Executive Privilege in an Era of Intensified Polarization: The Challenges of Restoring the Accommodation Process

Mark J. Rozell
Dean, Schar School of Policy and Government
Ruth D. and John T. Hazel Faculty Chair in Public Policy
George Mason University

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Thank you, Senator Whitehouse and members of the committee, for the invitation to address the issue of the current status of executive privilege and its functioning in our system of separated powers. I have been writing about this topic for more than three decades and have observed how executive privilege disputes between the executive and legislative branches in particular have been contested and resolved.[1] Regrettably though, many such disputes are not being resolved, as presidents increasingly have claimed unbreachable executive powers not subject to negotiation and compromise.[2]

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[1] Executive Privilege: The Dilemma of Secrecy and Democratic Accountability. Baltimore, MD: Johns Hopkins University Press, 1994; Executive Privilege: Presidential Power, Secrecy and Accountability. Lawrence, KS: University Press of Kansas, 2020 (4th edition with Mitchel A. Sollenberger).

[2] Jeffrey Crouch, Mark J. Rozell, and Mitchel A. Sollenberger, The Unitary Executive Theory: A Danger to Constitutional Government. Lawrence, KS: University Press of Kansas, 2020.

Our system of separated powers has long depended on an accommodation process in which executive and legislative branch officials work out compromises that serve the needs of both as well as the public interest. For many years, the two branches generally worked effectively in settling executive privilege disputes, and it was not common that presidents would engage in brinkmanship tactics. Not every information access dispute was settled perfectly of course, but there existed longstanding norms and incentives to find ways to compromise and move on to other business.

Executive privilege has always operated in a constitutional grey zone in which the normal give-and-take of the system of separated powers struck me as a far better approach than imposing some firm rules, which can never anticipate all future scenarios. In the past, therefore, I have rejected calls for either (1) a legislative imposed definition of the scope and limits of executive privilege as an improper constraint on presidential authority, or (2) empowering the judicial branch to routinely settle access to information disputes between the political branches. Indeed, in 2021 I testified to this committee that I doubted the utility of the judicial branch being empowered to intervene and settle executive privilege disputes before an accommodation process between the political branches can take place or have enough time to work out some compromise.[3]

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[3] Mark J. Rozell, "Executive Privilege and the Accommodation Process". Testimony before the Senate Judiciary Committee, Subcommittee on Federal Courts, Oversight, Agency Action, and Federal Rights hearing on "Breaking the Logjam: Principles and Practices of Congressional Oversight and Executive Privilege", August 3, 2021 (Dirksen Senate Office Building room 226).

I applaud the work of this subcommittee to address the need for a solution to resolving executive privilege disputes given the breakdown of the accommodation process, which has largely been due to unyielding executive branch strategies to resist Congress's oversight and investigative functions. The committee report "Overprivileged" makes a strong case that the time-honored process of mutual accommodation and compromise over executive privilege disputes is not working effectively; that chief executives of both parties have adopted a vastly expanded definition of executive privilege and have engaged in a kind of brinksmanship strategy of daring Congress to employ its constitutional tools against the executive; and that an executive tactic of resist, obstruct and delay has worked to in effect "run out the clock" on an administration before a dispute can be resolved. Congress's constitutional and political tools, for so long very effective in constraining presidential overreach in the exercise of executive privilege, no longer are working effectively as they had in the past.[4]

Underlying these trends is the intensifying political polarization in which many members of both branches outright reject accommodation and compromise as a surrender of principles,

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[4] In testimony before this subcommittee on October 18, 2022, Christopher Schroeder, the Assistant Attorney General in the Office of Legal Counsel (OLC) offered a different view, in which the accommodation process is working effectively and failures in that process are the exception. Evidence of multiplying cases of executive branch refusal to negotiate legislative requests for information and testimony suggests that he understated the extent of the breakdown in the accommodation process.

and where partisan considerations too often override protecting institutional prerogatives. In part, current electoral and fundraising incentives are driving behavior in government that undermine the norms that long made the system work effectively. And finally, presidents who have engaged in non-compromising, brinksmanship strategies have relied on their partisan political bases both in Washington and nationally to give them the cover they need to persist in resisting congressional oversight and investigations.

