Mapping an Extraordinary Power

Miller Center Policy Report
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INTRODUCTORY LETTER
from GERALD L. BALILES

In its 35-year history, the Miller Center has sought to explore the inherent conflicts born from the separation of powers in our democratic government. These conflicts are institutional battles stemming from the enumerated powers of the various branches of government. In the case of executive privilege, there is the simultaneous need for the executive branch to seek counsel and open discussion that must, at times, be held in relative secrecy, and the congressional duty to provide oversight functions and ensure accountability and an appropriate level of transparency in policymaking. For its part, the judiciary has frequently decided to stay out of these conflicts and instead leave their resolution to the prevailing political will and climate.

Conflict over executive privilege is a seemingly intractable problem and one without a clear-cut solution. It is also an issue that must be examined outside of the context of a current conflict over the respective rights of the president and Congress, since undertaking the study of executive privilege is frequently construed as a partisan exercise received with some suspicion by advocates of either branch.

The Miller Center organized a symposium last year to provide a firm academic foundation and encourage a bipartisan, balanced, and informed study of this issue. The group was also convened to identify implementable solutions to the governance challenges imposed by the lack of clarity in executive privilege.

The report that follows provides a well-rounded primer of this contentious, yet extremely important, governance issue. It begins with a survey of the executive privilege challenge, outlining available policy solutions and their relative viability. In addition, you will find essays from two of the nation’s leading scholars on executive privilege, Mark Rozell and Heidi Kitrosser, that provide historical context and elucidate the appropriate lessons of history. It concludes with session summaries of the Miller Center’s symposium on executive privilege.

Like many of our nation’s governance challenges, executive privilege requires careful, nonpartisan analysis anchored in sound historical perspective. We hope that you find these materials useful and thought-provoking.

With kind regards, I am

Gerald L. Baliles

Director and CEO, The Miller Center
Governor of Virginia (1986–1990)
“...the scope of executive privilege must be very narrowly construed. Under this Administration, executive privilege will not be asserted without specific presidential approval... I want open government to be a reality in every way possible”

—Letter from President Richard M. Nixon to John E. Moss, April 7, 1969
Executive privilege is the president’s constitutional prerogative to withhold certain information requested by Congress. This prerogative is justified primarily by the president’s need to receive candid advice from his advisers. This section of the report identifies the various problems that scholars have identified with the current approach to executive privilege disputes between the president and Congress, and a menu of policy options for addressing these issues.

**Defining the Problem with Executive Privilege**

A discussion of policy solutions to the executive privilege “problem” would not be complete without a discussion of what the exact problem is. The definition of the problem will largely determine the choice of policy solutions. Some experts believe that the current approach to executive privilege is too favorable to either the president or Congress. Others dislike the lack of clarity with the current approach and the partisan nature of the disputes it produces.

*Lack of Clarity About Which Materials Are Privileged and For How Long*

There is no federal statute that defines the extent of executive privilege. Although there is case law recognizing the existence of the privilege, courts have been reluctant to establish any workable guidelines for determining which executive branch materials are protected. Even attempting to establish such guidelines might be seen as a politically calculated attempt to diminish the president’s constitutional privilege. And even if there were a clear rule, there would not necessarily be a neutral arbiter to apply it. This is because the judiciary, for both jurisdictional and prudential reasons, has historically been reluctant to intervene in executive privilege disputes between the president and Congress.

As a result, executive privilege disputes are usually resolved through the political process. In a typical executive privilege dispute, the president will assert that materials sought
“Executive privilege will be asserted only after careful review demonstrates that assertion of the privilege is necessary to protect Executive Branch prerogatives…. Executive privilege belongs to the President, not individual departments or agencies.”

—Memorandum from Clinton White House Counsel Lloyd Cutler to All Executive Department and Agency General Counsels, September 28, 1994
by Congress are protected. Congress may then threaten to withhold funding from the president’s favorite projects or even threaten contempt proceedings, but the dispute will almost always be resolved through negotiation between the two branches. Some experts argue that this approach is flawed because the outcome of a given executive privilege dispute is determined by the relative political power and popularity of the two branches rather than the strength of each side’s constitutional arguments. They point out that the president is typically over-investigated during periods of divided government and under-investigated during periods of unified government.

People who believe that this is the main problem with executive privilege advocate solutions that would better define and formalize the privilege, such as a statutory executive privilege scheme, increased reliance on executive branch memoranda on executive privilege, or increased reliance on other more clearly defined privileges such as attorney-client privilege.

Is the Lack of Clear Guidelines Actually Desirable?

Other scholars argue that the lack of clear statutory or common-law rules about executive privilege is actually a good thing. They point out that executive privilege disputes between Congress and the president are inherently political and therefore not susceptible to adjudication by the courts—even if the courts were to be statutorily designated as the arbiters of these disputes. In addition, the wide variety of executive privilege disputes makes it difficult to prescribe a single rule defining the extent of the privilege under all circumstances. As a result, any sort of statute that sought to delineate the privilege could do so only in vague terms.

The current approach allows the natural separation of powers set up by the Constitution to bring about mutually acceptable resolutions to executive privilege disputes. Both Congress and the president have tools at their disposal to check the other. The president holds the initiative in executive privilege disputes since he possesses the underlying information, but Congress can extract this information by withholding funding, holding up appointments, and in extreme cases, bringing contempt of Congress charges. This means that neither branch always gets its way in executive privilege disputes, and the two sides are usually forced to negotiate a solution.
The Rancorous Nature of Executive Privilege Disputes

Although the current approach to executive privilege allows most disputes to be settled through negotiation, these settlements may come with significant partisan bickering. Members of Congress and the executive are often more interested in scoring political points than in protecting the prerogatives of their respective branches of government. They see themselves as partisans first and institutionalists second. As a result, Congress tends to investigate the executive branch more when it is controlled by the opposing party and less when the same party controls both branches.

Several policy options outlined below could address this problem by encouraging more cooperation between the president and Congress. These solutions include designating a few members of Congress to view materials protected by executive privilege and using special prosecutors instead of members of Congress to investigate contempt charges against executive branch officials.

Is the President Too Powerful?

Many scholars, especially those associated with Congress, believe that the current scope of executive privilege is too broad and that it confers too much power on the president. They point out that the executive branch has an inherent advantage in executive privilege disputes since it holds the materials requested by Congress. This means that the executive can slow-walk the production of documents to Congress or simply refuse to produce them at all.

The more documents that are classified and withheld from Congress, the more difficult it is for Congress to perform its constitutional duties to oversee the executive and craft informed legislation. In addition, it becomes more difficult for the press to play its constitutional role of monitoring the executive and keeping the public informed about its actions. To make matters worse, the public is often sympathetic to excessive assertion of executive privilege—especially when national security matters are involved.

Scholars who believe that executive privilege has made the president too powerful generally want to strengthen Congress vis-à-vis the president. However, many of them believe that Congress already possesses the constitutional means to effectively check
overly broad assertions of privilege. They argue that if Congress would simply use its funding, confirmation, and contempt powers more assertively, a proper constitutional balance would be restored.

**Or Is Congress Too Powerful?**

Others argue that the current protections for presidential documents are too weak. The disclosure of so many documents required by Congress has dissuaded many executive branch members from writing notes, sending e-mails, recording conversations, and so on. With these officials’ reluctance to record their communications with the president due to these disclosure requirements—or, worse, out of fear of congressional subpoena—it has become more difficult for the president to receive candid advice. In addition, the country has lost the historical value that recordings of these discussions could provide.

**Non-Statutory Policy Solutions**

Most of the realistic policy solutions to the executive privilege problem are non-statutory. This is because a statutory approach would require the concurrence of Congress and the president, whose interests are often diametrically opposed in this area. Some of the most popular non-statutory solutions include leaving the issue to the political process, encouraging Congress to be more assertive against the president, increasing the use of executive branch memoranda, and relying more on other privileges such as attorney-client privilege.

**Leave the Issue to the Political Process**

The easiest response to the problems with executive privilege would be doing nothing and leaving the resolution of disputes to the political process. As discussed above, people who advocate this approach believe that the inherent separation of powers affected by the Constitution prevents one-sided outcomes to these disputes. Indeed, history shows that the political process has been the most common method by far for resolving these disputes. Perhaps surprisingly, this process is often cooperative in nature. Members of Congress and the executive typically meet with each other even before a formal document request is made to decide which documents the executive

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*History shows that the political process has been the most common method by far for resolving these disputes.*
will ultimately provide. Neither the president nor Congress has seen the need to take many of these disputes to court, suggesting that both sides are at least somewhat satisfied with the settlements they have negotiated.

Still, just because these settlements have been satisfactory to the executive and Congress does not necessarily mean they have been in the public interest. One could easily argue that this approach to executive privilege disputes simply allows the more politically popular side to “win.” It could be that the two branches both find a negotiated agreement acceptable because one side receives most of the concessions and the other side feels too weak to challenge the result.

Those who advocate leaving the issue to the political process contend that it is perfectly appropriate for political calculations to affect the resolution of an inherently political dispute. And even if this approach sometimes leads to resolutions more favorable to one branch than the other, at least it prevents the worst possible outcomes. Generally, the more sensitive a document is, the less likely it is to be disclosed to Congress—and truly confidential information is almost never disclosed. In the end, this approach brings about a sort of rough justice, with the prerogatives of the executive and Congress being balanced in an acceptable manner.

**Encourage Congress to Be More Assertive**

Many scholars, including current and former congressional staffers, believe that Congress has ceded too much ground to the president in recent executive privilege disputes. They also believe that the political process is the best way to resolve these disputes—but only if Congress becomes more assertive against the president. They argue that members of Congress, viewing their role as advocates for their institution, should be more aggressive, regardless of their party affiliation.

One way to restore such institutional balance would be to expand knowledge of executive privilege matters among congressional staffs. Members of Congress need more people with experience policing the executive branch. This could be accomplished by reducing staff turnover and increasing awareness of executive-legislative powers.

More significantly, Congress could make greater use of its constitutional checks on the executive. Congress has the power to defund executive programs, hold up presidential appointments, and even bring contempt and impeachment proceedings against executive branch officials. The problem, supporters of Congress argue, is that it has
On the evening of June 17, 1972, five men were arrested for burglarizing the offices of the Democratic National Committee located inside the Watergate complex in Washington, DC. Although the purpose of the break-in and whether or not President Nixon ordered it has never been proven, it quickly came to light that all five of the burglars were connected to Nixon’s 1972 re-election campaign. Over the course of Nixon’s second term, it also became apparent that Nixon knew about the break-in and covered it up afterward. This led to his resignation on August 9, 1974.

Some of the most important items of evidence in the Watergate scandal were tape recordings of conversations between the president and his advisers. The existence of such tapes became public on July 16, 1973, when former Deputy Assistant to the President Alexander Butterfield testified before the Senate Watergate Committee. According to Butterfield’s testimony, there was a tape recording system in the White House that recorded virtually all the conversations between the president and his advisers. In response, Watergate Special Prosecutor Archibald Cox requested that Nixon turn over certain tapes related to the scandal. When the president refused, Cox obtained a subpoena from the Federal District Court for the District of Columbia. After the validity of this subpoena was upheld by the DC Circuit Court of Appeals, Nixon responded by having Cox fired. However, the public backlash against this move was so strong that Nixon was eventually forced to turn the tapes over anyway.

In April 1974, a new special prosecutor, Leon Jaworski, requested an additional 64 tapes from the White House. When the DC District Court ordered Nixon to release the tapes for in-camera review, Nixon claimed executive privilege and again appealed to the DC Circuit Court of Appeals. However, before the Circuit Court heard arguments the Supreme Court agreed to directly review the District Court’s decision.

