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## Executive Privilege and the Modern Presidents: In Nixon's Shadow

Mark J. Rozell†

Executive privilege is the right of the President and high-level executive branch officers to withhold information from Congress, the courts, and ultimately the public. It is now a well-established constitutional power—one with a longstanding history in American government, going back to the George Washington administration. Yet for most people, the mere mention of executive privilege conjures up images of Watergate and President Richard Nixon's attempt to use that doctrine to obstruct justice.

It is therefore no surprise that most recently the Clinton administration ignited a firestorm of controversy by signaling its intention to use executive privilege in the Monica Lewinsky investigation to shield the content of presidential and White House staff discussions from the Office of the Independent Counsel. Media accounts made the most of the Nixon analogy, placing the White House in the difficult—but perhaps well deserved—position of having to defend its use of this little understood presidential power.

Executive privilege is controversial in large part because it is never mentioned in the Constitution. In fact, the phrase "executive privilege" was not even coined until the Eisenhower administration.

Historic precedents and judicial interpretation clearly have validated executive privilege. Presidents have secrecy needs and few would suggest that the power of inquiry, whether wielded by prosecutors or Congress, is absolute. Any claim of executive privilege is open to challenge and, as with

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other governmental powers, it may be subject to a balancing test when weighed against demands for access to information.

There is a long history of disputes over presidential claims to secrecy. Indeed, every President since Washington has exercised some form of what we today call executive privilege. Executive privilege is an accepted doctrine when appropriately applied to two circumstances: (1) certain national security needs and (2) protecting the privacy of White House deliberations when it is in the public interest to do so.

The first case of an executive privilege dispute nicely illustrates the core issues. In 1792 Congress requested from the Washington administration information regarding the failure of a U.S. military expedition. Congress specifically requested White House records and testimony from presidential staff familiar with the event.<sup>1</sup>

Washington convened his Cabinet to discuss the possibility of withholding information requested by Congress. Thomas Jefferson recorded in his notes of the meeting that the Cabinet had all agreed that a President has a right to withhold information when it is in the public interest to do so.<sup>2</sup> While eventually Washington decided to cooperate with the Congress, he had laid the groundwork for later Presidents to claim executive privilege.

On two other occasions during his presidency Washington made a similar determination that Presidents have a right to secrecy in some matters and thus refused requests for information. Ultimately, he stood by those refusals. In each case, Washington based his decision on the standard of whether concealing the information was justified by a need to protect the public interest.

Washington's actions are particularly noteworthy because the nation's first President was very conscious of the fact that everything he did established a precedent for the office. At no point did he believe that a President could withhold information to protect himself from politically embarrassing information or to cover-up conversations about potential wrongdoing in the White House.<sup>3</sup>

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1. See 3 ANNALS OF CONGRESS 493 (1792).

2. See PAUL FORD, 1 THE WRITINGS OF THOMAS JEFFERSON 189-90 (1892).

3. A more detailed treatment of the Washington administration examples is in MARK J. ROZELL, EXECUTIVE PRIVILEGE: THE DILEMMA OF SECRECY AND DEMOCRATIC ACCOUNTABILITY 32-36 (1994). See also Mark J. Rozell,

Controversy occasionally ensued when Washington's successors exercised this presidential power. For many years there existed a widespread consensus that the President may withhold information to protect the national interest. Over time, that came to mean shielding materials relating to national security or maintaining the privacy of internal deliberations over official governmental matters.

President Richard M. Nixon gave executive privilege a bad name, however, when he invoked these legitimate defenses in a circumstance where clearly the President was trying to conceal White House wrongdoing. His actions and the timely publication of scholar Raoul Berger's book, *Executive Privilege: A Constitutional Myth*,<sup>4</sup> destroyed the consensus that executive privilege is legitimate. Many began to question whether the President ever could legitimately make such a claim. Every President who has asserted executive privilege since has been subject to unflattering characterizations that he is engaging in Nixonian tactics to conceal and deceive.

An unfortunate consequence of this turn of events has been the attempts by Nixon's successors to conceal even their use of executive privilege. A common tactic is to devise some other phrase or use some other power to justify withholding information when an executive privilege claim would have been appropriate.

This essay describes and analyzes executive privilege controversies in the post-Watergate era. As the following reveals, when it comes to executive privilege, the modern Presidents have had to walk in the shadow of Richard Nixon. His impact on this constitutional doctrine remains profound and to this date the proper balance in the exercise of executive privilege has not been restored. Presidents Ford and Carter generally avoided using executive privilege and protected presidential secrecy through the exercise of other sources of authority in order to avoid the Nixon analogy. President Reagan tried to reaffirm this power, but he ultimately failed to stand his ground against Congress. President Bush crafted a successful strategy of concealing his use of executive privilege to avoid controversy and protect his prerogatives. President Clinton is the first post-Watergate President not to shy away from executive

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*Abusing the Privilege*, LEGAL TIMES, Mar. 30, 1998, at 23-26; Mark J. Rozell, *Clear Misuse of the Privilege of Rank*, WASH. POST, May 18, 1998, at A17.

4. RAOUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH (1974).

privilege, although his approach has spanned the spectrum from claiming to protect a constitutional principle to denying that the President has anything to do with asserting this power.

As the following post-Watergate events make clear, there is a need to reestablish the legitimacy of executive privilege and an understanding of its proper scope and limits in our constitutional system. These goals cannot be achieved through statutory law, but rather, through a return to the constitutional Framers' understanding of the separation of powers.

