documents by an incumbent or past president to stand. Furthermore, the Bush EO required anyone seeking to overcome constitutionally based privileges to have a "demonstrated, specific need" for presidential records (Section 2c). The Presidential Records Act of 1978 did not contain such a high obstacle for those seeking access to presidential documents to overcome.

The Bush EO set off challenges by public advocacy groups, academic professional organizations, press groups, and some members of Congress. All were concerned that the EO vastly expanded the scope of governmental secrecy in a way that was damaging to democratic institutions. Several groups, including the American Historical Association, the Organization of American Historians, and Public Citizen, initiated a lawsuit to have the EO overturned. Congress held hearings that were highly critical of the EO, but did not take any formal action to reverse the president's action.

Congress had the authority to act given that the handling of presidential papers should be determined by statute and not by executive order. Presidential papers are ultimately public documents—a part of our national records—and they are paid for with public funds. They should not be treated merely as private papers. Also, an ex-president's interest in maintaining confidentiality erodes substantially once he leaves office and it continues to erode even further over time. Usually when a president seeks to protect secrecy with executive privilege, he does so with regard to some matter of immediate national concern, not with regard to actions of past administrations.

Lacking legislative action, the Bush EO stood for several years. President Barack Obama, in one of his earliest official acts as president in 2009, issued an executive order that reversed Bush's action. What could not be accomplished legislatively happened as a result of presidential action. Obama's action was consistent with pledges he had made as a presidential candidate to conduct an open administration. Yet a number of President Obama's later actions on executive privilege disappointed advocates of government transparency because they had expected him to maintain a posture consistent with his overturning of the controversial Bush executive order. Obama's willingness to use executive privilege in other contexts is consistent instead with a longstanding practice of presidents promising transparency but then ultimately discovering the utility of this power to what they perceive as protecting the institutional interests of the presidency. Controversy arises especially when presidents appear to be using this power not to protect the institution, but for their own political interests.

THE LEGITIMACY OF EXECUTIVE PRIVILEGE

Despite some abuses of that power, the legitimacy of executive privilege is firmly established in our constitutional system. The Supreme Court has struck down important legislative control devices, expanding the scope of the president's powers.^[2,3] The Court has also determined that secrecy is a necessary condition for the president to carry out many of his constitutional duties, especially in foreign affairs.^[4]

Under U.S. law, the power to classify information belongs to the executive branch, not Congress. Proponents of executive privilege also point out that congressional decision making is purposefully slow, indecisive. Congress may be out of session when a national security crisis arises. Some proponents even take the argument another step in suggesting that Congress does a poor job at keeping secrets. But to be fair, the executive branch does not always maintain secrets either. Once sensitive information is turned over to any large group of officials, there is no guarantee that someone will not divulge what he or she knows for policy or partisan reasons. For that reason, executive privilege may occasionally be necessary to substantially close the circle of individuals with access to sensitive information, especially when national security is at stake.

Presidents rely heavily on being able to consult with advisers, without fear of public disclosure of their deliberations. Executive privilege recognizes this notion. Indeed, in *U.S. v. Nixon*,^[5] the Supreme Court not only recognized the constitutionality of executive privilege, but the occasional need for secrecy to the operation of the presidency.

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...is too

plain to require further discussion. 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. ...The confidentiality of presidential communications ... has constitutional underpinnings ... The privilege is fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution. (pp. 705–706, 708).

In 1979, in *Federal Open Market Committee of the Federal Reserve System v. Merrill*,^[6] the Court affirmed its support of executive privilege based on the need for candid interchange among advisers.

Documents shielded by executive privilege remain privileged even after the decision to which they pertain may have been effected, since disclosure at any time could inhibit the free flow of advice, including analysis, reports and expression of opinions. (p. 361).