At oral arguments before the Supreme Court, Nixon’s attorney argued that executive privilege was absolute and that it was in the president’s sole discretion to determine when it applied. The Court squarely rejected this conception of the privilege. While recognizing that the privilege was constitutionally based “to the extent that [it] relates to the effective discharge of the president’s powers,” it held that the privilege did not apply to the tapes in question. When presidential materials are subpoenaed as part of a criminal case, the

**United States v. Nixon**
demands of due process and the interest in the functioning of the court system outweigh the president’s interest in receiving candid advice. Executive privilege can only be used in such a case when it is needed to “protect military, diplomatic, or sensitive national security secrets.”

In late July 1974, the administration released the tapes. Among them was the now-infamous “Smoking Gun Tape,” recorded on June 23, 1972, six days after the Watergate break-in. In the tape, Nixon and his chief of staff, H.R. Haldeman, decide to direct the CIA to block the FBI’s investigation of the matter by falsely claiming that national security matters were involved. This constituted obstruction of justice, a federal crime and an impeachable offense. After the Smoking Gun Tape became public on August 5, Nixon was quickly forced to resign.
abdicated its responsibility to employ these checks—sometimes because Congress is controlled by the president’s political party, and other times because it fears expending political capital on executive privilege disputes.

However, Congress’ checks on the president are quite strong, and the costs of using them are very low in relation to the benefits achieved. Since the president is completely dependent on Congress for the funding of the executive branch, Congress can win an executive privilege dispute by defunding the agency or department in which an intransigent executive official serves.

A less heavy-handed option is to hold up the appointment of an official to the offending department or agency. For instance, during the U.S. attorneys firing controversy of 2006–07, Congress could have forced the Bush administration to disclose information about the firings by holding up the appointment of Attorney General Michael Mukasey. However, Congress went a different route, referring the matter to the U.S. attorney for the District of Columbia pursuant to the contempt of Congress statute discussed below. This approach was ultimately unsuccessful.

Another check—and one more directly related to executive privilege disputes—is Congress’ power to punish contempt. Contempt of Congress can consist of anything that impedes Congress from carrying out its functions, including bribing a member of Congress or preventing a congressman from travelling to the Capitol, but it also includes refusing to testify before Congress or to provide documents to Congress after being subpoenaed. Congress’ power to punish refusals to testify or produce documents is derived from its power to call witnesses to testify about legislative matters. In the early years of the republic, Congress directly exercised its inherent contempt power by sending the sergeant-at-arms of the offended chamber to arrest the alleged contemnor and bring him before the bar of that chamber. The chamber would then try the person and vote on whether to convict him. Punishments were generally light and ranged from a reprimand to imprisonment of the contemnor until he cooperated. At no point was there any involvement by Article II prosecutors or Article III judges.

In addition to its constitutional contempt power, Congress has a statutory contempt power under an 1857 federal law. This statutory contempt power requires a majority vote by the offended chamber. Once this vote is secured, the Speaker of the House or...
the President of the Senate refers the matter to the appropriate U.S. attorney—typically the U.S. attorney for the District of Columbia. The U.S. attorney then has the “duty” to bring the matter before a grand jury. If the alleged contemnor is indicted, a conviction requires proof of certain elements, including valid committee authority to demand the person’s cooperation, a valid legislative purpose, the defendant’s willful default of his obligation, and the pertinence of the committee’s inquiry. The offense is considered a misdemeanor, and a convicted contemnor can be fined between $100 and $1,000 and imprisoned for one to twelve months.

The problem is that Congress has exclusively relied on the statutory approach to contempt proceedings since 1935. Although the contempt of Congress statute speaks of the U.S. attorney’s “duty” to bring contempt charges before a grand jury, subsequent case law has made it clear that the president can order a U.S. attorney not to pursue an investigation. This means that the contempt of Congress statute is effectively toothless, as illustrated by the 2006 U.S. attorneys firing controversy. During this dispute, White House Counsel Harriet Miers and White House Chief of Staff Josh Bolten both refused to testify about the firings, claiming executive privilege. When the matter was referred to the U.S. attorney by the Speaker of the House, the Department of Justice simply refused to prosecute.

If Congress desired, it could return to using its inherent contempt power as it did during the period from 1857 until 1935 despite the fact that the statutory approach was also available. By using this inherent power, Congress could bypass the Justice Department and directly punish executive branch officials who refuse to testify or produce documents.

There are several procedural options for trying alleged contemnors, including trial before the full offended chamber, trial before a committee followed by a vote of the full chamber, and trial before a specially created tribunal composed of independent fact finders, again followed by a vote of the full chamber.

Opponents of the inherent contempt approach emphasize that it has not been used since 1935 and warn that Congress might use this considerable power to go on political witch hunts. These fears are somewhat overblown since Congress’ inherent contempt power, although not subject to restraint by the executive branch, is limited by the Constitution. Those convicted of contempt through Congress’ inherent power can seek judicial review, either through an action against the
Clinton Invokes Executive Privilege in Mike Espy Case

On January 22, 1993, Congressman Mike Espy was sworn in as the 25th U.S. Secretary of Agriculture. Just over a year into his tenure as secretary, in March 1994, charges surfaced that Espy had unlawfully accepted gifts and gratuities from individuals and corporations regulated by the Department of Agriculture. The department’s inspector general investigated the matter and submitted its findings to the Justice Department in the spring of 1994. On September 9, Donald Smalz was appointed as independent counsel to investigate the allegations. Espy announced his resignation on October 3, effective at the end of the year.

At President Clinton’s request, the White House Counsel’s Office conducted its own investigation into Espy’s ethical conduct and concluded in October 1994 that no further action was warranted. This report was made public on October 11, and three days later the grand jury issued a subpoena for the underlying documents used to draft the report. President Clinton denied the request for 84 of the documents, citing his executive and deliberative process privileges. The district court denied a motion to compel based on the privilege claim, and the subpoena was nullified following in camera review.

Smalz disputed that decision, arguing that the White House had waived its claims of privilege by releasing the final White House Counsel’s report, and that the presidential communications privilege did not apply to the withheld documents because none of the documents was sent to or received from the president (the only document that the president received regarding the Espy investigation was the White House Counsel’s final report). Smalz also countered the validity of the deliberative process claim by stating that the need to obtain evidence that may shed light on governmental misconduct outweighs that privilege.

In June 1997, the DC Circuit Court of Appeals unanimously reversed the decision in favor of the independent counsel. The court’s opinion, issued by Judge Patricia M. Wald, outlined the difference in these two privileges and determined that executive privilege—although it generally protects communications among White House advisers as well as discussions and written correspondences with the president—“only applies to communications that these advisers and their staff author or solicit and receive in the course of performing their function of advising the President on official Government matters.” In this case, it could be overcome by the Office of Independent Counsel’s need for the documents.
The decision provided additional clarity on the types of presidential decision-making that asserting the privilege is meant to protect by tying them to powers outlined in Article II of the Constitution, specifically those identified as “quintessential and non-delegable”. The opinion also set limitations on the scope of staff covered by the privilege, confining it to White House staff, and then only to White House staff that has “operational proximity” to direct presidential decision-making. The privilege did not extend to staff in executive branch agencies.

The appeals court ruling was important because it clarified several executive privilege issues left unsettled by Watergate, including the parameters of executive privilege, how far in the executive branch privilege extends, whether privilege claims can be made for documents not seen or known by the president, and the criteria for defeating a valid claim of executive privilege.

In the end, Espy was indicted on 39 counts of corruption in August 1997. He pled guilty to one count, while eight other counts were dismissed by the district court judge. In December 1998, a federal jury acquitted Espy of the remaining 30 charges.
sergeant-at-arms or a habeas proceeding. Also, in past cases where the alleged contemnor was ultimately convicted, the punishments were almost always minor; admonishments and fines were most common.¹⁶

A more general objection to using congressional checks, including withholding funding and blocking appointments, is that it is unfair to block the president’s agenda on an unrelated matter when he refuses to provide Congress with requested information. If Congress cannot obtain needed information about an executive department or agency, and therefore, cannot effectively oversee it, then it may be fair to defund that agency or block appointments to it. However, blocking funding or appointments to some unrelated program seems like a disproportionate response.

In addition, relying on congressional checks on the executive is probably not a realistic solution to the problem of executive privilege during periods of unified government. As mentioned before, members of Congress tend to be partisans first and institutionalists second. When the president is a member of their own party, they tend to be less active in overseeing the executive.

Finally, encouraging Congress to be more assertive against the executive would breed even more animosity between the two branches. Although a certain amount of friction between the branches is necessary for our constitutional scheme of checks and balances to work, constant animosity is counterproductive since it prevents the branches from crafting policy compromises on important issues facing the country.

**Increase the Use of Executive Memoranda**

The first detailed executive memorandum specifically related to executive privilege was issued by the Nixon administration.¹⁷ Although the Watergate scandal temporarily made it politically unpalatable for administrations to discuss executive privilege, it has become a semi-regular practice for each new administration to issue a similar memorandum detailing the administration’s beliefs about the scope of executive privilege and the procedures it will follow in asserting it. Such memoranda were issued by the Carter, Reagan, and Clinton administrations.¹⁸ Since there is no one procedure that all presidents are required to follow in asserting executive privilege, each of these memoranda essentially outlines the procedure that the issuing administration intends to follow.

For example, the memorandum issued by the Clinton administration stated that executive privilege would only be asserted “after careful review demonstrates that assertion of the privilege is necessary to protect Executive Branch prerogatives.” It also stated that
“executive privilege belongs to the President, not individual departments or agencies.” 19

The privilege had to be specifically asserted by President Clinton himself.

The Clinton memorandum closely tracked the language of President Reagan’s memorandum. Reagan similarly required that any assertion of executive privilege be made by the president. If a department head believed a congressional request might concern privileged information, he or she was required to notify and consult with the White House Counsel and Attorney General. Together, the three would then decide whether to release the requested information or submit the issue to the president. If they referred the matter to the president and he decided to claim executive privilege, the president would then instruct the department head to notify Congress that “the claim of executive privilege is being made with the specific approval of the president.” 20

Memoranda on executive privilege set up markers that help delineate the privilege in the future. If an administration breaks the rules it sets up for itself in one of these memoranda, the public and Congress can then punish the administration for not abiding by its own standards. Memoranda also enable an administration to police itself by establishing set procedures for asserting the privilege. Internal limits on executive privilege at least provide some basis for public accountability.

Executive memoranda have also helped develop the “common law” of executive privilege. There is little actual common law on the privilege since these disputes seldom find their way to court. The next best thing may be to develop best practices for claiming executive privilege over successive administrations. The similarity of the memos issued by Nixon, Carter, Reagan, and Clinton on so many issues—such as the presumption in favor of openness and the requirement that executive privilege be asserted by the president himself21—suggests that this approach has met with some success. One way to strengthen this approach to executive privilege would be to develop a model executive branch memorandum detailing the procedures for asserting the privilege. Future administrations could then use this model to help write their own memoranda, and the public and Congress would have a record of best practices with which to compare the president’s procedures.

The most glaring weakness of executive memoranda as a means for defining executive privilege is that they are not legally binding upon the president. He can change his mind.

The most glaring weakness of executive memoranda as a means for defining executive privilege is that they are not legally binding upon the president.
The U.S. Attorneys Firing Controversy

On December 7, 2006, the Department of Justice fired eight of the country’s 93 United States attorneys. The firings were controversial because of allegations that they were politically motivated.

It has become regular practice during the past 30 years for incoming administrations to replace some or all of the country’s U.S. attorneys—and for openly political reasons. The Reagan and Clinton administrations both replaced all of the attorneys, preferring to employ people who shared their political views and policy goals. However, firings of U.S. attorneys in the middle of a presidential term have been rare.