### I. FORD: PROCEEDING WITH CAUTION

Because of the Watergate taint, Ford proceeded cautiously on executive privilege. He never adopted a formal policy on executive privilege. Ford avoided the phrase "executive privilege" as much as possible and frequently cited statutory authority as the basis for keeping secrets. Ford understood that he would fail in his efforts to withhold information if he openly claimed executive privilege. Ford carefully chose only a few executive privilege battles with Congress—ones that he considered to be the most important secrecy issues in his administration and that he thought he could win.

Certain members of the Ford administration wanted to develop procedures for handling executive privilege controversies. Certain members of Congress sent letters to the President requesting that such procedures be issued. White House staff composed a draft executive order on executive privilege, but Ford never issued the order.

Rep. John Moss (D-CA) requested that Ford adopt a policy on executive privilege in which the constitutional doctrine could be "invoked only by the President or with specific presidential approval in each instance."<sup>5</sup> Moss noted that he had received commitments from presidents Kennedy, Johnson, and Nixon to limit the use of executive privilege to personal claims by the President.<sup>6</sup> Ford never responded to the request. Deputy Assistant to the President, Max L. Friedersdorf, responded that Moss's letter would be shared with the president's advisers.<sup>7</sup>

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5. Letter from Rep. John E. Moss to President Gerald R. Ford (Aug. 15, 1974) (available at Gerald R. Ford Library, Ann Arbor, Michigan [Hereinafter Ford Library] in Folder: *Executive Privilege (2)*, Box 13, Philip W. Buchen Files).

6. *See id.*

7. *See* Letter from Max L. Friedersdorf to Rep. John E. Moss (Aug. 16,

Ford also received letters asking for policy clarifications on executive privilege from Reps. John N. Erlenborn and William S. Moorhead and from Senators Sam Ervin, William V. Roth, and Edmund S. Muskie.<sup>8</sup> Two presidential aides acknowledged the letters, but Ford took no action.<sup>9</sup>

In September 1974, General Counsel to the Office of Management and Budget (OMB), Stanley Ebner, expressed his concern to the Counsel to the President, Philip W. Buchen, that "President Ford has taken no public position on the issue of executive privilege."<sup>10</sup> Ebner noted that OMB had to handle numerous "requests for information or records from the Congress and from outside government."<sup>11</sup> He recalled Nixon's executive privilege memorandum and advised: "You will no doubt want to give some consideration to the question of a possible reaffirmation or modification of this policy by the President on his own initiative."<sup>12</sup>

Assistant to the President, William E. Timmons, advised Buchen to "research the issue [of executive privilege] and get guidance from the President on how he plans to handle this ticklish problem when it is raised."<sup>13</sup> Timmons wrote that members of Congress would press for disputed information on Watergate, the Nixon pardon and other matters, necessitating some presidential guidelines.<sup>14</sup>

Timmons and Friedersdorf proposed a meeting between the President and Representatives Erlenborn and Moorhead to dis-

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1974) (available at Ford Library in Folder: *Executive Privilege (2)*, Box 13, Philip W. Buchen Files).

8. See Letter from Reps. John N. Erlenborn and William S. Moorhead to President Gerald R. Ford (Aug. 13, 1974); Letter from Sens. Sam Ervin, Edmund S. Muskie, and William V. Roth to President Gerald R. Ford (Aug. 22, 1974) (letters available at Ford Library in Folder: *Executive Privilege—General (2)*, Box 13, Edward Schmults Files).

9. See Letter from Max L. Friedersdorf to Rep. John N. Erlenborn (Aug. 16, 1974); Letters from William E. Timmons to Sens. Sam Ervin, Edmund S. Muskie, and William V. Roth (Aug. 28, 1974) (letters available at Ford Library in Folder: *Executive Privilege—General (2)*, Box 13, Edward Schmults Files).

10. Memorandum from Stanley Ebner to Philip W. Buchen (Sept. 19, 1974) (available at Ford Library in Folder: *Executive Privilege (2)*, Box 13, Philip W. Buchen Files).

11. *Id.*

12. *Id.*

13. Memorandum from William E. Timmons to Philip W. Buchen (Sept. 23, 1974) (available at Ford Library in Folder: *Executive Privilege (2)*, Box 13, Philip W. Buchen Files).

14. *See id.*

cuss pending legislation on executive privilege.<sup>15</sup> The meeting was held for fifteen minutes on October 10, 1974, in the Oval Office. There is no record of what was said in the meeting, but a White House background paper for the meeting identified "talking points" for the President. The talking points noted that Ford would emphasize his desire to run an open administration and that he would value the "views and recommendations" of the congressmen on executive privilege.<sup>16</sup> The legislative proposal on executive privilege that provided the basis for the meeting failed to pass Congress.

Ford continued to use an ad hoc group, formed in the Nixon administration, to make recommendations on information policy issues, including those pertaining to the Freedom of Information Act and executive privilege. A September 1974 memorandum from the Executive Director of the Domestic Council on the Right of Privacy, Doug Metz, to Buchen, outlined several recommendations.<sup>17</sup> The memorandum made it clear that Ford's options on executive privilege were limited because that subject was "inextricably bound up with Watergate."<sup>18</sup> The memorandum advised Ford to meet with members of Congress on the subject, affirm the intention to conduct an "open presidency," avoid an outright defense of executive privilege, and issue an executive order "affirming the traditional commitment to prudence in the exercise of the privilege."<sup>19</sup> A discussion draft of an executive order entitled "Establishing a Procedure for Determining Whether Executive Privilege Should Be Invoked" accompanied the memorandum. Also included was a proposed draft letter on executive privilege for the President to issue to all federal employees.<sup>20</sup> The intention was to formalize a presidential position on executive privilege.<sup>21</sup> Ford never issued the proposed executive order and letter.