The very structure of our separation of powers system naturally advantages presidents in this hyper-partisan environment. The unity of the executive assures that presidents will always steadfastly defend executive powers and prerogatives without having to navigate any internal dissention. Congress of course never has had such unity, and contrary to the expectations of our constitutional framers the legislative branch has often failed to defend its institutional powers against executive overreach of authority. Congress now is so beset by intensified partisanship that collective action in defense of institutional prerogatives seems more unlikely than ever.

Nonetheless, in the past, Congress had many successes in challenging presidential overreach in the use of executive privilege. For a period of time after the Watergate scandal, executive privilege had a bad name because of the presidential abuse of that power that led to President Richard M. Nixon's resignation. As long as claims of executive privilege had a negative association with a past misuse of that power, Congress had substantial political cover to challenge presidential refusals to comply with congressional requests for information or for testimony by White House officials.

In what follows, I provide selected and telling examples of the accommodation process at work when executive privilege disputes were settled effectively, followed by cases that

illustrate the challenges that now exist in finding solutions to access to information disputes. These examples showcase just how far the longstanding norms of the system of separated powers have deteriorated and affirm the need for creative thinking about how to manage future executive privilege disputes.

Executive Privilege: The Framework

Executive privilege is the constitutional-based authority of the president and high-level executive branch officials to withhold information from Congress, the courts, and ultimately the public. Only presidents may claim or authorize the use of executive privilege. It is a limited power to be used only under the most compelling circumstances, in the national interest and not the political interests of the president. All claims of executive privilege are subject to a balancing test against the interests and needs of the other branches. In a democratic-republic, the presumption generally is in favor of openness. Thus, there is a heavier burden on the executive to uphold a claim of executive privilege than there is on Congress and the courts to receive access to information that is necessary to fulfill their core functions.

The necessity of occasional secrecy to the proper functioning of the White House is obvious and hardly controversial. Nonetheless, the consensus among experts breaks down when the discussion turns to particular uses of executive privilege. Under what circumstances, for example, is it appropriate for the president to prevent the testimony before Congress of White House aides or former aides?

It is tempting to try to fill in the constitutional grey areas of executive privilege, either through a statutory definition or further clarification by the courts. Although it must seem frustrating to many observers that there are no clear answers to “who’s right and who’s

wrong?" when assessing the competing claims of the White House and Congress, it is preferable that the definition of executive privilege be left broad enough to allow for a process of give-and-take by the political branches. A precise legislative or judicial line-drawing on the use of executive privilege potentially would constrain its exercise by future presidents when most needed and it would likely result in presidents sidestepping the principle and finding other statutory or constitutional bases for secrecy. Indeed, that already has happened on numerous occasions.

Executive privilege claims occur in vastly different situations, complicating any efforts to define firm boundaries regarding its exercise. A few examples illustrate – the first regarding a congressional request for testimony in the Army-McCarthy hearings, the second a request for testimony in the Watergate hearings.

When confronted with a threat of a congressional subpoena to compel testimony by a White House adviser, President Dwight Eisenhower said in 1954 "any man who testifies as to the advice that he gave me won't be working for me that night". The president went on to say that a close White House aide's work "is really a part of me and he's not going up on the Hill".[5] The *Washington Post* weighed in with editorial support for the president's view and at one point

[5] Quoted in Fred I. Greenstein, The Hidden-Hand Presidency. New York: Basic Books, 1982, p. 205.

said that the president's right to withhold information and testimony from Congress "is altogether beyond question".[6]

Two decades later the same newspaper famously uncovered the Watergate scandal that led to President Richard M. Nixon's resignation. During the investigation of Watergate, a Senate committee requested the testimony of Nixon White House Counsel John Dean. The president claimed that executive privilege shielded presidential aides from compulsory testimony. He made the extraordinary claim that under the separation of powers, the president's exercise of his powers cannot be questioned by another branch of the government. He stated that, "If the president is not subject to such questioning, it is equally appropriate that members of his staff not be so questioned, for their roles are in effect an extension of the president".[7] In the face of strong opposition, Nixon backed down from this broad assertion of privilege and he consented to allow Dean and other White House aides to testify.