To this day, Republicans and Democrats strongly disagree over whether the Bush administration’s firings were improper; congressional Democrats alleged that they were inappropriately motivated by politics. Of course, even if the firings were purely motivated by politics, this alone would not violate any federal law. However, it was argued that some of the firings obstructed corruption investigations into Republican officials by the terminated U.S. attorneys. Additionally, it was alleged that Republican congressmen and their staffs had used their position to pressure the attorneys about ongoing cases, which would have been a violation of congressional ethics rules. This, combined with Congress’ general power to oversee the Department of Justice, gave Congress the ability to subpoena documents related to the matter and call members of the Bush administration to testify.

On March 15, 2007, the Senate Judiciary Committee exercised this power by authorizing subpoenas of several White House officials. On March 20, the White House responded by asserting executive privilege. The administration offered to allow members of Congress to interview the officials, although not under oath and without any transcripts of the proceedings. Congress rejected this proposal.

White House Counsel Harriet Miers and Chief of Staff Josh Bolten would later refuse to appear before the House Judiciary Committee about the matter, citing the assertion of executive privilege. In response, the Committee voted along party lines to issue citations of contempt against the two under the contempt of Congress statute. The full House of Representatives approved the resolution on February 14, 2008, but the contempt investigation stalled when the Justice Department ordered the U.S. attorney for the District of Columbia not to pursue it.
The Committee also sued the Bush administration in federal court in an attempt to compel testimony from Miers and Bolten. On July 31, 2008, Federal Judge John D. Bates declined the administration’s request to dismiss the case, rejecting its argument that senior presidential aides are absolutely immune from congressional subpoenas. However, Judge Bates did not address the substance of the administration’s specific claims of executive privilege, instead encouraging the two sides to reach a negotiated solution.

A deal was eventually struck to bring the litigation and contempt proceedings to an end—although not until President Bush had left office. The Obama administration brokered the 2009 agreement, which provided for Miers and former White House adviser Karl Rove to testify under oath, though not in public. It appears that both sides did not want to settle the dispute in court.
and withdraw or simply contravene a memorandum whenever he wishes. For instance, the Clinton administration claimed in its memo that “[i]n circumstances involving communications relating to investigations of personal wrongdoing by government officials, it is our practice not to assert executive privilege, either in judicial proceedings or in congressional investigations and hearings.” Clinton would later unsuccessfully assert executive privilege in an attempt to withhold information about the Monica Lewinsky scandal from the Office of Independent Counsel. Still, there are political consequences for a president who goes back on a promise made earlier in his administration. Additionally, a memorandum may not be legally binding, but it is still an effective tool for the president to establish best practices for subordinates to follow.

In the end, executive memoranda are a relatively weak but easily implementable method for defining the extent of executive privilege and policing its overuse.

**Rely on Other Privileges When Withholding Information**

One way to avoid disputes related to executive privilege would be for the president to rely on other narrower privileges when withholding information from Congress. For instance, the president could assert attorney-client privilege with regard to communications with executive branch lawyers. Since these lawyers technically represent the president, any legal advice they give him falls within the scope of the privilege. However, attorney-client privilege is most typically asserted in a judicial proceeding, such as a trial or grand jury hearing. The question of whether this privilege applies against congressional subpoenas is surprisingly unsettled. The limited case law on the subject is mixed.

Opponents of applying attorney-client privilege in this context point out that Congress’ power to investigate is constitutional in nature whereas attorney-client privilege is statutory; it is merely a rule of evidence. A constitutional power, they argue, trumps a statutory power. The Legal Ethics Committee of the District of Columbia Bar has implicitly accepted this view by advising lawyers that they can disregard attorney-client privilege when privileged information is subpoenaed by Congress and the lawyer is threatened with contempt charges.

As a matter of policy, however, Congress has often respected the attorney-client privilege when investigating the executive. For instance, the Senate Watergate Committee recognized the general applicability of the privilege. In deciding whether to accept or
dispute a claim of attorney-client privilege, Congress typically weighs considerations of legislative need and public policy while also considering how squarely the needed information fits within the confines of the privilege.29

In the end, attorney-client privilege, as applied against Congress, is just as unclearly defined as executive privilege. As a result, attorney-client privilege disputes are often settled like executive privilege disputes: with the strength of the privilege depending on the relative aggressiveness of the president and Congress. Still, since attorney-client privilege is narrower than executive privilege in that it only applies to legal discussions between the president and executive branch lawyers, it holds some promise for those who would like to see fewer of these disputes between Congress and the president.

Statutory Solutions to Executive Privilege Disputes

Many of the policy options for resolving the executive privilege problem would require legislation by Congress. Such an approach is inherently difficult because the president would have to sign any such legislation and his interests are directly opposed to those of Congress. Still, a statutory approach to the problem holds the promise of greater certainty and finality than the more informal solutions discussed in the previous section. Assuming that these statutory solutions are constitutional, they would each be legally binding upon Congress, the president, and the courts.

Statutorily Define the Extent of Executive Privilege and Designate a Neutral Arbiter of Disputes

The most ambitious statutory approach would be to pass a law delineating the scope of executive privilege and the procedure for asserting it. Such a law would probably designate a neutral arbiter, such as a federal court, to settle disputes about whether particular documents fell within the statutory privilege.30

A quasi-constitutional statute would give necessarily broad guidelines about which executive materials are protected by the privilege. It could do this using a subject-matter test or a proximity test. A subject-matter test would determine whether a document was privileged by asking whether it related to certain subjects. Documents related to
national security matters or sensitive diplomatic relations as well as communications giving advice to the president would probably be included. A proximity test would require that documents come within a certain “distance” of the president in order to be privileged. This would mean that documents that actually pass the president’s desk would be entitled to the greatest degree of protection, while those viewed only by lower-level executive officials would receive the least protection. These two tests could, of course, be combined; the statute could require that privileged documents both be related to certain subjects and come within a certain distance of the president.

The statute would also need to set up a process to decide whether these tests were satisfied in close cases. This would most likely be done through litigation between members of Congress and the president in federal district court. One way to conduct such cases would be to use a burden-shifting scheme such as that used in employment discrimination cases. When the president refused to provide Congress with requested documents, the relevant committee chairman would have the burden of establishing that the documents were relevant to legislation, oversight, or some other constitutional role of Congress. The burden would then shift to the president to show that the documents were covered by executive privilege; this would require satisfying the test set up by the statute. The burden would then shift back to Congress to prove that its reason for demanding the documents was more compelling than the president’s reason for withholding them.

There would be several issues to address under a quasi-constitutional statute, none of which are satisfied with easy answers. Would anyone other than the president be able to assert executive privilege? The main rationale for the privilege—assuring candid advice from subordinates—also seems to apply to heads of departments and agencies. Also, would executive officials confirmed by the Senate be more subject to subpoena by Congress since Congress arguably has a greater connection to them? Finally, could executive privilege ever be used to shield evidence of wrongdoing, assuming that the requested materials otherwise satisfied the privilege requirements?

Like the War Powers Resolution, a quasi-constitutional statute would have critics on both the congressional side and the presidential side. Supporters of Congress might argue that the executive privilege statute went too far, conferring a wider privilege on the president than the Constitution. In contrast, defenders of the president might argue that such a statute would unconstitutionally restrain the president’s inherent privilege.
argue that the executive privilege statute went too far, conferring a wider privilege on the president than the Constitution. In contrast, defenders of the president might argue that such a statute would unconstitutionally restrain the president’s inherent privilege.

Finally, it might be politically impossible for Congress to pass an executive privilege statute that the president would actually be willing to sign. The president would only go along with a statute that he felt expanded his power, yet Congress would want a statute that increased its power at the expense of the president. One possible compromise would be a statute that defined and solidified executive privilege but also provided statutory protection for congressional documents, such as those seized in the raid on former congressman William Jefferson’s office.

Overall, an executive privilege statute would help bring some clarity to this complicated issue. However, because of the political difficulties associated with passing such a statute and the sentiment that this issue is best left to the political process, such a statute is unlikely to be enacted.

Create a Narrower Statutory Privilege for Audio Recordings

A more modest statutory proposal is to protect audio recordings of executive branch discussions against release to Congress or the public. This proposal is driven in part by a desire to safeguard the prerogatives of the executive. However, it is also motivated by the need to preserve records of executive branch discussions for their historical value. A strong statutory privilege for audio recordings would likely lead the executive branch to record discussions with the president again.

Such a privilege would need to be absolute or near-absolute in order to adequately protect executive branch officials. However, Congress could ensure that the privilege did not become too strong by imposing time limits on the privilege. At the very most, the privilege would last for fifty years. By the time the privilege expired, any sensitive discussions would be remote enough in time that they would no longer be embarrassing. The Presidential Records Act already protects presidential documents but only for twelve years; a longer period of protection is needed for this privilege to be effective.

Of course, presidential advisers might still err on the side of caution in deciding what to record even with a strong recordings privilege. However, this narrower approach to protecting executive branch communications is more plausible than an all-encompassing executive privilege statute, and it would allow historians to better chronicle the deliberations that lead to important presidential decisions.
“Congressional Privilege” and the FBI Raid of William Jefferson’s Congressional Office

William J. Jefferson, also known as “Dollar Bill,” is a former congressman from Louisiana’s second congressional district. On August 5, 2009, he was convicted in federal court of eleven corruption charges, including bribery, wire fraud, and racketeering and was later sentenced to thirteen years in prison—the longest jail sentence ever given to a congressman. The trial arose out of an arrangement between Jefferson and the high-tech company iGate, which bribed Jefferson to use his influence to promote iGate’s products to both the federal government and to investors in western Africa.

The FBI, as part of its investigation of this arrangement, persuaded iGate investor Lori Mody to wear a wire and talk to Jefferson. During one conversation, Jefferson told Mody that he needed money to “motivate” the vice president of Nigeria to award iGate contracts in his country. Mody eventually gave Jefferson a briefcase containing $100,000 in cash provided by the FBI. Several days later, on August 3, 2005, FBI agents searched Jefferson’s house in Washington, DC, and found $90,000 of the money hidden in Jefferson’s freezer.

Using this information, the FBI obtained a search warrant for Jefferson’s congressional office and executed it on the night of May 20, 2006. This was the first and only raid of a congressional office by the executive branch in American history, and it set off a firestorm of controversy. Congressional leaders of both parties angrily demanded the return of all seized documents, asserting a “congressional privilege” based on Congress’ need to function free of harassment or intimidation by the executive branch. At the same time, executive officials, including Attorney General Alberto Gonzalez, were said to be ready to resign if any of the materials were returned. On May 25, President Bush intervened by ordering that the documents be sealed for 45 days.

On July 10, the DC Federal District Court held that the raid was legal, rejecting Jefferson’s arguments based on separation of powers, the Speech or Debate Clause, and the Fourth Amendment. However, this decision was overturned on August 3 by the DC Circuit Court of Appeals. It held that Jefferson had to be given an opportunity to review the seized documents and to assert privilege as to those he believed were protected.

The circuit court primarily based its decision on the Speech or Debate Clause of Article I, Section 6 of the Constitution. This clause provides that members of Congress “shall in all
Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.” Federal case law has established that this clause protects all “legislative” acts by sitting members of Congress.

The circuit court in Jefferson’s case extended this to certain congressional documents, reasoning that the threat of public disclosure of discussions between congressmen and their aides might prevent aides from giving candid advice about legislative matters. The court also pointed out that the congressional privilege explicitly created by the Speech or Debate Clause is absolute, unlike the qualified executive privilege the courts have found implicit in the Constitution.
Designate a Few Members of Congress to View Sensitive Materials

Another option is to statutorily designate a few congressional leaders as eligible to view materials protected by executive privilege. This could be a sensible middle-ground between complete withholding of sensitive information and full public disclosure. Congress would theoretically be able to access sensitive information for oversight purposes without the harm to the executive (and the public) that would come with full disclosure.