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15. See White House Schedule Proposal (Sept. 23, 1974) (available at Ford Library in Folder: *Executive Privilege (2)*, Box 13, Philip W. Buchen Files).

16. Agenda: Meeting with Moorhead and Erlenborn (Oct. 9, 1974) (available at Ford Library in Folder: *Executive Privilege (2)*, Box 13, Philip W. Buchen Files).

17. See Memorandum from Doug Metz to Philip W. Buchen (Sept. 24, 1974) (available at Ford Library in Folder: *Executive Privilege—General (2)*, Box 13, Edward Schmults Files).

18. *Id.*

19. *Id.*

20. *See id.*

21. *See id.*

A September 1974 memorandum from Associate Counsel Dudley Chapman to Buchen summarized executive privilege issues before the administration and offered recommendations.<sup>22</sup> Echoing Metz, Chapman stated that, “the unfavorable connotations of executive privilege and the present mood of Congress dictate a sharp break from traditional practice.”<sup>23</sup> Chapman too recommended that Ford adopt a formal policy on executive privilege rather than try to deal with each controversy on a case-by-case basis.<sup>24</sup> Chapman believed that Ford needed to acknowledge Congress’s requests for information and to meet with the congressmen who had written letters urging the adoption of legislation to limit the use of executive privilege.<sup>25</sup>

A later memorandum by Chapman noted the difficulty posed by members of Congress who request executive branch information and “no longer give up when they are told no.”<sup>26</sup> He maintained that, “many of the requests we are now getting cannot be resolved through traditional compromise because the purpose of the request is to test the principle.”<sup>27</sup> He suggested: (1) cite exemptions from FOIA “rather than executive privilege”; (2) use executive privilege as a last resort—avoid the use of the term in favor of “presidential” or “constitutional privilege,” or “confidential working papers”; (3) issue formal guidelines on the use of executive privilege.<sup>28</sup> Chapman noted that congressional requests for a Ford statement on executive privilege remained unanswered.<sup>29</sup>

In April 1975, a discussion of how to handle executive privilege controversies was held at the Office of the Deputy Counsel to the President. The discussion summary makes it clear that the administration lacked a set of guidelines for handling executive privilege controversies.<sup>30</sup>

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22. Memorandum from Dudley Chapman to Philip W. Buchen (Sept. 25, 1974) (available at Ford Library in Folder: *Executive Privilege—General (2)*, Box 13, Edward Schmults Files).

23. *Id.*

24. *See id.*

25. *See id.*

26. Memorandum from Dudley Chapman to Philip W. Buchen et al. (Nov. 5, 1974) (available at Ford Library in Folder: *Executive Privilege—General (1)*, Box 13, Edward Schmults Files).

27. *Id.*

28. *Id.*

29. *See id.*

30. *See Note from Robert L. Keuch to Rod Hills (Apr. 7, 1975)* (available at Ford Library in Folder: *Executive Privilege (4)*, Box 13, Philip W. Buchen Files).



In November 1975, Buchen sent a memorandum to all senior White House staff and members of the Cabinet summarizing access to information controversies before the administration.<sup>31</sup> He cited the use of statutory bases for refusing information in some cases, compliance with congressional requests in a number of cases, and the use of executive privilege as a basis to withhold information in a few cases.<sup>32</sup> Part III of the memorandum summarized the executive privilege procedures adopted by Ford's predecessors. It identified no such procedures for the Ford administration. In fact, the only mention of Ford in this section was that, in response to a question, the President had told Congress that he believed in the principle of executive privilege and in the right of confidentiality for each branch of government.<sup>33</sup>

A November 1975 memorandum on executive privilege from the Office of the Attorney General noted the need to approach the subject when it arises "in a systematic fashion."<sup>34</sup> The memorandum was "intended to facilitate the construction of a framework for future actions."<sup>35</sup> It further suggested categories of areas in which executive privilege could be asserted and the levels of priority assigned to various justifications for withholding information.<sup>36</sup>

What is telling about all of these memoranda and letters is the amount of effort the Ford administration devoted to discussing how to handle executive privilege. Despite all of this discussion, the President never adopted a formal policy, but rather dealt with executive privilege controversies on a case-by-case basis.

To understand Ford's handling of this subject, the political context of that period must be acknowledged. Any position on executive privilege would have invited public protest and congressional condemnation, even if the President had adopted a reasonably limited policy. Executive privilege and Watergate

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31. Memorandum from Philip W. Buchen to Members of the Cabinet and Senior White House Staff (Nov. 21, 1975) [hereinafter Buchen Memorandum] (available at Ford Library in Folder: *Executive Privilege (5)*, Box 13, Philip W. Buchen Files).

32. *See id.*

33. *See id.*

34. Memorandum from the Office of the Attorney General—Privilege of the Executive Branch to Withhold Information from Congressional Committees (Nov. 1975) (available at Ford Library in Folder: *Executive Privilege (3)*, Box 13, Philip W. Buchen Files).

35. *Id.*

36. *See id.*

were intertwined. Ford's decision not to adopt a policy on executive privilege—and only one that would have severely weakened the constitutional doctrine could have been conceivable at that time—was prudent, given the difficult environment in which he governed.