Although Congress needs access to executive branch information to carry out its oversight and investigative duties, it does not follow that Congress is entitled to full access to the details of every executive branch communication. Congress's power of inquiry is broad, but not unlimited. Critics of executive privilege have claimed that the Constitution granted to Congress an absolute power of inquiry. Yet there is nothing in Article I, or in any part of the Constitution, that substantiates that claim. The debates at the Constitutional Convention and at the subsequent ratifying conventions provide little evidence that the Framers intended to confer such authority on Congress. There are constitutional limits on the powers of the respective governmental branches. The common standard for legislative inquiry has been whether the requested information was germane to the Congress's lawmaking and oversight functions.

Members of Congress too receive candid, confidential advice from committee staff and legislative assistants. Congressional committees meet on occasion in closed session to "mark up" legislation. Congress is not obligated to disclose information to another branch. A court subpoena will not be honored except with a vote of the legislative chamber concerned. Members of Congress enjoy a constitutional form of privilege that absolves them from having to account for certain official behavior, particularly regarding speech, anywhere but in Congress.

Secrecy also is found in the judicial branch. It is difficult to imagine more secretive deliberations than those that take place in Supreme Court conferences. Members of the judiciary claim immunity from having to respond to congressional subpoenas. The norm of judicial privilege also protects judges from having to testify about their professional conduct.

It is thus inconceivable that secrecy, so common to the legislative and judicial branches, would be uniquely excluded from the executive. The executive branch is

regularly engaged in a number of activities that are secret in nature. George C. Calhoun explains that the executive branch "presents...matters to grand juries; assembles confidential investigative files in criminal matters; compiles files containing personal information involving such things as census, tax, and veterans information; and health, education and welfare benefits to name a few. All of these activities must, of necessity, generate a considerable amount of confidential information. And personnel in the executive branch...necessarily prepare many more confidential memoranda. Finally, they produce a considerable amount of classified information as a result of the activities of the intelligence community" (p. 174).^[7]

RESTORING THE BALANCE

The post-Watergate period has witnessed a breakdown in the proper exercise of executive privilege. Because of former president Richard M. Nixon's abuses, presidents Gerald Ford and Jimmy Carter kept executive privilege at a distance and resorted to other constitutional and statutory means to preserve executive branch secrecy (pp. 73–93).^[8] President Ronald Reagan tried to restore executive privilege as a presidential prerogative but ultimately failed when congressional committees threatened administration officials with contempt citations and exercised other powers to compel disclosure (pp. 94–107).^[8] President George H.W. Bush, like Ford and Carter before him, avoided executive privilege where possible and used other means to preserve secrecy (pp. 107–122).^[8] President Bill Clinton exercised executive privilege more often than all of the other post-Watergate presidents combined, oftentimes improperly (pp. 123–147).^[8] President George W. Bush exercised the privilege more sparingly than his predecessor, but still a number of times under very questionable circumstances (pp. 148–190).^[8] President Barack Obama similarly has been spare in the formal exercise of this power and he too has claimed other constitutional-based principles for withholding information (pp. 190–194).^[8] In the post-Watergate era, therefore, presidents either have avoided uttering the words "executive privilege" and protected secrecy through other sources of authority (Ford, Carter, Bush I, Obama), or they have tried to restore executive privilege and failed (Reagan, Clinton, Bush II).

Clinton's aggressive use of executive privilege in the so-called Lewinsky scandal that led to his *impeachment* served to revive the national debate over this presidential power—a debate that continued into the Bush and Obama years. It is therefore an appropriate time to assess how to restore a sense of balance to the executive privilege debate.

The dilemma of executive privilege is that of permitting governmental secrecy in a political system predicated on leadership *accountability*. On the surface, the dilemma is a complex one to resolve: how can the public hold

democratically elected leaders accountable when they are able to deliberate in secret or to make secretive decisions?