A similar scheme is already used to keep Congress informed about sensitive intelligence. This scheme is known colloquially as the “Gang of Eight” procedure. Under the National Security Act of 1947, as modified by the Intelligence Oversight Act of 1980 and the 1991 Intelligence Authorization Act, the Central Intelligence Agency is required to inform the House and Senate Select Committees on Intelligence about its activities, including “any significant anticipated intelligence activity.” In special cases, the president has the option of briefing only eight specified members of Congress instead of the full committees. These eight members are the Senate and House Majority and Minority Leaders, and the Chairs and Ranking Members of the House and Senate Intelligence Committees.31

Although the Gang of Eight procedure has been relatively successful in keeping information secret, it has not allowed for robust oversight. Since members of the Gang of Eight cannot divulge information to their respective full chambers, Congress cannot actually use this information to inform policymaking. All that the Gang of Eight members can do is consult with the administration and object to intelligence practices with which they disagree. Even then, they have no way of forcing the administration to act on these objections. For instance, when the George W. Bush administration informed the Gang of Eight about its warrantless wiretapping program, Senator Jay Rockefeller objected in a handwritten letter to Vice President Dick Cheney. However, Rockefeller realized he could do nothing to actually modify the program and admitted as much in the letter.32

We can expect similar problems with any statutory executive privilege scheme allowing the executive to provide information to only a few members of Congress. As long as the full House and Senate cannot access the needed information, they will not be able to use it to inform legislation and oversight. In addition, this sort of scheme would become much more
complicated if applied to executive privilege because it would involve more areas of policymaking. The Gang of Eight procedure is only used for intelligence matters, but claims of executive privilege can apply to any area within the executive branch’s responsibilities. Instead of just the House and Senate Intelligence Committees, virtually every committee would be involved since any committee’s information request can be met with a claim of executive privilege. Even if a privilege statute only required disclosure of protected information to the chair and ranking member of the requesting committee, there would still be many more members of Congress involved than under the Gang of Eight scheme, increasing the likelihood of leaks.

In addition, a statutory disclosure scheme might allow Congress to unfairly discover information that would give it a political advantage against the president, such as discussions about political strategy. This problem is not as severe under the Gang of Eight procedure since Congress and the president share a common goal in ensuring the effective functioning of the country’s intelligence community. Their interests are less well-aligned with regard to executive privilege matters, which are more inherently political.

While a procedure similar to the Gang of Eight seems like a good idea in theory, it may not be effective in practice because of the possibility of leaks, the difficulty of oversight, and the risk of overreaching by Congress.

**Use Special Prosecutors to Consider and Bring Contempt Charges**

One final statutory approach to executive privilege would be to provide for special prosecutors to investigate and bring contempt charges against executive branch officials who refuse to cooperate with congressional information requests. As outlined earlier in the discussion of Congress’ contempt power, both Congress and the executive have incentives to overreach in this area. Congress may use its contempt power for political leverage even when the circumstances do not justify it. On the other hand, the president may single-handedly halt statutory contempt proceedings by instructing the Justice Department not to pursue an investigation.

A special prosecutor independent from Congress and the president could ameliorate both these problems. Ideally, the special prosecutor would investigate alleged cases of contempt referred by Congress objectively and bring charges against the alleged contemnor
if he or she felt the case was strong enough. The prosecutor would not share the same incentive as Congress to over-investigate the president. At the same time, a special prosecutor could not be stonewalled by the administration since that position would not report to the president, unlike a U.S. attorney.

There are problems with this approach. Although the special prosecutor would not share Congress’ institutional bias, he or she still might over-investigate (as special prosecutors tend to do) because it is potentially embarrassing to preside over an investigation that produces no convictions. Also, there are the usual constitutional issues that come with special prosecutors. Advocates of a unitary executive believe that all federal law enforcement officials must ultimately report to the president, whether directly or through a supervisor. In their view, appointing a prosecutor not answerable to the president is unconstitutional.

Conclusion

It is difficult for scholars to agree on the problems related to executive privilege, which makes it even more difficult to identify a single policy solution. Even if consensus can be reached, any viable policy solution must be acceptable to both Congress and the executive branch, and implementable in practice. Facing these impediments to progress, executive privilege will likely remain an intractable problem into the foreseeable future.

Endnotes

1 See United States v. Nixon, 418 U.S. 683, 708-10 (1974) (implicitly recognizing existence of privilege in holding it cannot be used to block subpoena in criminal investigation absent need to protect military or diplomatic secrets).
4 See Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 225-27 (1821) (recognizing Congress’ implied contempt power for the first time); see also McGrain v. Daugherty, 273 U.S. 135, 175 (reasoning that Congress could not “wisely or effectively” consider potential legislation without this power).
5 Zuckerman, supra note 3, at 55.
7 Zuckerman, supra note 3, at 43.
9 Zuckerman, supra note 3, at 61.
11 Zuckerman, supra note 3, at 43; see also Jurney v. MacCracken, 294 U.S. 125 (1935) (case arising from this last use of Congress’ inherent contempt power).
See United States v. Nixon, 418 U.S. 683, 693 (1974) ("[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case...")

See MacCracken, supra note 11, at 151 (holding that Congress' statutory contempt power supplements, rather than replaces, its inherent contempt power).

Zuckerman, supra note 3, at 70–75.

Id. at 66.


Id. at 87, 94, 123–24.


Memorandum from President Ronald Reagan to Heads of Executive Departments and Agencies (Nov. 4, 1982), reprinted in Kaiser et al., supra note 19, at 143.

See Rozell, supra note 17, at 56, 87 (Discussing general policy of openness evinced by Nixon and Carter Administration memoranda and requirement in both memoranda that president approve assertions of executive privilege).

Memorandum from Lloyd Cutler, supra note 19.

Rozell, supra note 17, at 141–42.

See Office of the President v. Office of the Independent Counsel, 521 U.S. 1105 (1997) (rejecting claims by the First Lady of attorney-client and work-product privilege with respect to notes taken by White House Counsel Office attorneys); In re Bruce R. Lindsey (Grand Jury Testimony), 158 F.3d 1263 (D.C. Cir. 1998), cert. denied, 525 U.S. 996 (1998) (holding that a White House attorney may not invoke attorney-client privilege in response to grand jury subpoena seeking information on possible commission of federal crimes); but see In re Grand Jury Investigation, 399 F.3d 527 (2d Cir. 2005) (upholding a claim of attorney-client privilege with respect to communications between a former chief legal counsel to the governor of Connecticut who was under grand jury investigation).


Rosenbach and Tatelman, supra note 25, at 53.

For an example of such a statute, see Emily Berman, Executive Privilege: A Legislative Remedy (2009), Brennan Center for Justice, available at http://brennan3cdn.net/ed3eb0a4b215da3556...fzm6ba8ua.pdf.


Letter from Sen. John D. Rockefeller to Vice President Dick Cheney (July 17, 2003) (“Given the security restrictions associated with this information, and my inability to consult staff or counsel on my own, I feel unable to fully evaluate, much less endorse these activities...Without more information and the ability to draw on any independent legal or technical expertise I simply cannot satisfy lingering concerns.”), available at http://www.fas.org/irp/news/2005/12/rock121905.pdf.
“Any man who testifies as to the advice he gave me won’t be working for me that night.”

—President Dwight D. Eisenhower
Although nowhere mentioned in the Constitution, executive privilege has a long history in presidential politics. Presidents since George Washington have claimed the right to withhold information from either Congress or the judicial branch. Nonetheless, executive privilege is controversial. The very notion that a president may withhold information from those who have compulsory powers strikes at the core of our democratic principles, especially accountability in government.

Most Americans had never heard of executive privilege before President Richard M. Nixon invoked that authority in an effort to cover up wrongdoing in his White House. Nixon’s actions gave executive privilege a bad name. In *U.S. v. Nixon*, a unanimous Supreme Court upheld the legitimacy of executive privilege while striking down Nixon’s particular exercise of that power. The Court affirmed that presidential secrecy is subject to a balancing test. In this case, the requirements of criminal justice, to have access to the White House tapes that contained the evidence of presidential wrongdoing, were more compelling than Nixon’s claimed need of secrecy.

Executive privilege is a legitimate presidential power when exercised under appropriate circumstances. Like most other presidential powers, it is limited by the legitimate needs of the other branches. It also is limited by the democratic principle of openness. No claim of executive privilege should stand merely because a president or a high-ranking administration official has uttered the words “national security” or “ongoing criminal investigation.” A president’s claim of executive privilege must be balanced against other needs and also must meet certain standards of acceptability.
Some scholars have argued that executive privilege is a “myth” (Berger, 1974; Prakash, 1998). During the Watergate scandal, President Nixon claimed that executive privilege was a power that belonged to the entire executive branch of the government and that it was not subject to any limits. Both of these views are unsupported. The relevant debate today is over the proper scope and limits of executive privilege. Presidents have legitimate needs of confidentiality. The other branches and the public have legitimate needs of access to executive branch information. The question is not whether executive privilege is a legitimate power but rather how to balance competing needs when a president makes a privilege claim.

The Definition and Application of Executive Privilege

The phrase “executive privilege” was not a part of the common language until the Eisenhower administration. Executive privilege is an implied power derived from Article II of the Constitution. It is the right of the president and high-level executive branch officers to withhold information from those who have compulsory power—Congress and the courts (and, therefore, ultimately the public). The modern understanding of executive privilege has evolved over a long period, the result of presidential actions, official administration policies, and some court decisions.

President Washington had a profound influence on the development of executive privilege because of the precedents he established. In the first controversy over executive withholding of information from Congress, the president decided that he indeed possessed such a power but only if his actions were in the service of the public interest. Washington determined that he could not withhold information merely for the purpose of concealing politically damaging or embarrassing information.

The particular circumstance involved the disastrous November 1791 St. Clair military expedition against Native American Indians in which General St. Clair lost many of his troops and supplies. Congress convened an investigation and directed the president to turn over any documents or information germane to the decision to initiate the expedition. The political temptation for the president not to cooperate was clear.
With the unanimous advice of his Cabinet, the president determined that he had the right under the Constitution to withhold the information, as long as it was in the public interest to do so. Thomas Jefferson attended the discussion and later recorded in his notes that the Cabinet members had all determined “that the Executive ought to communicate such papers as the public good would permit & ought to refuse those the disclosure of which would injure the public” (Ford, 1892, I: 189–190). In the end, Washington determined that there were no potentially serious public consequences to divulging the information, and he cooperated with the congressional investigation.

In 1794, the U.S. Senate requested copies of diplomatic correspondence between the U.S. and France. Washington believed that full disclosure was inappropriate. Again the president’s Cabinet agreed that he had the right to withhold the information. Washington replied to the Senate that he would direct copies and translations of the correspondences to be made available, “except in those particulars, in my judgment, for public considerations, ought not to be communicated” (Sofaer, 1975: 1320). The Senate never challenged the president’s right to withhold portions of the correspondences.

In 1796, the House requested information concerning the president’s instructions to John Jay regarding treaty negotiations with Great Britain. Washington refused and replied that “the nature of foreign negotiations requires caution, and their success must often depend on secrecy” (Richardson, 1897, I: 186). The House passed a non-binding resolution stating that Congress had a right to the information. During debate, Rep. James Madison declared “that the executive had a right, under a due responsibility, also, to withhold information, when of a nature that did not permit a disclosure of it at the time” (5 Annals of Congress, 1796: 771–772). During ratification the Senate voted to keep the treaty secret, as Alexander Hamilton wrote, “because they thought it [the secrecy] the affair of the president to do as he thought fit” (Lodge, 1903, X: 107).