#### A. FORD'S EXERCISE OF EXECUTIVE PRIVILEGE

Ford's promises to work constructively with Congress and to run an open presidency created high expectations. Nonetheless, regarding executive privilege, some members of Congress wanted to test the limits of how far Ford would go in exercising this power. And despite his promises, Ford never conceded that the legislature had the right of access to sensitive executive branch information.

##### 1. The Nixon Pardon

The pardon of Richard M. Nixon on September 8, 1974, set back much of the progress Ford had made in establishing a positive relationship with Congress. Many members of Congress reacted angrily not only to the decision, but to the secretive manner in which Ford considered and issued the pardon. Some accused Ford of an unseemly deal—a pardon for the presidency—and sought to compel testimony from Ford's legal counsel Phil Buchen and other staffers.<sup>37</sup>

These requests for testimony led to the first executive privilege controversy during Ford's presidency. Ford ended the controversy when he agreed to appear before a House subcommittee to answer questions about the pardon.<sup>38</sup> Ford told the subcommittee that, "the right of executive privilege is to be exercised with caution and restraint."<sup>39</sup> He explained: "I feel a responsibility, as you do, that each branch of government must preserve a degree of confidentiality for its internal communications."<sup>40</sup>

##### 2. Aid to South Vietnam

Ford provided information to Congress in areas where previous presidents had been reluctant to cooperate with legislative

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37. See STANLEY I. KUTLER, *THE WARS OF WATERGATE: THE LAST CRISIS OF RICHARD NIXON 564-70* (1990).

38. See *id.* at 570.

39. Buchen Memorandum, *supra* note 31 (quoting President Gerald R. Ford).

40. *Id.*

inquiries. He agreed to furnish Congress with information on the activities of the Central Intelligence Agency (CIA) and the Federal Bureau of Investigation (FBI).<sup>41</sup> Ford turned over previously withheld information that was relevant to inquiries into alleged CIA complicity in assassination schemes.<sup>42</sup> Nonetheless, Ford did draw the line with Congress over certain requests for information. In 1975, the Senate Judiciary Subcommittee on Separation of Powers requested that Ford release information on correspondence between President Nixon and South Vietnamese President Nguyen Van Thieu regarding promises of U.S. aid to South Vietnam in the case that North Vietnam did not honor the Paris Peace Accords. Ford responded that he would not release any of the documents.<sup>43</sup> The subcommittee could do little more than to hold hearings on the controversy.

### 3. Request for Survey of Hospitals

In October 1975, Rep. Moss requested from Secretary of the Department of Health, Education, and Welfare (HEW), F. David Mathews, information on surveys of hospitals conducted by the Joint Commission on Accreditation of Hospitals.<sup>44</sup> Mathews refused and cited the Social Security Act's confidentiality provision.<sup>45</sup> The subcommittee challenged Mathews and issued a subpoena. Attorney General Edward Levi advised Mathews that the confidentiality provision of the Social Security Act was not a strong enough basis for withholding information from Congress.<sup>46</sup> Mathews turned the information over to Congress.<sup>47</sup>

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41. See Robert G. Dixon, Jr., *Congress, Shared Administration, and Executive Privilege*, in CONGRESS AGAINST THE PRESIDENT 125, 129 (Harvey C. Mansfield, Sr. ed., 1975).

42. See *id.*

43. See *id.*; see also Dom Bonafede et al., *The President Versus Congress: The Score Since Watergate*, NAT'L J., May 29, 1976, at 738.

44. See Buchen Memorandum, *supra* note 31.

45. See *id.*

46. See *id.*

47. See *id.*

#### 4. Confidential Export Reports<sup>48</sup>

In July 1975, Moss requested from the Department of Commerce copies of all quarterly reports filed by exporters under the Export Administration Act of 1969. Moss's subcommittee was investigating the extent to which U.S. companies had been requested by Arab countries to not do business with Israel. Secretary of Commerce Rogers C.B. Morton sent to Moss a summary of Israel boycott information reported by U.S. companies. Morton refused to submit the reports and based his refusal on Section 7(c) of the Export Administration Act.<sup>49</sup>

The subcommittee subpoenaed the documents. Levi ruled that Section 7(c) applied to Congress and that it was therefore proper to withhold the documents. Morton appeared before the subcommittee and informed the members of the Attorney General's opinion. Morton offered to provide Congress with summaries of information in the reports, but that failed to satisfy the subcommittee.<sup>50</sup>

The subcommittee voted Morton in contempt of Congress. The Interstate and Foreign Commerce Committee scheduled a meeting to discuss the contempt resolution. The day before the meeting Morton agreed to show the documents to Moss, with the understanding that the information would not be made public. The subcommittee dropped its contempt of Congress proceedings.

#### 5. House Select Committee on Intelligence Subpoenas<sup>51</sup>

In November 1975, the House Select Committee on Intelligence issued seven subpoenas on the Ford administration (five of those to the National Security Council). The NSC forwarded

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48. This section is summarized from the following sources: Buchen Memorandum, *supra* note 31; RICHARD EHLKE, CRS REPORT FOR CONGRESS: CONGRESSIONAL ACCESS TO INFORMATION FROM THE EXECUTIVE: A LEGAL ANALYSIS (Rep. No. 86-50A) at 41-43 (Mar. 10, 1986); Peter M. Shane, *Negotiating for Knowledge: Administrative Responses to Congressional Demands for Information*, 44 ADMIN. L. REV. 197, 202-03 (1992).

49. 50 U.S.C. § 2406(c) (1969).

50. See *Contempt Proceedings Against Secretary of Commerce, Rogers C.B. Morton. Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce*, 94th Cong. 11 (1975).