President Eisenhower had refused to allow testimony before a committee hearing chaired by Senator Joseph McCarthy (R-Wisc.), President Nixon had attempted to use executive privilege to conceal evidence of actual White House wrongdoing. In the U.S. v. Nixon (1974) case the U.S. Supreme Court correctly allowed that executive privilege is a legitimate power, but one subject to limits and to the competing interests of the other branches. Access to evidence in a

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[6] Washington Post, May 18, 1954, p. 14.

[7] Quoted in U.S. Congress, House of Representatives, Availability of Information to Congress, Hearings before a Subcommittee of the Committee on Government Operations, 93rd Cong., 1st sess., April 3, 4, 19, p. 308.

criminal investigation had to override the president's generalized claim to confidentiality in that case.

Resolving Executive Privilege Disputes Through Accommodation or Confrontation

My research on the history and practice of executive privilege began in the 1980s and has continued to this day. My analyses have extolled the virtues of a constitutionally and operationally flexible process in which negotiations and compromises between the political branches effectively resolved executive privilege disputes, mitigating the need for any statutory or judicial-created framework for the exercise of this power. Much has changed in four decades. The accommodation process today is largely broken. Interbranch confrontation has long been a means of resolution when accommodation does not work, but the balance over time has shifted decidedly to the executive. There appears to be less willingness by presidents to accommodate when there is a highly favorable risk-reward ratio to engage in confrontation and delay tactics. To provide historical context of the current state, it helps first to provide some telling examples of how the system operated effectively in the past.

In the 1980s President Ronald Reagan made several direct claims or threats to assert executive privilege in response to congressional demands for testimony and documents. In every case the president asserted some principled need to protect the public from the claimed damaging effects of disclosure of executive branch information. Each time Congress pushed hard and eventually reached an accommodation with the White House where the president gave up most of what he had tried to conceal, but the outcome of the process allowed room for the president to claim the interests of the executive branch had been upheld. One example will suffice.

In June 1986, President Reagan nominated Associate Justice of the U.S. Supreme Court William H. Rehnquist for the position of chief justice and federal appeals court judge Antonin Scalia to fill the associate justice position once vacated by Rehnquist.[8] Members of the Senate Judiciary Committee requested Department of Justice documents that Rehnquist had written when he had served as head of the Nixon Administration Office of Legal Counsel. The president declared executive privilege, precipitating a challenge by the committee. With bipartisan support, the committee had the votes to subpoena the documents. Members of the committee and of the DOJ negotiated and reached a settlement in which selected documents were made available to senators. Reagan waived executive privilege. Committee members declared they prevailed and got the documents they wanted. The DOJ spokesman declared the administration prevailed by limiting senators' access to only selected documents. It was a model outcome of

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[8] The sequence of events surrounding the Rehnquist memoranda is derived from reports in Congressional Quarterly Weekly Reports and the Washington Post. See Nadine Cohodas, "Rehnquist Rebuts Criticism, Confirmation Seems Likely", Congressional Quarterly Weekly Reports, August 2, 1986, pp. 1764-1765; Nadine Cohodas, "Rehnquist, Scalia Headed for Confirmation", Congressional Quarterly Weekly Reports, August 9, 1986, pp. 1844-1846; Al Kamen and Howard Kurtz, "Rehnquist Told in 1974 Of Restriction in Deed", Washington Post, August 6, 1986, pp. A1, 6; David Broder, "Those Memos Will Tell", Washington Post, August 6, 1986, p. A15; Howard Kurtz and Al Kamen, "Rehnquist Not in Danger Over Papers", Washington Post, August 7, 1986, pp. A1, 14; Howard Kurtz, "Rehnquist Memos Described", Washington Post, August 7, 1986, p. A15.

accommodation and compromise in which both sides got to claim victory and the business of government could move forward.