During his presidency, Thomas Jefferson classified his correspondence as either public or secret. He withheld from Congress correspondence he deemed secret. In 1807, Jefferson denied a congressional request for information about the Aaron Burr conspiracy. A House resolution requested that the president “lay before this House any information in the possession of the Executive, except such as he may deem the public welfare to require not to be disclosed” (16 Annals of Congress, 1806-7: 336). Thus, the House
recognized the legitimacy of presidential secrecy for the public good. Jefferson responded that although Burr obviously was guilty of treason, it would be improper to divulge materials that would reveal the names of other alleged conspirators. The president wrote to the prosecutor that it was “the necessary right of the President of the [United States] to decide, independently, what papers coming to him as President, the public interest permit to be communicated, & to whom” (Ford, 1892, IX: 55). These early cases established the appropriate standard that any presidential withholding of information must be in the service of the public interest, not an administration’s own political interest. Not all presidents have upheld this standard. But over the years, executive privilege evolved into a constitutional principle that is recognized as legitimate when used under certain circumstances. The following describes the evolution of administration policies and procedures toward executive privilege in the modern era as well as a selection of important controversies over that principle.

**Executive Privilege and the Modern Presidents**

President Dwight Eisenhower holds the presidential record for assertions of executive privilege at more than 40. Many of those assertions were refusals to comply with congressional requests for testimony from White House officials. Eisenhower felt so strongly about the principle that at one point he stated, “Any man who testifies as to the advice he gave me won’t be working for me that night” (Greenstein, 1982: 205).

A key event in the development of executive privilege was Eisenhower’s letter of May 17, 1954 to the secretary of defense instructing department employees not to comply with a congressional request to testify about confidential matters in the Army-McCarthy hearings. Eisenhower articulated the principle that candid advice was essential to the proper functioning of the executive branch and that limiting candor would ultimately harm “the public interest” (Public Papers, 1954: 483–4).

At one point, Eisenhower effectively declared that executive privilege belonged to the entire executive branch. Over the course of history, the practice has been to confine its use to the president and high-level White House officials when directed by the president. He declared all advice to the president not subject to the compulsory powers of the other branches. The development of executive privilege practice and law more recently has resulted in a key distinction between discussions about official governmental matters and those about private matters.

Eisenhower’s administration originated the use of the phrase “executive privilege” and expanded the actual practice of that power. Members of Congress rightfully concerned
about the expanded practice sought to limit Eisenhower’s successors through the articulation of certain standards. Rep. John Moss (D-CA), the chairman of the House Subcommittee on Government Information, led the effort. Beginning with the Kennedy administration, Moss sent letters to successive presidents requesting written clarification of policy toward the use of executive privilege. President John Kennedy replied that executive privilege “can be invoked only by the president and will not be used without specific presidential approval” (Mollenhoff, 1962: 239). President Lyndon Johnson similarly responded that “the claim of ‘executive privilege’ will continue to be made only by the president” (U.S. Senate, 1971: 35).

President Richard Nixon responded most forthrightly to Moss’s inquiry when he wrote: “the scope of executive privilege must be very narrowly construed. Under this Administration, executive privilege will not be asserted without specific presidential approval.…. I want open government to be a reality in every way possible” (Letter from Nixon to Moss). Nixon issued the first detailed presidential memorandum specifically on the proper use of executive privilege. Further: “The policy of this Administration is to comply to the fullest extent possible with Congressional requests for information. While the Executive branch has the responsibility of withholding certain information the disclosure of which would be incompatible with the public interest, this Administration will invoke this authority only in the most compelling circumstances and after a rigorous inquiry into the actual need for its exercise. For those reasons Executive privilege will not be used without specific Presidential approval” (Nixon memorandum).

The memorandum outlined the procedure to be used whenever a question of executive privilege was raised. If a department head believed that a congressional request for information might concern privileged information, he would consult with the attorney general. They would then decide whether to release the information or to submit the matter to the president through the counsel to the president. At that stage, the president either would instruct the department head to claim executive privilege with presidential approval or request that Congress give some time to the president to make a decision.

Nixon’s response to Moss and the executive privilege memorandum were important to the development of standard procedures on the use and scope of that power. The Watergate scandal tainted this legacy, and Nixon is better known for his abuse of executive privilege than for his effort to clarify procedures for the exercise of this power.
Nixon’s Watergate claims of executive privilege were extraordinary. He maintained that this presidential power was not subject to challenge by the other branches. At one point, he stated that “the manner in which the president exercises his assigned executive powers is not subject to questioning by another branch of the government” (House of Representatives, 1973: 308). During oral argument in the U.S. v. Nixon case, the president’s attorney, James St. Clair, rejected the authority of the Court to decide the propriety of the chief executive’s claims of privilege. He stated that the president was submitting to the Court “for its guidance and judgment with respect to the law” the matter of the president’s use of executive privilege but that the president maintained his own “obligations under the Constitution” (418 U.S. 683 [1974]). Nixon’s position was that executive privilege, “inherent in the constitutional grant of executive power, is a matter of presidential judgment alone” (Nixon brief).

Ultimately, the president resorted to executive privilege to try to conceal his own role in the Watergate coverup. The Supreme Court rejected the president’s claim of executive privilege and thus compelled that he release the incriminating White House tapes. The president resigned his office in disgrace, and he left the principle of executive privilege with a shattered reputation. His immediate successors naturally sought to avoid any association with executive privilege, for to invoke that power might have subjected them to criticism for Nixon-like tactics.

Nixon’s practices thus had a chilling effect on the ability of his immediate successors either to clarify procedures or properly exercise that power. President Gerald Ford began what became a common post-Watergate practice of avoiding executive privilege inquiries and using other constitutional or statutory powers to justify withholding information. Within a week of Ford’s inauguration, Rep. Moss sent his usual inquiry to the president requesting a statement on executive privilege policy (Letter from Moss to Ford). Ford ignored the letter. Other members of Congress weighed in with their own requests, and Ford ignored their letters too. Numerous discussions took place within the White House over the need for the president to either reaffirm or modify Nixon’s official executive privilege procedures. Ford took no action on the recommendations.
The associate counsel to the president summed up the dilemma nicely when he suggested three options: (1) cite exemptions from the Freedom of Information Act as the basis for withholding information “rather than executive privilege”; (2) use executive privilege only as a last resort—even avoid the use of the phrase in favor of “presidential” or “constitutional privilege”; (3) issue formal guidelines on executive privilege (Chapman memorandum). Ford chose to handle executive privilege controversies on a case-by-case basis rather than to issue general guidelines. He understood that for many people “executive privilege” and “Watergate” had become synonymous.

President Jimmy Carter similarly did not respond to congressional requests for clarification of administration policy on executive privilege. It was not until the week before the 1980 election that the Carter administration established some official executive privilege procedures. On October 31, 1980, White House Counsel Lloyd Cutler issued an executive privilege memorandum to White House staff and heads of units within the Executive Office of the President. The memorandum established that those considering the use of executive privilege must first seek the concurrence of the Office of Counsel to the President. The memorandum also emphasized that only the president had the authority to waive executive privilege (Cutler memorandum, 1980).

On November 4, 1982, President Ronald Reagan issued an executive privilege memorandum to heads of executive departments and agencies. The Reagan procedures dovetailed closely with the 1969 Nixon memorandum and affirmed the administration policy “to comply with congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the executive branch.” The memorandum reaffirmed the need for “confidentiality of some communications” and that executive privilege would be used “only in the most compelling circumstances, and only after careful review demonstrates that assertion of the privilege is necessary.” Finally, “executive privilege shall not be invoked without specific presidential authorization.”

The Reagan memorandum developed greater clarity of procedures than before. All congressional requests must be accommodated unless “compliance raises a substantial question of executive privilege.” Such a question arises if the information “might significantly impair the national security (including the conduct of foreign relations),
the deliberative process of the executive branch, or other aspects of the performance of
the executive branch’s constitutional duties.” If a department head believed that a request
for information might concern privileged information, he or she would notify and
consult with both the attorney general and the counsel to the president. Those three
individuals would then decide to release the information to Congress or have the matter
submitted to the president for a decision if any one of them believes that it is necessary
to invoke executive privilege. At that point, the department head would ask Congress
to await a presidential decision. If the president chose executive privilege, he would
instruct the department head to inform Congress “that the claim of executive privilege
is being made with the specific approval of the president.” The Reagan memorandum
allowed for the use of executive privilege, even if the information originated from staff
levels far removed from the Oval Office (Reagan memorandum).

President George H.W. Bush did not initiate any new
executive privilege procedures. Bush frequently withheld
information without invoking executive privilege. When
the Bush administration wanted to withhold information
from Congress, it used a variety of names other than
executive privilege to justify that action. Among them
were “internal departmental deliberations,” “deliberations
of another agency,” and the “secret opinions policy”
(Rozell, 2010: 108).

In 1994, the Clinton administration issued new executive
privilege procedures. The memorandum from Special
Counsel to the President Lloyd Cutler stated: “The policy of
this Administration is to comply with congressional
requests for information to the fullest extent consistent with
the constitutional and statutory obligations of the Executive
Branch…. [E]xecutive privilege will be asserted only after
careful review demonstrates that assertion of the privilege is
necessary to protect Executive Branch prerogatives.” The memorandum further stated
that: “Executive privilege belongs to the President, not individual departments or agencies.”

The Cutler memorandum described procedures for the use of executive privilege, and
these were not significantly different from those outlined in the Reagan memorandum.
In light of Clinton’s use of executive privilege in the presidential scandal of 1998–99, one
sentence stands out: “In circumstances involving communications relating to investigations of personal wrongdoing by government officials, it is our practice not to assert executive privilege, either in judicial proceedings or in congressional investigations and hearings” (Cutler memorandum, 1994).

The Clinton administration also adopted the very broad view that all White House communications are presumptively privileged and that Congress has a less valid claim to executive branch information when conducting oversight than when considering legislation. Evidence to date suggests that the Clinton administration claimed executive privilege perhaps as many as six times prior to the so-called Lewinsky scandal.

The most prominent case was the administration’s refusal to turn over documents from its 1994 ethics review of Agriculture Secretary Mike Espy. An independent counsel accused Espy of bribery and accepting various illegal gifts, including ones worth approximately $34,000 from a company regulated by the Agriculture Department. In June 1997, the independent counsel requested 84 documents concerning the Espy investigation. Later that year, an appeals court declared that the claim of executive privilege in this case had been overcome by the Office of Independent Counsel’s (OIC) need for the documents in a criminal investigation (Rozell, 2010: 130). Judge Patricia Wald nonetheless issued a sweeping opinion in which she ruled that executive privilege generally protects communications among White House advisers as well as discussions and written correspondences with the president (In re Sealed Case, 121 F.3d 729).

Another controversial use of executive privilege involved an internal administration memorandum that was critical of U.S. anti-drug policy. At the request of the Pentagon, FBI Director Louis Freeh wrote a memorandum on administration anti-drug efforts. Freeh’s wording was critical of the president’s leadership. A House subcommittee requested a copy of the memorandum. Clinton refused, claiming executive privilege. In part, this claim rested on the valid position that there is a strong governmental interest in protecting the privacy of internal correspondences. Yet some subcommittee members maintained that the president merely was covering up information that was embarrassing rather than crucial to protecting the public interest. Clinton never made a case that releasing the memorandum would cause undue harm.
In January 1996, the administration claimed executive privilege to protect some 3,000 White House Travel Office documents from congressional investigators. The administration had earlier fired several Travel Office employees and ordered FBI investigations of possible criminal activity by the officials. The firings were highly controversial, and critics suggested that the president and first lady had embarked on the firings in order to reward cronies with the jobs. In May 1996, a House subcommittee held White House Counsel Jack Quinn and aides David Watkins and Michael Moore in contempt of Congress for refusing to comply with the congressional requests for documents. The White House eventually released the documents, including those involving discussions between the first lady and White House staff, White House talking points for sympathetic Democratic committee members, and other materials not traditionally covered by executive privilege (Rozell, 2010: 127).

Kenneth Starr countered that the Clinton scandal involved personal rather than official governmental matters, and therefore, the White House’s various claims of executive privilege could not stand.