51. This section is summarized from the following sources: RICHARD EHLKE, CRS REPORT TO CONGRESS: CONGRESSIONAL ACCESS TO INFORMATION: SELECTED PROBLEMS AND ISSUES (Rep. No. 79-220A) (Oct. 16, 1979) at 19-21; EHLKE, *supra* note 48, at 20n; Buchen Memorandum, *supra* note 31.

available documents to the committee and promised to furnish other materials when available. The committee issued one subpoena to the CIA and the agency provided the information.

Finally, the committee issued a subpoena to the Secretary of State Henry Kissinger to compel disclosure of all documents pertaining to Department of State recommendations to the NSC on covert activities since 1965. Ford directed Kissinger to assert executive privilege. The Department of State Legal Adviser informed the committee of Ford's decision. The committee cited Kissinger for contempt and recommended a full House contempt citation.<sup>52</sup> The President protested that "in addition to disclosing highly sensitive military and foreign affairs assessments and evaluations, the documents revealed to an unacceptable degree the consultation process involving advice and recommendations to Presidents Kennedy, Johnson and Nixon, made to them directly or to committees composed of their closest aides and counselors."<sup>53</sup> A White House memorandum from Buchen reveals a number of bases for this assertion of executive privilege. In particular, the memorandum cited *United States v. Nixon*<sup>54</sup> and instances in the Eisenhower and Kennedy administrations of "presidential directives to Cabinet members not to release certain information to Congress."<sup>55</sup> The administration and Congress reached a compromise in which committee members and staff would attend a briefing on the information contained in the materials. The committee dropped its citation of contempt for Kissinger.

## 6. Electronic Surveillance Controversy<sup>56</sup>

The most controversial case of presidential withholding of information during the Ford administration began in 1976 and resulted in inter-branch negotiations and legal disputes over a two-year period into Jimmy Carter's term of office. This controversy involved the use of unwarranted wiretaps on citizens for national security purposes. In brief, the FBI had asked American Telephone and Telegraph Company (AT&T) to place certain

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52. See H.R. REP. NO. 94-693, at 31 (1975).

53. Letter from President Ford to Rep. Otis Pike (Nov. 19, 1975), quoted in EHLKE, *supra* note 51.

54. 418 U.S. 683 (1974).

55. Buchen Memorandum, *supra* note 31.

56. This section is summarized from 5 CONSTITUTIONAL ASPECTS OF WATERGATE 183-88 (A. Stephen Boyan ed., 1979); EHLKE, *supra* note 51, at 9-14.

individuals under electronic surveillance. The House Committee on Interstate and Foreign Commerce subpoenaed documents on behalf of the Subcommittee on Oversight and Investigations. The subcommittee wanted to investigate the extent of wiretapping, the names of individuals subject to surveillance, whether the wiretaps were legal and truly were for national security reasons.

Ford cited national security—not executive privilege—and refused to divulge the documents. He offered a compromise in which he would supply the committee with the Attorney General's memoranda citing the reasons for the surveillance, as well as a sample list of surveillances. The subcommittee rejected the compromise.

AT&T decided that it should comply and the Department of Justice sued AT&T to prohibit the company from turning over the materials. Ford maintained that the company had an obligation "as an agent of the United States" not to comply with the subpoena.<sup>57</sup> The District Court sided with Ford and enjoined AT&T from releasing the disputed materials. The court ruled that the controversy concerned national security and that releasing the materials could lead to public disclosure of sensitive information.<sup>58</sup>

Subcommittee chair Moss appealed on behalf of the House of Representatives. The Court of Appeals rejected the District Court decision to defer to the executive branch but nonetheless upheld the injunction against AT&T.<sup>59</sup> The Court of Appeals remanded the dispute to the District Court for further negotiation between the branches.<sup>60</sup> Negotiations failed to resolve the dispute and the case again went to the Court of Appeals.<sup>61</sup> The Court of Appeals refused to side with either branch and suggested procedures for sampling disputed materials and in camera inspection by the District Court.<sup>62</sup> Eventually, the executive and legislative branches agreed on a procedure in which committee counsel received certain intelligence memoranda. Both parties to the dispute agreed to dismiss the case.

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57. 5 CONSTITUTIONAL ASPECTS OF WATERGATE, *supra* note 56, at 184.

58. *See United States v. AT&T*, 419 F. Supp. 454, 460-61 (D.D.C. 1976).

59. *See United States v. AT&T*, 551 F.2d 384, 395 (D.C. Cir. 1976).

60. *See id.*

61. *See United States v. AT&T*, 567 F.2d 121 (D.C. Cir. 1977).

62. *See id.* at 131-33.

## B. EXECUTIVE PRIVILEGE IN THE FORD ADMINISTRATION

Ford's cautious approach to executive privilege reflected the times. In the wake of Watergate, congressional reforms limiting presidential powers constrained Ford's ability to openly exercise presidential powers. A deep suspicion of presidential powers pervaded not only in Congress, but also in the media and public opinion. Ford also was constrained by a hastily comprised, disorganized White House staff and the lack of an electoral mandate. His leadership became more complicated after the Nixon pardon. In the 1974 elections, Democrats added 46 House seats and four in the Senate, giving the majority party a 146-seat advantage in the House and 23 in the Senate.

Ford's one advantage was his extensive knowledge of the Congress and its members. If Ford couldn't count on the traditional vehicles of presidential leadership—public opinion, bargaining, coalition building—he at least understood the inner working of Congress. With a cautious, understated strategy of working around the problem of executive privilege, Ford protected his authority against the difficult odds that confronted him.