Under certain circumstances, presidential exercise of executive privilege fits comfortably within the embrace of our constitutional system. Nonetheless, in recent years, executive privilege has fallen into disrepute because of the abuses of that power by presidents seeking to conceal wrongdoing. The modern pattern of executive branch recriminations of legislators and Independent Counsels for meddling where they do not belong and accusations that the executive branch's failure to divulge all information constitutes criminal activity have been harmful to our governing system. Currently there appears to be a lack of recognition by the political branches of each other's legitimate powers and interests in the area of governmental secrecy. Restoring balance to the modern debate over executive privilege requires recognizing the following:

First, when used under appropriate circumstances, executive privilege is a legitimate constitutional power. The weight of the evidence refutes Raoul Berger's bold assertion that executive privilege is a "constitutional myth." Consequently, presidential administrations should not be devising schemes for achieving the ends of executive privilege while avoiding any mention of this principle. Furthermore, Congress (and judicial entities) must recognize that the executive branch—like the legislative and judicial branches—has a legitimate need to deliberate in secret and that not every assertion of executive privilege is automatically a devious attempt to conceal wrongdoing.

Second, executive privilege is not an unlimited, unfettered presidential power. Executive privilege should be exercised rarely and for the most compelling reasons. Congress has the right—and often the duty—to challenge presidential secrecy claims.

Third, there are no clear, precise constitutional boundaries that determine, *a priori*, whether any particular claim of executive privilege is legitimate. The resolution to the dilemma of executive privilege is found in the political ebb and flow of our separation of powers system. There is no need for any precise definition of the constitutional boundaries surrounding executive privilege. Such a power cannot be subject to precise definition because it is impossible to determine in advance all of the circumstances under which presidents may have to exercise that power. A return to the traditional separation of powers theory provides the appropriate resolution to the dilemma of executive privilege and democratic accountability.

Congress already has the institutional capability to challenge claims of executive privilege by means other than eliminating the right to withhold information or attaching

statutory restrictions on the exercise of that power. For example, if members of Congress are not satisfied with the response to their demands for information, they have the option of retaliating by withholding support for the president's agenda or for his executive branch nominees. In one famous case during the Nixon years, a Senate committee threatened not to confirm a prominent presidential nomination until a separate access to information dispute had been resolved. That action resulted in President Nixon ceding to the Senators' demands. If information can be withheld only for the most compelling reasons, it is not at all unreasonable for Congress to try to force the president's hand by making him weigh the importance of withholding the information against that of moving forward a nomination or piece of legislation. Presumably, information being withheld for purposes of vital national security or constitutional concerns would take precedence over pending legislation or a presidential appointment. If not, then there appears to be little justification in the first place for withholding the information.

Congress possesses numerous other means by which to compel presidential compliance with requests for information. One of those is the control Congress maintains over the governmental "purse-strings," a formidable power over the executive branch. Additionally, Congress often relies on the *subpoena power* and the *contempt of Congress* charge to compel release of information. It is not merely the exercise of these powers that matters, but the threat that Congress may resort to the use of them. During the Reagan years, for example, Congress had a great deal of success at compelling executive branch disclosure of information through the subpoena and contempt of Congress powers.

In the extreme case, Congress has the power of impeachment—the ultimate weapon with which to threaten the executive. Clearly this congressional power cannot routinely be exercised as a means of compelling disclosure of information and consequently is not going to constitute a real threat in commonplace information disputes. Nonetheless, in the case of a scandal of Watergate-like proportions where all other remedies have failed, Congress can threaten to exercise its ultimate power over the president. For a time, Congress in 1998 considered an impeachment article against President Clinton for abuses of presidential powers, including executive privilege. Congress ultimately dropped that particular article.

In the vast majority of cases—and history verifies this point—it can be expected that the president will comply with requests for information rather than withstand retaliation from Congress. Presidential history is replete with examples of chief executives who tried to invoke privilege or threatened to do so, only to back down in the face of congressional challenges. If members of Congress believe that the chief executive is improperly using executive privilege, the answer resides not in judicial challenges to presidential authority, but in exercising to full effect the vast array of powers already at Congress's disposal.

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