In 1996, the House Committee on International Relations subpoenaed 47 White House and State Department documents concerning U.S. policy toward Haiti. The House requested these materials in light of accusations that U.S.-trained security forces of the Haitian regime were involved in political assassinations and that efforts to stop drug trafficking from Haiti to the U.S. were a failure. Quinn notified the committee that the president claimed executive privilege over the documents. Committee leaders alleged a cover-up, and the White House claimed that the documents protected sensitive national security information. In this case, the House committee had pushed for memoranda from the national security adviser to the president, lending credibility to Clinton’s position that releasing the documents might harm national security. The House committee ultimately did not fight the president’s claim of privilege (Rozell, 2010: 137–8).

Most notably, Clinton used executive privilege to try to conceal evidence of White House wrongdoing in the Lewinsky scandal. Clinton’s lawyers argued that the president has a broad-based executive privilege and to deny that claim was nothing less than to strip away the legal protections for confidential White House deliberations. Independent Counsel Kenneth Starr countered that the Clinton scandal involved personal rather than official governmental matters, and therefore, the White House’s various claims of executive privilege could not stand. (“Ruff’s Argument for Executive Privilege”; “White House Argument Seeking Privilege”).
Federal Judge Norma Holloway Johnson ultimately sided with the OIC because Starr had made a compelling showing of need for access to the information shielded by executive privilege. Judge Johnson applied the classic constitutional balancing test that in a criminal investigation, the need for evidence outweighs any presidential claim to secrecy (“Judge Johnson’s Order on Executive Privilege”). After then dropping its claim of executive privilege, the White House later asserted additional claims as the investigation moved forward (see “Referral to the U.S. House of Representatives”).

The George W. Bush administration made far-reaching efforts to expand executive privilege. President Bush made his first formal claim of executive privilege on December 12, 2001, in response to a congressional subpoena for Department of Justice records. The administration maintained that it even had the right to refuse a congressional request for access to records from closed investigations. The administration claimed that revealing any such information would have a “chilling effect” on future Department deliberations.

Bush issued an executive privilege memorandum to his attorney general in which he emphasized the deliberative nature of some of the prosecutorial materials requested by Congress. The president expressed concern that releasing the materials “would inhibit the candor necessary to the effectiveness of the deliberative processes by which the Department makes prosecutorial decisions.” More vaguely, the president asserted the separation of powers doctrine, the need “to protect individual liberty,” and he stated that “congressional access to these documents would be contrary to the national interest” (Letter from Bush to Ashcroft). Ultimately, the congressional committee that challenged Bush’s claim of privilege succeeded in getting access to most of the disputed documents. This resolution came about as a result of legislative pressure on the administration followed by a compromise struck by both sides after some contentious negotiations.

In another 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 twelve years after an administration had left office.

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. Although
Reagan’s executive order 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 period for review. After that period, absent 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 supersede Reagan’s executive order and to vastly expand the scope of privileges available to current and former presidents. Under the Bush executive order, former presidents may assert executive privilege over their own papers, even if the incumbent president disagrees. The executive order also gives a sitting president the power to assert executive privilege over a past administration’s papers, even if the former president disagrees. The Bush standard allowed any claim of privilege over old documents by an incumbent or past president to stand (Letter from Gonzales to Horn). Furthermore, the Bush executive order 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.

The Bush executive order set off challenges by public advocacy groups, academic professional organizations, press groups, and some members of Congress. All were concerned that the executive order vastly expanded the scope of governmental secrecy in a way that was damaging to democratic institutions. Several groups initiated a lawsuit to have the executive order overturned, and Congress held hearings. President Barack Obama settled the issue on January 21, 2009 by issuing an executive order that overturned Bush’s controversial one.

What is striking about these early Bush-era executive privilege controversies is that the administration sought to protect secrecy in the one case over documents regarding a terminated investigation and in the other case over the presidential papers of past administrations.

What is striking about these early Bush-era executive privilege controversies is that the administration sought to protect secrecy in the one case over documents regarding a terminated investigation and in the other case over the presidential papers of past administrations. Usually when an administration seeks to protect secrecy with executive privilege, it does so with regard to some matter of immediate national concern.
There were several additional Bush-era executive privilege controversies. I have written (with Mitch Sollenberger) in detail on each of these, including the conflict over access to the Cheney energy task force documents, an EPA agency-level claim of privilege, the investigation into the White House leaking of the name of a CIA operative, and the very contentious events surrounding the firings of the U.S. attorneys and refusal to allow certain White House aides to testify (see Rozell, *Executive Privilege*, chapter 7; Rozell and Sollenberger, various publications listed in Sources). Under the theory of the unitary executive, the Bush administration pushed the principle of executive privilege to the far limits. The former president not only had tried to conceal all deliberative documents, including those from long ago closed investigations, he attempted to shield all White House aides from testifying, even in cases of investigations of potential criminal activities. Whereas President Nixon had pushed the limits of executive privilege in Watergate to try to conceal wrongdoing and President Clinton exceeded his own administration’s standards to try to thwart the OIC in the Lewinsky scandal, President George W. Bush tried to establish a routine executive privilege that was not subject to the normal constraints of a system of separated powers. His efforts to expand the scope of this power were the most bold of any of the modern presidents. The controversy over the U.S. attorneys firings, which involved a bold claim that White House aides and even former ones are prohibited from ever testifying on the Hill, remained unresolved into the Obama administration. Bush’s successor promised a new era of transparency, and he was openly critical of Bush’s practices during the 2008 campaign.

President Barack Obama’s record on government secrecy issues suggests that he is not inclined to depart from all of Bush’s practices. The continuing controversy over whether former Bush White House officials could claim executive privilege to avoid congressional testimony created an unwanted complication for the new president. There was considerable pressure on Obama to step forward and compel Karl Rove in particular to testify about the case involving the removal of U.S. attorneys. Obama’s initial reluctance to get directly involved seemed puzzling given his past promises of transparency and the complete lack of merit to the claim that former White House aides possess absolute immunity to testimony. Here we had the former aide Rove claiming executive privilege, an Article II-based presidential power, with the backing of private citizen George W.
Bush, as the sitting president took no action and his White House counsel even said that to do so might have the effect of undermining executive powers.

The brokered deal created a bad precedent. Remarkably, the involved parties agreed that any testimony was not to be public and not even in person but rather in “transcribed depositions.” Further, under this agreement, the depositions were not to touch on discussions with the president, any presidential decisions, or even discussions with any officials from the White House counsel’s office, thus potentially sheltering those persons responsible for the scandal. And there was no clear specification of the scope and limits of executive privilege claims that could be made by those testifying.

The Obama Justice Department sided with the former Bush administration claim of executive privilege to prevent the release of the transcript of the Cheney interview with a special prosecutor who was examining the leak of Valerie Plame’s identity as a CIA agent. The core of the Bush administration’s position was that compelling the release of such information would make future vice presidents or even presidents reluctant to cooperate with criminal investigations for fear of disclosure. The Obama Justice Department agreed and said in a court filing that one of the reasons for taking this position was that a future vice president indeed might not cooperate because of the fear “that it’s going to get on the ‘Daily Show’” (Smith, June 19, 2009).

This argument, as well as the position of the Bush Justice Department, brought a strong rebuke from U.S. District Judge Emmet G. Sullivan, who properly told the Obama Justice Department to provide him with a copy of Cheney’s statement for review. Although the Obama Justice Department has cooperated with this request, Assistant Attorney General Lanny Breuer stated in an affidavit in support of keeping the Cheney remarks secret that by compelling disclosure, “there is an increased likelihood that such officials could feel reluctant to participate” (Smith, July 3, 2009).
Separation of Powers: Resolving Executive Privilege Disputes

Executive privilege is constitutionally based. Since the Nixon years, presidents have not made effective use of that power. Some have devised means of concealing executive privilege, and some have used that power improperly. Presidents have secrecy needs, and Congress has oversight and investigative duties. Executive privilege inevitably leads to interbranch clashes.

It is understandable why, especially in light of modern controversies, some would find appealing a statutory definition of executive privilege or a judicial clarification of the limits of that power. Yet over the course of presidential history, there has evolved an understanding of executive privilege that has been established through precedents, some court decisions, and presidential declarations. Executive privilege is legitimate when it applies to protecting: (1) certain national security needs, (2) the privacy of official White House deliberations when it is in the public interest to do so, or (3) the secrecy of ongoing investigations. In our democratic system, the presumption must be in favor of openness. The burden is on presidents to prove that they have a compelling need for secrecy, not on those who have compulsory powers to prove that they need information.

The proper resolution to conflict over presidential secrecy is rooted in the separation of powers. Congress and the courts already have the institutional means to challenge executive privilege. The proper solution to the potential abuse of executive privilege is not legalistic precision but rather for the other branches to fully use the powers that they already possess.

If members of Congress are not satisfied with the president’s response to their requests for information or testimony, they have numerous options. Congress can issue subpoenas and perhaps ultimately contempt of Congress resolutions, or retaliate by withholding support for the president’s agenda or for one or more of his nominees, or simply withhold funding for presidential-favored programs. These actions give the president the option of weighing the importance of secrecy against such interbranch conflict and the problems it may cause for him. If executive privilege can be exercised only for the most compelling reasons—a real threat to the national security or compromising internal discussions in a way that will clearly harm the public—then it is not unreasonable to force the president’s
hand in this fashion. Presumably, information being withheld for such vital purposes would take precedence over pending legislation or a presidential appointment.

In most cases in which presidents have withheld information or testimony and Congress has retaliated in some form, presidents ultimately have either ceded to Congress’ demands or worked out some form of accommodation. In my studies of the history of executive privilege, I have not come across a single incident in which a president gave in to Congress’ demands and thereby committed a substantial harm to the national security or created a precedent that undermined the right of confidential deliberations for his successors.

Presidents are not powerless in these disputes. They have the ability to rally opinion against Congress for bottling up the agenda, program spending, or nominations. They can shift the burden to Congress to decide how important the information they seek is and how much political heat they should withstand. Presidents also have the powers of their office to help or to frustrate the needs of individual members of Congress.

The history of executive privilege shows that the president and Congress resolve these disputes and that the lack of precise legal guidelines on the use of that power has not resulted in constitutional crises. Someone gives in, or there is an agreed-upon accommodation. The extreme case would of course involve Congress using its power of impeachment against the president who refused to cooperate with demands for information. President Theodore Roosevelt in one case personally seized government papers and dared Congress to impeach him for doing so. But Congress could have tried to get the documents by retaliating in less dramatic ways. The key point is that in legislative-executive disputes over information, the legislature possesses the ultimate weapon of impeachment should no action short of that step resolve the situation.

There are powerful incentives for both branches to reach accommodations. One approach has been for the executive to allow a few members of Congress—for example, the chair and ranking minority member of the committee seeking the information—to privately review confidential documents. During the Second World War, President Franklin Roosevelt personally shared sensitive national security information with a few
trusted and highly respected members of Congress, and they respected the sanctity of that information. There is nothing at all improper with having the executive limit access to secret information to some members of Congress who can attest to the validity of the need for secrecy.

The judicial branch sometimes is a party to an interbranch dispute over access to information. President Clinton tried to shield White House information and testimony from the OIC in 1998, but a federal judge ultimately decided that the constitutional balancing test weighed in favor of the OIC’s need for information. The process of accommodation is obviously more difficult between the president and a judicial entity than between a president and Congress. But the same principle applies: each side should use the powers already at its disposal as fully as possible.

When a dispute over information rises to the level of a constitutional crisis, the courts may get involved, as happened in the Watergate episode. The unanimous court in U.S. v. Nixon declared the privilege “constitutionally based” and that on matters of national security or foreign policy deliberations, such a power is difficult for another branch to overcome. Yet the court made it clear that at times the privilege may have to defer to the constitutionally-based powers of the coordinate branches of the government. In that case, the need for information in a criminal trial had to outweigh any presidential claim to secrecy. The Supreme Court in that case upheld the legitimacy of the judiciary to pose as a viable check on the abuse of executive privilege.