In the post-Watergate environment, Ford was in no position to defend executive privilege. He never issued a formal policy on executive privilege. He avoided congressional inquiries regarding his administration's policy on executive privilege. To the extent possible, his White House avoided the phrase "executive privilege" and used other legal bases for withholding information (e.g., statutory law, and separation of powers).

Although Ford's White House held extensive discussions over how to handle executive privilege controversies, the President avoided taking any public position that was more specific than support in principle for the doctrine. Ford understood the nature of the times and did not want to unnecessarily stir up any controversy over such an issue so closely linked to the Nixon presidency. Ford acted prudently in following this cautious, non-confrontational approach. By managing conflict over access to information, he had some success in withholding important information and left the broader constitutional debates over executive privilege to a future administration.

Ford's actions on executive privilege are a reflection of what Charles Jones calls the "separated presidency."<sup>63</sup> That is, a

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63. Charles O. Jones, *The Separated Presidency—Making It Work in Contemporary Politics*, in *THE NEW AMERICAN POLITICAL SYSTEM* 1-28 (Anthony

President who is separated from the rest of the political system has to "react strategically, devising techniques for retaining his prerogatives."<sup>64</sup> A President with a large political mandate can be expected to adopt leadership strategies that build on his support. A President such as Ford—one with no mandate who must establish his legitimacy to lead—will adopt different strategies based on his unusual circumstances. Ford's effort to project the image of openness while protecting secrecy represents the strategy of a separated President to both establish his legitimacy before the people while protecting the prerogatives of his office.

## II. CARTER: FOLLOWING IN FORD'S FOOTSTEPS

Although Jimmy Carter sought the presidency in 1976 as a candidate committed to open government and fundamental change from the Nixon era, as President he never rejected the right of executive privilege. Nonetheless, Carter did not make much use of that power, even when justified. Carter never issued a policy on executive privilege. He avoided personally responding to congressional inquiries on the subject. When his administration sought to withhold information, it usually did so without raising executive privilege. Carter crafted a strategy of withholding information while avoiding, to the extent possible, any executive privilege controversy. This strategy deflected controversy, but it caused internal administration confusion over what to do when access to information disputes arose. Carter tried to protect confidentiality, not break the pledge of an open presidency, and satisfy congressional demands for information all at the same time.

Certain members of the Carter administration raised the subject of developing a formal policy on executive privilege. Members of Congress requested a commitment from the President that only he would assert executive privilege, if such a power had to be exercised at all. And some Carter White House staffers had written an executive order on executive privilege that met congressional resistance and that the President never issued.

In June 1977 Rep. Richardson Preyer (D-N.C.) and Rep. Paul N. McCloskey, Jr. (R-Calif.) requested a presidential statement of policy on executive privilege.<sup>65</sup> The congressmen

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King ed., 2d ed. 1990).

64. *Id.* at 19.

65. See Letter from Representatives Richardson Preyer and Paul N.



noted that presidents Kennedy, Johnson, and Nixon had responded to previous such requests and had all affirmed that, "executive privilege can be invoked only by the President and would not be used without specific presidential approval."<sup>66</sup> Preyer and McCloskey explained that a Carter Deputy Attorney General already had shown reluctance to turn over to Congress a requested memorandum and had seemed confused over whether executive privilege had been invoked.<sup>67</sup> The controversy, they wrote, "underscored the confusion among new administration officials about the guidelines for such a claim."<sup>68</sup>

Carter never responded to the letter. Preyer and Richardson persisted. In May 1978, Preyer and members of his staff met with Counsel to the President, Robert J. Lipshutz, and members of his staff, to discuss a variety of issues. Lipshutz said that the White House policy on executive privilege was that only the President could assert that authority. Preyer sought more than a verbal assurance of Carter's policy and wrote to Lipshutz that he wanted written confirmation of this policy from Carter.<sup>69</sup> Nearly four months later, Preyer and McCloskey wrote another letter to Carter stating that they still wished to receive from Carter a formal affirmation of the policy that only the President can assert executive privilege.<sup>70</sup> Preyer and McCloskey merely received acknowledgments of their request from the Assistant to the President for Congressional Liaison.<sup>71</sup> Carter did not respond and he never issued any statement of policy on executive privilege.<sup>72</sup>

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McCloskey, Jr. to President Jimmy Carter (June 13, 1977) (available at Jimmy Carter Library, Atlanta, Georgia [hereinafter Carter Library] in File: *Executive Privilege*, 3-6/77, Box 130, Margaret McKenna Files).

66. *Id.*

67. *See id.*

68. *Id.*

69. *See* Letter from Rep. Richardson Preyer to Robert J. Lipshutz (June 1, 1978) (available at Carter Library in File: *Executive Privilege*, 1/78-7/79, Box 130, Margaret McKenna Files). A Department of State memorandum also stated that "only the President may invoke executive privilege; no other person may assert it or decide on the President's behalf to invoke it." State Department Notice, *Congressional Access to Departmental Information*, Apr. 11, 1978, at 4.

70. *See* Letter from Rep. Richardson Preyer and Rep. Paul N. McCloskey, Jr. to President Jimmy Carter (Sept. 27, 1978) (available at Carter Library in File: *Executive Privilege*, 1/78-7/79, Box 130, Margaret McKenna Files).

71. *See* Letters from Frank Moore to Rep. Richardson Preyer and Rep. Paul N. McCloskey, Jr. (Oct. 10, 1978) (available at Carter Library in Box FE 2-1, White House Central File [hereinafter WHCF]-Subject File).