During the George H. W. Bush presidency an executive privilege controversy arose when a January 1991 House resolution of inquiry requested from the White House specific information pertaining to Operation Desert Shield and U.S.-Persian Gulf policy. The counsel to the president, C. Boyden Gray, replied that the White House could not respond to the request because it intruded on sensitive national security areas protected by executive privilege. Gray warned that divulging the information to Congress would result in "grave damage to the national security."[9] After resistance from members of the House of Representatives, the president dropped his claim of executive privilege and reached an accommodation with Congress whereby the White House, Department of Defense, and Department of State provided summary information germane to the information request. The CIA offered information separately in classified form. Although some members of Congress were not satisfied with the outcome, widespread public support for the president's military action made it politically difficult to press any harder for full disclosure. Again, each branch walked away with a partial victory preserving what it needed to protect its own institutional interests.

During the Bill Clinton presidency there were a number of executive privilege controversies, the most notable related to the Office of Independent Counsel investigation of the scandal resulting in the presidential impeachment. Prior to that scandal the president had

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[9] Letter from C. Boyden Gray to Rep. Dante B. Fascell, January 23, 1991 (copy on file with author).

claimed executive privilege in some battles with Congress, again with each case being resolved after posturing by both sides and then either an accommodation was reached or, in some cases, the White House merely relented.

In one case, a House committee investigating the controversial firings of seven White House travel office employees subpoenaed White House documents. The president initially compromised in turning over a large number of documents, although committee members were not satisfied that the documents most germane to their investigation had been released. The president claimed executive privilege to protect over 3,000 pages of documents related to the firings. After a substantial period of negotiations did not resolve the dispute, the committee voted to hold the president's counsel and two other White House aides in contempt of Congress.[10] On the eve of a full House vote to hold these officials in contempt of Congress, the White House relented and reached an accommodation to allow the committee access to the disputed documents through a review process in which no note-taking or photographing of documents would be permitted. The accommodation here only could be reached through pushback by Congress and did not result from White House willingness to forge a workable compromise to avoid a major confrontation.

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[10] U.S. Congress, House of Representatives, Proceedings Against John M. Quinn, David Watkins, and Matthew Moore, Report of the Committee on Government Reform and Oversight, May 29, 1996.

The Clinton White House established some important precedents for resisting congressional access to information. The administration adopted the very broad view that all White House communications are presumptively privileged. Furthermore, the administration position was that Congress has a less valid claim to executive branch information when conducting oversight than when conducting legislation.[11] This distinction lacks credibility, yet several administrations have since resorted to it in order to resist congressional oversight and investigations.[12]

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[11] See Letter from Janet Reno, United States Attorney General, to President Bill Clinton, September 30, 1996 (copy on file with author); Letter from Janet Reno, United States Attorney General, to President Bill Clinton, September 20, 1996 (copy on file with author).

[12] The administration drew this dubious distinction from an erroneous interpretation of the D.C. Circuit Court's 1974 ruling in Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974). Although the court did not explicitly acknowledge Congress's need for information in cases of oversight, that does not mean that the court thereby overruled the well-established investigative powers of legislative committees. The Reagan and George H.W. Bush administrations also made such broad claims in this regard. See Memorandum from William Barr, United States Attorney General, to Counsels' Consultative Group, June 19, 1989 (copy on file with author); Letter from William French Smith, United States Attorney General, to President Ronald Reagan, October 31, 1981 (copy on file with author).

The Clinton administration also refused to release to congressional investigators any documents that the White House deemed as "subject to a claim of executive privilege". In other words, on numerous occasions the White House withheld documents under the principle of executive privilege without actually formally invoking that power. Consequently, the real extent of Clinton's use of executive privilege has been somewhat masked by White House claims that many uses of that power didn't really count because no one formally invoked it.

President George W. Bush tried to withhold from Congress some Department of Justice documents that were over twenty years old. The president claimed that deliberative documents from the DOJ are always protected by executive privilege, even in cases of Department investigations that had been closed down years before. A House committee investigating credible allegations of wrongdoing by the FBI in the 1960s and 1970s demanded access to the key DOJ documents that shed light on the matter.[13] After the president's refusal, the committee