There is also legal precedent for in camera review of sensitive information by the courts. Rather than compelling disclosure of information for open-court review, the executive may satisfy the court in secret chambers of the need for non-disclosure. Disputes over executive privilege cannot be resolved with constitutional or statutory exactitude but rather through the normal ebb and flow of politics as provided for in the system of separation of powers. Through presidential history, executive privilege has evolved with only one constitutional crisis, which was peaceably resolved. The lack of legalistic precision regarding executive privilege has not caused intractable constitutional crises. The constraints provided by the system of separated powers work.
Sources

Annals of Congress.
House or Representatives, 1973 Availability of Information to Congress, Hearings Before a Subcommittee of the Committee on Government Operations. 93rd Congress, 1st Session, April 3, 4, 19.
Letter from Counsel to the President Alberto R. Gonzales to Rep. Stephen Horn (R-CA), November 2, 2001 (on file with author).
Memorandum from President George W. Bush to Attorney General John Ashcroft, December 12, 2001 (on file with author).
Memorandum from Lloyd N. Cutler to Heads of All Units Within the Executive Office of the President and the Senior White House Staff, October 31, 1980, File: “Executive Privilege, 6/77–11/80”, Box 74, Lloyd Cutler Files, Jimmy Carter Presidential Library, Atlanta, Georgia.
Memorandum from Lloyd Cutler to All Executive Department and Agency General Counsels, September 28, 1994 (on file with author).
Memorandum from President Ronald Reagan to Heads of Executive Departments and Agencies, “Procedures Governing Responses to Congressional Requests for Information”, November 4, 1982 (on file with author).
EXECUTIVE PRIVILEGE:
BACKGROUND AND SOME KEY ISSUES

Introduction

Tensions between government secrecy and accountability are built into our constitutional DNA. The U.S. Constitution was itself drafted in secret, and the accompanying controversy portended modern reactions to government secrecy. James Madison insisted that “no Constitution would ever have been adopted by the Convention if the debates had been public.” Yet Thomas Jefferson, writing from Paris, lamented that the delegates “began their deliberations by so abominable a precedent as that of tying up the tongues of their members.” And the behavior of framer Benjamin Franklin foreshadowed the potential for information leaks. Franklin “required a delegate at his elbow when in public to remind him of the secrecy requirement.”

Throughout U.S. history, most controversies over government secrecy have centered on the executive branch. This is not surprising, as the executive is the branch best equipped to keep secrets. This was a quality about which the founders boasted, proclaiming that the president would possess “[d]ecision, activity, secrecy, and dispatch.” The virtues of executive secrecy are not hard to fathom, particularly in the realm of national security. Yet secrecy also poses substantial risks. It may cloak abuse or incompetence. And it can undermine popular, congressional, and judicial oversight. Indeed, in practically the same breaths in which they championed the president’s capacity to keep secrets, members of the founding generation assured one another that presidential wrongdoing would be discovered and the president held accountable for the same. For example, in the same essay in which he explained that a single or “unitary” president could act with “[d]ecision, activity, secrecy, and dispatch,” Alexander Hamilton boasted that unity would also conduce to accountability. He explained that “multiplication of the executive adds to the difficulty of detection,”
Releasing the materials “would inhibit the candor necessary to the effectiveness of the deliberative processes by which the Department makes prosecutorial decisions and congressional access to these documents would be contrary to the national interest”.

—Memorandum from President George W. Bush to Attorney General John Ashcroft, December 12, 2001
including the “opportunity of discovering [misconduct] with facility and clearness.”
One person “will be more narrowly watched and most readily suspected.” These twin assurances—that the president would be capable of secrecy while remaining accountable to a scrutinizing people and their representatives—were echoed many times over in the debates on the Constitution’s framing and ratification.

While the founders largely glossed over the tension between secrecy and accountability in championing ratification, the tension is real and remains with us today. One significant manifestation of it is the existence of executive privilege disputes between Congress and the president. Such disputes occur when a congressional body, such as a Senate or House committee or subcommittee, seeks information from the president or another high-level executive branch officer and the officer refuses, claiming a constitutional right to withhold the information. Even in cases where executive privilege is never explicitly claimed, it has a significant “shadow effect.” That is, the doctrine’s very existence influences information disputes, regardless of whether it is formally invoked in a given case. A shadow effect of executive privilege, for example, is that congresspersons may forgo seeking information in the first place or may give up after an initial refusal because their continued insistence might result in a protracted battle that outlasts the investigating committee’s mandate, the duration of the current administration, or public attention spans.

Executive privilege thus is of substantial practical significance. Furthermore, examining it enables us to shed light more generally on the tension between secrecy and democracy in our constitutional system. This paper is meant to help guide the discussion of executive privilege conflicts between Congress and the executive branch, the problems that they raise, and possible means to address those problems. The next section provides a summary review of some major background points. It reviews the mechanics by which executive privilege claims arise or have a shadow effect on information disputes, summarizes major constitutional arguments for and against executive privilege, and provides an overview of major case law precedents and their significance. The paper’s final section raises some questions for discussion.
Background

*How Executive Privilege Claims—and Their Shadow Effects—Arise*

Executive privilege conflicts between Congress and the executive branch arise when a congressional body—generally a chamber committee or sub-committee—requests information or testimony from the president or information or testimony from another official that may touch on presidential communications. There are many ways that executive privilege can factor into refusals of such requests. The most straightforward way is through a formal claim of privilege upon receipt of the initial request or as a defense against actions—such as a subpoena’s issuance or a contempt vote—taken by the relevant committee or chamber in response to noncompliance. Should a rare judicial action result—either through suit by the executive upon receiving a subpoena or by the relevant congressional body to enforce its demands—then the privilege claim would likely be reiterated in court. A recent rare case of an executive privilege claim leading to a judicial decision occurred toward the end of the last Bush administration. Two administration officials refused to appear when subpoenaed before the House Judiciary Committee to testify on the firing of several U.S. attorneys. The House sought declaratory relief before the U.S. District Court to enforce the subpoenas. A federal judge denied the officials’ claims of blanket immunity from appearing. He explained that they must appear to testify but that they can raise executive privilege claims in response to specific questions. Given the controversy’s protracted nature, the decision as to whether to appeal the ruling fell to the Obama administration, which expressed mixed feelings on the matter. The question of appeal was mooted when a compromise was negotiated between the committee and the officials.

Executive privilege may also be raised as a basis to object to legislation that would require information disclosures to members of Congress. For example, the Obama administration objected to proposed legislation to require notice to the congressional intelligence committees in cases where administrations currently may notify a smaller group known as the “Gang of Eight.” It deemed the proposal to “raise significant executive privilege concerns by purporting to require the disclosure of internal executive branch legal advice and deliberations.” It also cited “the president’s responsibility to protect sensitive national security information.”
administration also threatened to veto an amended proposal, written in response to its initial objection, to allow Gang of Eight notice while requiring some general information—including the fact that more detailed notice was given to the Gang of Eight—to be provided to the full intelligence committees.\textsuperscript{11}

Finally, even where executive privilege is never raised explicitly, it casts a long shadow over debates and decisions on information sharing. Vague allusions by administrations about “separation of powers” problems that might be raised by information requests, or the mere possibility that executive privilege claims will be raised, can discourage congresspersons from pursuing inquiries in light of their possible futility. Such allusions or possibilities can also serve as desired escape hatches for members of Congress who prefer not to probe the executive branch for partisan or other reasons.\textsuperscript{12}

\textit{Major Constitutional Arguments—Apart from Judicial Precedent— for the Privilege}

Proponents of executive privilege deem it implicit in the president's law-execution and commander-in-chief powers. To effectuate these powers, they explain, he must be able to hold candid discussions with advisors. The candor of such discussions would be undermined, they say, if Congress could freely demand to know their content. Privilege proponents also argue that the president must, as commander-in-chief and chief executive, be able to determine when it would be too dangerous, from a national security perspective, to disclose certain information to members of Congress.\textsuperscript{13}

Privilege proponents also draw from history. They infer a secret-keeping right partly from two Federalist Paper passages that celebrate the president's capacity to keep secrets: Federalist 70, in which Alexander Hamilton supports a unitary president because “[d]ecision, activity, secrecy and despatch [sic] will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any great number,” and Federalist 64, in which John Jay champions the relative “secrecy” and “despatch [sic]” of the executive branch as an advantage in treaty-making.\textsuperscript{14} They also argue that there is a long, post-founding history of presidents refusing congressional information requests and that this history bolsters the case for the privilege.\textsuperscript{15}
Major Constitutional Arguments—Apart from Judicial Precedent—Against the Privilege

Others argue that there is no such thing as a constitutional executive privilege. They observe that the president possesses no explicit textual privileges and contrast this with congresspersons’ privilege “from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and [from questioning] for any Speech or Debate in either House.” They also note that only Congress has textual permission to keep secrets. Specifically, the Constitution requires “[e]ach House [to] keep a Journal of its Proceedings, and from time to time publish the same,” but allows each chamber to exempt “such [p]arts as may in their Judgment require Secrecy.”16 Furthermore, constitutional privilege opponents note that the exercise of most presidential powers are contingent on congressional decisions, given Congress’ control over funding, the creation of administrative offices, and the raising of a military. An implied executive privilege would, they argue, be wildly inconsistent with this constitutional structure.17

Constitutional privilege opponents also dismiss proponents’ uses of history. Founding-era references to presidential secrecy, they say, speak only to the president’s structural capacities. This is very different, they argue, from a constitutional right to exercise those capacities in the face of inter-branch checks.18 They also dispute the significance of the post-founding secrecy episodes cited by privilege proponents. Opponents argue that, at least in the early examples closest to the founding, these episodes reflect negotiation and discussion between the branches. They do not reflect clear assertions of a constitutional privilege or congressional acquiescence to the same.19

The Role and Content of Judicial Precedent

Because the handful of judicial precedents on executive privilege include some that arose outside of the context of congressional information requests, it is useful at this point to remember that executive privilege claims can arise in response to three types of information requests. First, privilege claims may be responsive to congressional requests. Second, they may be triggered by requests from non-congressional bodies, such as public interest groups, invoking statutory access rights. Third, they may arise in response to discovery demands generated in litigation.
The seminal executive privilege case, *U.S. v. Nixon*, arose when President Nixon challenged a district court’s refusal to quash a special prosecutor’s subpoena ordering him to turn over tapes and other records of his White House conversations with various aides and advisers.\(^\text{20}\) Although the *Nixon* Court admonished that its analysis did not necessarily apply to legislative/executive disputes,\(^\text{21}\) the Court and lower courts have since indicated that that analysis, or something much like it, governs any such dispute decided on the merits.\(^\text{22}\) Perhaps more importantly, as executive privilege disputes very rarely reach the courts, the framework outlined in *Nixon* influences political debates and strategizing over information disclosures.\(^\text{23}\) The *Nixon* framework thus impacts the reach and shape of executive privilege’s shadow.