72. In July 1979, Rep. John Erlenborn (R-Ill.) also requested from the White House that there be some response to the Preyer-McCloskey letters. At this late

There were many White House communications concerning executive privilege.<sup>73</sup> Those communications focused on the need to establish a formal policy.<sup>74</sup> The Office of Counsel to the President developed a draft Executive Order on the use of executive privilege by departmental agencies.<sup>75</sup> Heads of the various executive departments then had the opportunity to respond to the proposal. The draft Executive Order emphasized the administration's goal of cooperation with congressional requests for information, belief in the use of executive privilege under only the most compelling circumstances, and requirement of "specific presidential approval" for any use of executive privilege.<sup>76</sup> The draft Executive Order stated formal procedures for the use of executive privilege.<sup>77</sup>

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date in Carter's term, the General Counsel to the Office of Management and Budget wrote a memorandum to Lipshutz asking if there had been any request to various executive privilege inquiries and asking as well how to respond to members of Congress seeking information about the administration's policy. See Memorandum from Robert P. Bedell to Robert J. Lipshutz (July 12, 1978) (available at Carter Library in File: *Executive Privilege, 1/78-7/79*, Box 130, Margaret McKenna Files).

73. There are numerous memoranda on these White House discussions at the Carter Library in File: *Executive Privilege, 7-12/77*, Box 130, Margaret McKenna Files. See Memorandum from Edward C. Newton to Margaret McKenna (May 12, 1977); Memorandum from Patricia M. Wald to Heads of Offices, Bureaus, and Divisions (June 29, 1977); Memorandum from Robert J. Lipshutz to Margaret McKenna (July 6, 1977); Memorandum from James W. Moorman to Patricia M. Wald (July 8, 1977); Memorandum from Thomas J. Madden to Patricia M. Wald (July 11, 1977); Memorandum from Myron C. Baum to Patricia M. Wald (July 13, 1977); Memorandum from Kevin D. Rooney to Patricia M. Wald (July 14, 1977); Memorandum from John M. Harmon to Patricia M. Wald (July 19, 1977); Memorandum from Patricia M. Wald to Heads of Offices, Boards, and Divisions (July 20, 1977); Memorandum from Gilbert G. Pompa to Patricia M. Wald (July 20, 1977).

74. See the following memoranda in File: *Executive Privilege, 7-12/77*, Box 130, Margaret McKenna Files, at the Carter Library: Memorandum from Margaret McKenna to Patricia M. Wald and John Harmon (July 18, 1977); Memorandum from Eric L. Richard to Margaret McKenna (July 25, 1977); Memorandum from Margaret McKenna to Doug Huron (Aug. 10, 1977); Memorandum from Doug Huron to William Nichols (Aug. 15, 1977); Route Slip from Ron Kienlen to Doug Huron (Oct. 14, 1977) (containing copies of all departmental responses to the proposed executive order); Memorandum from Eric L. Richard to Working Group on Disclosure of Information to Congress (Oct. 25, 1977); Memorandum from Eric L. Richard to Working Group on Disclosure of Information (Nov. 3, 1977).

75. See Memorandum: Congressional Requests for Information from the Executive Branch (1977, no specific date provided) and other memoranda on the executive privilege available at Carter Library in Box FE-1, WHCF-Subject File.

76. See *id.*

77. See *id.*

Rep. Moss reviewed the proposed Executive Order and urged Carter that the directive not be issued. Moss objected that the proposal would "create an imbalance" between the branches.<sup>78</sup> He argued that the proposal was too broad and that it would have allowed certain executive branch personnel "to play a substantive role in determining the application of executive privilege to congressional requests for information."<sup>79</sup>

Because Carter never issued the proposed Executive Order and never conveyed to administration personnel how to handle executive privilege controversies, members of the administration lacked guidance on how to respond to such controversies. As late as 1979, a controversy arose over requested congressional testimony from White House staff prompting a memorandum from Lipshutz.<sup>80</sup> The memorandum made clear that "the personal staff of the President is immune from testimonial compulsion by Congress."<sup>81</sup> Lipshutz further emphasized the importance of "frank and candid discussions between the President and his personal staff."<sup>82</sup>

It was not until the week before the 1980 election that the Carter administration established some official executive privilege procedures. In early 1980, Counsel to the President, Lloyd Cutler, requested an intradepartmental memorandum on executive privilege. The memorandum summarized the history of the doctrine, legal principles, congressional enforcement mechanisms, and procedures for invocation.<sup>83</sup> The memorandum made it clear that under Carter no official procedures had been established and that the administration had adopted de facto the procedures issued by the Nixon administration.<sup>84</sup>

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78. Letter from Rep. John E. Moss to President Jimmy Carter (Oct. 11, 1977) (available at Carter Library in Box FE 2-1, WHCF-Subject File). Frank Moore wrote to Moss acknowledging that Carter received the letter and would keep the Congressman's "comments under consideration." Letter from Frank Moore to Rep. John E. Moss (Oct. 20, 1977) (available at Carter Library in Box FE 2-1, WHCF-Subject File).

79. Letter from Rep. John E. Moss to President Jimmy Carter (Oct. 11, 1977) (available at Carter Library in Box FE 2-1, WHCF-Subject File).

80. Memorandum from Robert Lipshutz to White House staff (Feb. 8, 1979) (available at Carter Library in Box FE-2, WHCF-Subject File).