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[13] Mark J. Rozell, "Congressional Access to Department of Justice Deliberative Documents". Testimony Before the House Committee on Government Reform and Oversight hearing "Withholding Information from Congress", February 6, 2002 (Rayburn House Office Building room 2157). In this hearing, a GOP majority committee stood firm in opposition to a Republican president's insistence on withholding documents that were preventing a committee investigation of allegations of government wrongdoing. Members of the White House and the DOJ even called GOP committee members to request that the hearing not take place. GOP committee members strongly rejected the requests and insisted that the prerogative of

threatened to take the matter to court. The GOP-led committee stood firm in its opposition to executive privilege in this case and the president's actions resulted in substantial editorial and public criticism. Before the committee pursued the matter further the White House agreed to a compromise and turned over most of the contested documents. Both sides declared victory, as the committee got the materials it needed and the White House was able to protect a small category of documents from full disclosure.[14]

In 2011, the Obama administration refused to release documents requested by Congress regarding the government providing a one-half billion dollars loan guarantee to Solyndra, a solar power firm that went bankrupt. In response to the congressional demands, the administration claimed that providing the documents would place an "unreasonable burden on the president's ability to meet his constitutional duties". White House counsel Kathryn Ruemmler wrote in reply

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Congress to get access to information that was needed to conduct an investigation had to be protected, no matter the partisan standing of the White House.

[14] See U.S. Congress, House of Representatives, Committee on Government Reform, Investigation into Allegations of Justice Department Misconduct in New England – Volume 1. Washington, D.C.: Government Printing Office, 2002, https://www.govinfo.gov/content/pkg/CHRG-107hhrg78051/html/CHRG-107hhrg78051.htm (accessed by author September 16, 2023).

to the congressional demand that the administration had already turned over numerous pages of documents on the matter.[15] Many of those documents though were not responsive to the committee request, whereas the White House held back relevant documents under the guise that the congressional request was too broad. As two separate House committees - Energy and Commerce, and Oversight and Government Reform - ramped up investigations, the administration eventually handed over many more relevant documents that became a part of the basis for a later very critical inspector general report of the loan program.[16]

The above cases are examples of the successful give-and-take between the political branches over access to information. Some of these disputes escalated over time and reaching accommodations was not easy. They key though is that the respective branches operated in an environment of mutual respect for efforts to uphold institutional powers in light of some

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[15] Fox News, "White House Fires Back at 'Overbroad' Subpoena on Solyndra Documents", November 4, 2011, https://www.foxnews.com/politics/white-house-fires-back-at-overbroad-subpoena-on-solyndra-documents (accessed by author on September 14, 2023).

[16] U.S. Department of Energy Office of Inspector General, "The Department of Energy's Loan Guarantee to Solyndra, Inc.", August 24, 2015, https://www.energy.gov/sites/prod/files/2015/08/f26/11-0078-I.pdf (accessed by author on September 14, 2023).

difficult challenges. In each case, the parties reached a resolution and the business of governing moved forward.

Executive Privilege and the Decline of Interbranch Accommodation

Presidents increasingly have taken the position of not negotiating a compromise but instead standing firm on claims of executive privilege and in some cases even daring Congress to employ whatever tools it has to challenge the executive. The report "Overprivileged" documents well the decline of executive cooperation and accommodation and thus just a small set of a much larger number of cases can illuminate the nature of the problem.

Fast and Furious

The major executive privilege controversy in the Barack Obama years was what became known as the "Fast and Furious" scandal. Beginning in March 2011, the House Oversight Committee launched an investigation into the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF)'s Operation Fast and Furious, which was a program designed to trace thousands of firearms from the United States to Mexico and then catch Mexican drug cartel members. Controversy over Fast and Furious arose after two of these weapons were found at the murder scene of U.S. Border Patrol agent Brian Terry.

Over the course of a year, the Department of Justice withheld documents and mislead Congress about the nature of the Fast and Furious program. The Department of Justice eventually had to retract a February 4, 2011 letter to Congress denying the allegation that guns had been allowed to "walk". In October 2011, the Oversight Committee again subpoenaed the Justice Department for more information about the case. The Obama administration again refused to disclose the information. By May 2012, after repeated requests for the Obama

administration to comply with the subpoena, House Speaker John Boehner wrote to Attorney General Eric Holder and informed him that he risked being charged with contempt of Congress if his department continued to refuse to satisfy the information request. In a June meeting between Holder and House Oversight Chair Rep. Darrell Issa (R-CA), the attorney general offered a "fair compilation" of the subpoenaed documents that the administration had so far refused to disclose, but only on the condition that the contempt vote be cancelled and that Issa accept the validity of the documents even before he had a chance to review them. Issa turned down the deal.[17]