While the *Nixon* Court rejected the specific claim of executive privilege before it, it deemed the doctrine itself valid. Indeed, the Court said that the privilege is a presumptive one, given the need for candor in executive branch discussions.\(^\text{24}\) Furthermore, the Court suggested that national security-based privilege claims merit even greater, possibly absolute judicial deference.\(^\text{25}\) In the few cases involving disputes that arose from congressional investigations, courts generally have either applied a Nixon-style balancing test, avoided the merits through aggressive use of jurisdictional doctrines, or encouraged political resolution, but ultimately balanced interests when the resolution was ineffective.\(^\text{26}\) In the context of disputes involving public access statutes, courts generally have construed statutes narrowly to avoid the separation of powers problems that might arise were disclosure by the president or another official statutorily required.\(^\text{27}\)

**Issues and Questions for Discussion**

**Diagnosing the Problem, if Any**

1. Do executive privilege disputes present a problem that needs solving in the first place? Some argue that the current system, governed largely by the “political ebb and flow of…separation of powers” and the distant threat of judicial involvement, is unlikely to be improved through institutional fixes.\(^\text{28}\) Is there indeed a problem that can be solved institutionally?
2. If there is a problem, how should we characterize it? Generally, those who identify problems in the current system consider one of the branches more disadvantaged than the other. Some argue that Congress abuses its oversight powers and that the executive branch is beleaguered as a result. Others argue that Congress is deeply disadvantaged. Because the executive possesses the information in the first instance, they say, it effectively holds the cards, and any delays or compromises redound to its benefit. Furthermore, they deem Congress’ disadvantage multiplied by the shadow effect of executive privilege. Are any of these characterizations correct?

3. If there is a problem, has it changed over time? Has it gotten worse? Better? Simply changed in its nature?

**Does the Constitution Matter?**

1. As discussed earlier, much ink has been spilled in arguing either that executive privilege is a constitutional prerogative or that there is no such thing as a constitutional executive privilege. The potential implications of these arguments are obvious. If there is no such thing as a constitutional executive privilege, then Congress is legally free to pass statutes mandating certain disclosures (or establishing the procedural means to resolve disputes over the same), and the executive is legally obligated to abide by those statutes. Yet as a matter of realpolitik, do the constitutional arguments matter? If they do, is it primarily because of the possibility, however remote, of eventual judicial review? Or do constitutional arguments matter at least partly because they constitute rhetorical tools for each side to wield?

2. If constitutional arguments matter either partly or entirely because of how they may be wielded politically, how does this play out in practice? If what mattered politically were institutional loyalties, then presumably this would play out in a straightforward fashion, with the executive predictably wielding pro-privilege constitutional arguments and congresspersons countering with anti-privilege constitutional arguments. Yet one would likely be accused of naivete for adhering to that neat theory. Do constitutional politics instead turn on partisan considerations, with congresspersons of the president’s party adopting pro-executive constitutional arguments and those of the opposite party arguing against executive privilege? Alternatively, is it in most congresspersons’ interests to remain uninformed about executive doings—perhaps especially in matters of national security—and hence to deem their hands tied by the Constitution?
**Improving the System?**

1. Assuming for the moment that anything were politically possible, what would be the ideal “fix” or “fixes” to the system, assuming that there is room for improvement? Would the ideal fix come via statute? Via changes in internal chamber rules? Should courts play more of a role? Less of a role?

2. Returning to the real world, how might political realities impact the ability of particular fixes to be implemented? What fixes, if any, are both desirable and politically feasible?

3. Another limitation, of course, is the judiciary. How might the actuality or potentiality of judicial review of statutory or other changes influence what can realistically be done?

**Endnotes**

1 A few small passages in this paper have been taken, largely intact, from two articles: Heidi Kitrosser, *Accountability, Transparency, and Presidential Supremacy*, ___ St. Thom. J. L. & Pub. Pol’y ___ (2011) and Heidi


3 *The Federalist* No. 70, at 422–23 (Clinton Rossiter ed., 2003).

4 Id. at 426–27, 429.


7 Miers, 558 F.Supp.2d at 56–57, 61–64, 105–06.


14 See, e.g., id. at 24–25 (citing these passages in support of a qualified privilege).
15 See, e.g., id. at 28–43. See also William P. Rogers, The Papers of the Executive Branch, 44 A.B.A. J. 941, 944 (1958).
18 See Kitrosser, supra note 12, at 512, 524–26; Prakash, supra note 16, at 1175–76.
21 Id. at 712 n.19.
24 418 U.S. at 708, 713.
25 Id. at 706, 710–11. See also In re Sealed Case, 121 F.3d 729, 743 n.12 (D.C. Cir. 1997) (stating that the Nixon Court implied that the national security based privilege is “close to absolute.”).
26 See Kitrosser, supra note 12, at 502 & 502 nn. 61–63 (collecting cases).
27 Id. at 502–03 & 503 n. 64–65 (collecting cases).
29 See, e.g., Devins, supra note 28, at 133 (quoting Theodore Olson).
30 See, e.g., Berman, supra note 12, at 2–4, 7–11.
Panel Chair Heidi Kitrosser began the session by reminding the participants that executive privilege—though it functions as a constitutional “check and balance” and has been asserted by presidents from George Washington onwards—was not really cemented and given a name until the Eisenhower administration.

Panelists Thomas Davis and Miriam Nemetz then discussed the actual practice of executive privilege. Much of this discussion centered around the difficulty in establishing bounds or limits to executive privilege that would preserve original intents of the president and the Congress. Three major issues were cited as contributing to that difficulty:

Lack of a neutral arbiter or impartial referee. The very nature of this privilege pits congressional requests for information against presidential claims of secrecy, historically without much intervention from the judiciary. So, a divided government usually leads to an over-investigation of the president’s decision-making, whereas, periods of unified government often result in under-examination. In both cases, no neutral third party serves as a mediator to manage requests for information, which may correspond to tens of thousands of documents in some cases, or make rulings on their necessity or relevance. Thus, dealing with those requests can be disruptive to ongoing executive branch workings and lead to further distrust between the branches.

A lack of judicial precedent for these cases also complicates the matter, since attempts to start defining which documents are indeed “presidential” (and thus protected) may be viewed as an attempt to diminish the power of the executive branch and an overly
political move that makes trusted advisers overly cautious in their dealings with the president. It was widely agreed that that lack of candor hinders the president’s informed decisionmaking and can adversely affect the country.

However, participants expressed concerns with pushing the issue to courts since it could slow down the courts and the process—even if undertaken on an expedited basis. Additionally, the president has not won any cases claiming executive privilege since the Nixon administration, so there would be little incentive for him to pursue the issue within the courts.

**Tensions and political considerations of president and Congress.** Executive privilege is something rarely invoked in public, although it may be more readily mentioned in backroom negotiations. Both the Congress and president must weigh the public opinion considerations in their decisions on this issue.

A president reticent to claim executive privilege since it is seen as “Nixonian” and could pique public suspicions may assert other privileges for protection, such as attorney-client privilege. For their part, members of Congress must also take political considerations like the procedural and public opinion risks into account. Will they be able to get the votes on the floor needed for the contempt citations? Will the public react negatively to a congressional subpoena if they view it as a personal attack or political calculation? Or, will they use up a lot of political capital and call in favors to get an investigation underway, only to have the public eventually lose interest? Even threatening impeachment could be viewed as a partisan tool, employed only when a president’s public approval rating is low.

Additional means for censure, such as fines for contempt, were seen as a possible “shaming mechanism” that would not require sign-off by the president. The point was also made that having one case in which the courts ruled with the Congress would likely lead to much greater responsiveness on the part of the executive branch to subpoenas.


*Lack of guidelines about what is privileged.* After outlining these obstacles to change, the conversations returned to the presidential documents themselves. Some panelists felt that the current situations, in which presidents and executive branch officials do not use e-mail or keep written or audio records of conversations, represent a high historical loss for the American public. One suggestion to ensure the security of these documents included either absolute immunity or an extended immunity (up to 50 years) on all presidential documents. The Presidential Records Act already provides some protection to the president’s papers and correspondence, although under much more limited terms. Absolute immunity was deemed impracticable, especially in an extreme circumstance, such as a murder in the Oval Office.

Even the proposed solution of allowing select members of Congress private access to the information—similar to the “Gang of Eight” process now—was deemed implausible by the group, due to concerns about leaks. Furthermore, a select membership limits congressional oversight judgments to only a few, select members. Audience member Mortimer Caplin made the point that considerations of history should not override Congress’ need to act on its oversight power.

Also, out of necessity, a president would not be willing to have partial protections and would probably err on maintaining things as they are now, where there is little written or recorded documentation of conversations with advisers and officials. Questions also arose about how wide or broad the “blanket” of executive privilege should be extended in the executive branch.
This panel focused less on legitimacy questions surrounding executive privilege and more on the impact of current political realities on executive privilege.

Panelist Saikrishna Prakash stated that the Constitution did not protect executive privilege. According to Prakash, far more important issues, such as the declaration of war, were left to Congress and that executive privilege should be as well. Journalist John Harris seemed to echo the sentiment, saying that he would welcome any measure that would enhance government accountability to the public, especially with shifts toward an “imperial presidency” and a corresponding expansion of secrecy and avoidance of accountability.

Increasing polarization also exacerbates tensions between the branches, according to the panelists. Inter-branch conflict is not limited to periods of time where there is divided government; it happens even when the same party is in control of each branch. Not only is there an ongoing struggle between the executive branch and Congress and a souring in the nature of their interactions, but there is also a private industry—the media—that profits from the polarization. The constancy of the news cycles makes accountability more difficult and also leads to the public’s shorter attention span.

Bernard Nussbaum agreed and pointed to his own experiences in the executive branch as evidence. He specifically mentioned the tensions around appointees and efforts by one party to prevent the other from adequately staffing the government. He said that that reality made the
president rely more heavily on staff and aides for candid advice, while also being very careful about what was being written down. Nussbaum argued that both executive privilege and attorney-client privilege have been undermined and have reduced the overall authority and autonomy of the executive branch.

Following those comments, the question was raised about whether executive privilege might actually make impeachment a more common congressional tool or if it effectively relegated congressional oversight power solely to impeachment.

Harris then asked whether a structural response to the executive problem was necessary or if the public could rely instead on the good intentions and public interest of lawmakers. Prakash ended the session by returning to the same issue about any executive privilege procedure or statute, which is figuring out a way to craft it so that each branch feels like it gets something out of it. Support from both Congress and the executive will be absolutely essential to garner the necessary support and to see the creation of a procedure or statute.
Conversation in this final session returned to the overarching question of whether or not there was in fact a policy solution or remedy to executive privilege issues. Mark Rozell did not think there was the need to legislate a solution. He stated that many of the issues are solved naturally through the separation of powers, which has both a constitutional basis and practical purpose. According to Rozell, executive privilege is not an absolute power without recourse and that any presumption should be in favor of openness, in accordance with the separation of powers and checks-and-balances structure.

Mitchel Sollenberger did not agree with a legislative or judicial solution either. He viewed the issues as a political process where any codification would not make sense. Members of Congress hold the upper hand in the process, especially in situations such as the U.S. attorney firings during the Bush administration, but do not see themselves as institutionalists intent on protecting the powers of the Congress (as opposed to those of the presidency).

Emily Berman held the opposing position and has crafted a statute in her research on the topic for the Brennan Center for Justice. She argued that the opportunity to submit disputes to federal courts on an expedited basis would level the playing field against an inherent advantage to the executive branch, as they are in possession of the information requested by Congress. Although a last resort, judicial review enables Congress to enforce its oversight powers more forcefully and offers a framework and guidelines in the face of widely varying ideas on what should be covered under executive privilege.
Audience member and executive privilege scholar Morton Rosenberg brought up a corollary concern about what to do with bad legal precedents. He said that contempt and inherent contempt tools Congress has on hand (especially when coupled with the political will to use them) provided enough power. Institutional memory was identified as essential to successful congressional oversight, and Rosenberg did raise the concern that turnover on congressional staffs and lack of transferred knowledge on how to conduct oversight has made executive privilege suffer.

A question was raised about whether courts should have a lesser role in adjudicating executive privilege issues as opposed to other intergovernmental disputes and whether or not this signified a lack of will or abdication of responsibilities by Congress.

The session closed with a reiteration of the need for an administration to clearly state guidelines they will use in asserting privilege, as well as the scope of that privilege. These are the ongoing and vexing questions that seem to defy easy, practical, and implementable solutions.
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