Soon after the Holder/Issa meeting, President Obama invoked executive privilege without providing a rationale for making the claim. In a letter to Issa, Deputy Attorney General David Cole tried to offer some justification for the executive privilege claim, noting that disclosure of information would "inhibit candor" and therefore "significantly impair" the executive branch.[18] Neither the Oversight Committee nor the House accepted the administration's rationale, and both bodies held Holder in contempt, marking the first time in the history of the United States that a cabinet officer had been held in contempt of Congress.

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[17] Louis Fisher, "Obama's Executive Privilege and Holder's Contempt: Operation Fast and Furious", Presidential Studies Quarterly Vol. 43 (March 2013): 178.

[18] Ibid., 179.

Under federal law, the Justice Department, acting through the U.S. Attorney in the District of Columbia, must enforce a contempt resolution. However, the Justice Department refused to enforce the citation. The House followed with a lawsuit that asked the D.C. District Court to dismiss Obama's executive privilege claim and compel Holder to produce the documents. The Obama administration argued before D.C. District Court Judge Amy Berman Jackson that it had "an unreviewable right to withhold materials from the legislature".[19] After nearly three years of court battles, Judge Jackson finally ruled in January 2016 that the Justice Department's Inspector General Report released to the public in 2012 made the administration's stonewalling moot. "There is no need to balance the need against the impact that the revelation of any record could have on candor in future executive decision making", Jackson argued "since any harm that might flow from the public revelation of the deliberations at issue here has already been self-inflicted".[20]

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[19] Mitchel A. Sollenberger and Mark J. Rozell, "Obama Administration Needs to Renew its Pledge to Greater Transparency", The Hill, November 11, 2013.

[20] Kevin Johnson, "Judge Rejects Privilege Claim in 'Fast and Furious' Inquiry", USA Today, January 19, 2016, https://www.usatoday.com/story/news/politics/2016/01/19/judge-fast-and-furious-atf/79012328/ (accessed by author on September 14, 2023).

In April 2016, Obama's Justice Department finally complied with the October 2011 House subpoena and released the documents that it had refused to disclose for years before.[21] In a letter to House Oversight Chair Jason Chaffetz (R-UT), Assistant Attorney General Peter Kadzik stated, "In light of the passage of time and other considerations, such as the Department's interests in moving past this litigation and building upon our cooperative working relationship with the Committee and other Congressional committees, the Department has decided that it is not in the Executive Branch's interest to continue litigating this issue at this time".[22] Why would the passage of time and other considerations be the deciding factors in releasing long-withheld documents? Considering the result, the entire episode appears to have been pointless stonewalling by the administration.

Sessions Testimony

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[21] Stephen Dinan, "Obama Relents on Fast & Furious Executive Privilege, Turns Records Over to Congress", Washington Times, April 8, 2016, http://www.washingtontimes.com/news/2016/apr/8/obama-relents-fast-furious-turns-records-congress/ (accessed by author on September 14, 2023).

[22] Assistant Attorney General Peter Kadzik letter to Chairman Jason Chaffetz, U.S. Department of Justice, April 8, 2016, http://www.politico.com/f/?id=00000153-f7ab-d0e4-af73-ffbb91c90001 (accessed by author on September 14, 2023).

On 13 June 2017, early in the congressional investigation of Russian meddling in the U.S. 2016 elections, the attorney general Jeff Sessions appeared before the Senate Intelligence Committee and refused to answer certain questions on the basis that they might someday be covered by executive privilege.[23] A revealing back and forth developed between the attorney general and the senators over the application of executive privilege in the Donald J. Trump White House. Asked whether he was refusing to answer some questions due to a claim of executive privilege, the attorney general said and repeated several times that he had no such authority, that only the president may claim that power. But when pushed, Sessions said that he could not answer some questions because doing so might reveal information that could at some point could be subject to a presidential claim of executive privilege.

Senators then asked Sessions to identify whatever legal standard other than executive privilege prevented him from answering their questions at that hearing. Again, Sessions maintained that since the president might assert executive privilege over something, to answer questions prior to a formal claim of privilege would be tantamount to taking that authority away from the president. At one point he stated "I'm protecting the president's constitutional right by not giving it away before he has a chance to review it". Senators objected that Sessions was "having it both ways" – assuming all the benefits of a claim of executive privilege without a

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[23] Politico Staff, "Transcript: Jeff Sessions' Testimony on Trump and Russia", Politico, June 13, 2017, https://www.politico.com/story/2017/06/13/full-text-jeff-session-trump-russia-testimony-239503 (accessed by author on September 14, 2023).

formal claim, and with no other legal foundation established for refusing to answer questions. Sessions kept returning to the same point. “I'm protecting the right of the president to assert it if he chooses and there may be other privileges that could apply in this circumstance”.

In the end, there was no winning this back and forth, for the senators who made no headway in getting Sessions to open up in testimony. For the senators, the frustration was that a formal claim of executive privilege at least would provide a basis for negotiating some compromise with the administration over access to information germane to their investigation. The position that Sessions took effectively was that the White House could refuse to provide any information because some day something might be subject to a claim of executive privilege, and thus there was no room for a negotiated settlement with Congress. That enabled the president at times to make the incredible claim that he and his administration were being transparent because he had not used executive privilege to prevent officials from talking to investigators.

McGahn Testimony

In May 2019, the House of Representatives Judiciary Committee subpoenaed former White House counsel Don McGahn to turn over official documents and to testify about Russia’s interference in the U.S. elections and possible coordination of that effort by Trump. Although McGahn at that point was a private citizen and not easily protected by any form of privilege, the president objected and eventually claimed executive privilege to block McGahn from cooperating with Congress. The president’s logic was that he already had allowed McGahn to speak with the Office of Special Counsel: “I let him interview the lawyer, the White House lawyer, for 30 hours. Think of that – 30 hours. I let him interview other people. I didn’t have to

let him interview anybody. I didn't have to give any documents. I was totally transparent because I knew I did nothing wrong".[24]

Because executive privilege exists to protect certain information from disclosure, the fact that the president had allowed McGahn and others to speak at length with the Mueller investigation team substantially weakened the basis of any later claim of executive privilege over the same information. The Mueller Report had been published at that point. It was a national bestseller and being dissected by media and political analysts constantly. To many it appeared that the president had waived the privilege by allowing his White House counsel and others to cooperate with the special counsel investigation, so to have later claimed that authority over information that largely had been made public was odd. To members of Congress seeking documents and testimony, the refusal to cooperate with their investigation stung particularly hard given that the president had cooperated with a special counsel but would not allow the legislative branch access to information needed for its own investigation. The Trump

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[24] "Remarks by President Trump and Prime Minister Pellegrini of the Slovak Republic Before Bilateral Meeting", The White House, https://www.whitehouse.gov/briefings-statements/remarks-president-trump-prime-minister-pellegrini-slovak-republic-bilateral-meeting/ (accessed by author on August 8, 2019). See also Tamara Keith, "Trump Threatens to Use Executive Privilege to Block testimonies on Capitol Hill", NPR All Things Considered, May 3, 2019, https://www.npr.org/2019/05/03/720097342/trump-threatens-to-use-executive-privilege-to-block-testimonies-on-capitol-hill (accessed by author September 14, 2023).

Administration retort was that since the special counsel is situated in the Department of Justice, and therefore is a part of the executive branch, that it was therefore legitimate to share information within the executive branch while claiming executive privilege over that requested by Congress.

The Trump Administration's claim of what it called the protective executive privilege overstepped all past legal and customary boundaries for executive privilege claims. To be sure, past administrations have made overbroad claims of executive privilege, but this Trump claim put a somewhat new twist on the exercise of this power. It clearly is intended to erect an unbreachable barrier to congressional efforts to obtain documents, testimony and other sources of evidence of potential White House and administration wrongdoing. It also buys the president time by reducing the political spotlight and placing the White House largely in control of any future accommodation process. The protective assertion does not rest on any sort of balancing of interests (executive's versus Congress's) as should be the case with executive privilege claims, and it is not clear that any reasonable time limits will be placed on an administration's review of documents.

Searching for a Path Forward

I have long argued that the accommodation process is the best means by which to resolve executive privilege disputes. Like many, I lament the decline in government of the spirit of comity and cooperation that were the hallmarks of the accommodation process. Longing for a return to the "good old days" is not a solution to the current impasse over executive privilege. Presidents, and even ex-presidents, have become increasingly bold in their claims and

unyielding to Congress.[25] Congress's constitutional and political tools are not working effectively to push back on executive overreach of power. As circumstances have changed, my own thinking about how to manage executive privilege disputes is evolving.

The report "Overprivileged" thus raises the important question of whether the breakdown in the accommodation process calls for reforms to better manage future executive privilege disputes. I agree that Congress should not abandon its traditional tools of challenging executive branch overreach in exercising its powers and that Congress should act to strengthen its tools. Also, adding new tools such as a congressional counterpart to the Department of Justice's Office of Legal Counsel (OLC) would be a very positive step forward to counter the tendency of the executive branch, and oftentimes the courts and legal scholars, to cite OLC opinions as binding legal precedents.

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[25] The authority of a former president to claim executive privilege is especially murky, as executive privilege is an Article II-based presidential power that belongs to the incumbent. The Supreme Court, in Nixon v. Administrator of General Services, 433 U.S. 425 (1977) allowed for a former president to claim executive privilege, while it ruled against former president Nixon's particular claim that precipitated this decision. In 2022, the Supreme Court, in Trump v. Thompson, rejected an executive privilege claim by former president Trump when he tried to block the National Archives from releasing to a House investigating committee Administration documents germane to the January 6, 2021 attack on the U.S. Capitol. This decision too left the door open to former presidents to claim executive privilege, although like in the 1977 ruling, it did not define the circumstances under which former presidents may assert the privilege.

These actions seem the most achievable in the near term as other proposals emerge to reform a broken process. The most challenging reforms to achieve will be those that would empower the judicial branch to resolve executive privilege disputes through mediation and ultimately litigation when the mediation process does not yield a positive outcome. Senators Whitehouse and Kennedy suggest specifically a mediation role for the U.S. District Court of the District of Columbia. In the past, Congress has elevated a role for that court in executive privilege disputes. The Presidential Records Act (PRA), for example, stipulates that the Court has jurisdiction over lawsuits by former presidents against disclosure.

Whether such a reform is workable depends on a number of factors, and I raise these as important considerations and not a criticism. For example: Do judges want to be invested with the authority to mediate information access disputes between the "political branches"? Judges likely will refuse to mediate in disputes that they deem to be political in nature, and therefore not of constitutional standing. Judges might push back on calls for mediation, declaring that the two branches have to battle out their differences that they should be perfectly capable of resolving on their own. Indeed, federal judges have demonstrated little interest in resolving disputes when presidents refuse to divulge information to Congress. Judges may also be concerned about issues of workload, if the other branches increasingly are in tussles over access to information. As many information disputes involve large reams of documents, it is hard to imagine any court having the capacity to review and render meaningful guidance in circumstances in which the White House claims some compelling national security or protection of state secrets basis for withholding many documents.

Also, I caution against the expectation by Congress that the judicial branch will favorably mediate legislative appeals for executive branch information. The judicial branch has given great deference to executive claims of expansive powers in national security and foreign policy generally. Many executive privilege disputes tend to have either an actual, or a presidential claimed, national security component. Could this suggested proposal, in other words, become a "careful what you wish for" scenario in which Congress expected a better outcome than the current give-and-take process, but ends up conceding more power through judicial interventions that favor the executive and create precedents for an expansive executive privilege power?

The potential major benefit of this suggested reform though could be the avoidance of protracted litigation between the political branches. The Trump years in particular were witness to an extraordinary number of lawsuits involving executive privilege claims. The decline of the accommodation process had already started before Mr. Trump's presidency, but during his term it became almost routine that the president and the House of Representatives in particular filed lawsuits against each other over access to information disputes. If a reform proposal can overcome the conditions that have enabled presidents to resist, obstruct, and delay, and if it could ultimately deliver a mediation process in which parties agree to play by the rules, that will be a huge forward move in reestablishing some balance between the branches in executive privilege disputes.