81. *Id.*

82. *Id.*

83. See Memorandum from Doug Huron and Barbara Bergman to Lloyd Cutler (Mar. 6, 1980) (available at Carter Library in File: *Executive Privilege*, 6/77-11/80, Box 74, Lloyd Cutler Files).

84. See *id.*

Because of a trade conflict with Mexico that resulted in a White House debate over how to handle certain internal documents, Cutler wrote to the Special Trade Representative: "I am concerned that a uniform policy regarding assertion of executive privilege be applied throughout the Executive Office of the President."<sup>85</sup> Cutler explained that presidential advisers could not waive executive privilege without presidential approval. This memorandum constituted the first official statement of procedures on executive privilege in the Carter White House.<sup>86</sup> Cutler further developed the procedures with a memorandum to all White House staff and heads of units within the Executive Office of the President.<sup>87</sup>

The memorandum established that those considering executive privilege must seek the concurrence of the Office of Counsel to the President and that only the President had the authority to waive executive privilege.<sup>88</sup> These procedures only applied to the White House staff and the heads of units within the Executive Office of the President. Cutler also wrote a memorandum to the Attorney General requesting some input as to whether "a similar consultation arrangement throughout the executive branch" should be adopted.<sup>89</sup> After Ronald Reagan's election the discussions turned to outlining for the incoming administration "the pending matters raising executive privilege problems."<sup>90</sup>

#### A. CARTER'S EXERCISE OF EXECUTIVE PRIVILEGE

Carter did not make extensive use of executive privilege. He did accept the legitimacy of that presidential prerogative and he asserted it on a few occasions.

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85. Memorandum from Lloyd N. Cutler to Reubin Askew (Oct. 22, 1980) (available at Carter Library in File: *Executive Privilege, 6/77-11/80*, Box 74, Lloyd Cutler Files).

86. *See id.*

87. *See id.*

88. *See* Memorandum from Lloyd N. Cutler to Heads of All Units Within the Executive Office of the President and the Senior White House Staff (Oct. 31, 1980) (available at Carter Library in File: *Executive Privilege, 6/77-11/80*, Box 74, Lloyd Cutler Files).

89. Memorandum from Lloyd N. Cutler to the Attorney General (Oct. 31, 1980) (available at Carter Library in File: *Executive Privilege, 6/77-11/80*, Box 74, Lloyd Cutler Files).

90. Memorandum from Zoe E. Baird to Lloyd N. Cutler (Nov. 10, 1980) (available at Carter Library in File: *Executive Privilege, 6/77-11/80*, Box 74, Lloyd Cutler Files).

The first case concerned the President's decision not to support funding many water dam projects while allowing certain such projects to be completed. The White House refused a congressional request for internal memoranda on discussions relating to this decision on the basis that such materials are privileged. The Audubon Society then filed suit against the administration to compel release of the memoranda. The Audubon Society believed that the President approved of the completion of one dam project and construction of another without the benefit of an environmental impact statement. In an April 1977 memorandum Lipshutz and Margaret McKenna outlined three policy options: produce the documents, claim executive privilege, and negotiate a continuance of the lawsuit.<sup>91</sup> Carter claimed executive privilege. The President withdrew this claim because the Audubon Society and the Department of Interior reached an agreement to end the litigation.<sup>92</sup>

Executive privilege arose in White House deliberations later that year when a House subcommittee chairman, Rep. Benjamin S. Rosenthal (D-N.Y.), requested access to documents relevant to the anti-boycott amendments to the Export Administration Act. Secretary of Commerce Juanita Kreps wrote to the President explaining that she submitted certain documents to Rosenthal and withheld others.<sup>93</sup> She noted that although executive privilege constituted the only legal grounds for withholding information, "because of the connotations this term has acquired since Watergate, it is preferable for us to couch our response in other terms, such as separation of powers."<sup>94</sup> Kreps wrote to Rosenthal that Commerce would release certain documents and provide only summaries of information contained in the more sensitive documents.<sup>95</sup> The subcommittee reviewed the materials but nonetheless formally rejected Kreps' proposal for handling dis-

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91. See Memorandum from Robert Lipshutz and Margaret McKenna to President Jimmy Carter (Apr. 30, 1977) (available at Carter Library in Box FE-1, WHCF-Subject File).

92. See Memorandum from Margaret McKenna and Robert Lipshutz to President Jimmy Carter (May 11, 1977) (available at Carter Library in File: *Executive Privilege, 1977*, Box 15, Robert Lipshutz Files).

93. See Memorandum from Juanita M. Kreps to President Jimmy Carter (Nov. 21, 1977) (available at Carter Library in File: *Executive Privilege, 1977*, Box 15, Robert Lipshutz Files).

94. *Id.*

95. See Letter from Juanita M. Kreps to Rep. Benjamin S. Rosenthal (Nov. 21, 1977) (available at Carter Library in File: *Executive Privilege, 1977*, Box 15, Robert Lipshutz Files).

puted documents.<sup>96</sup> The administration had resolved the dispute to its favor without asserting executive privilege.

Rosenthal separately requested documents from the Department of Treasury regarding the income tax treatment of payments made by U.S. oil companies to foreign nation-states.<sup>97</sup> Lipshutz believed that disclosure of documents would disrupt Middle East negotiations, possibly influence the deliberations of the Organization of Petroleum Exporting Countries (OPEC), and jeopardize Carter's energy legislation.<sup>98</sup> Rosenthal decided not to immediately pursue the documents although he said that he might raise the access issue again after Congress reconvened.<sup>99</sup> Lipshutz conveyed to Carter that, "the 'executive privilege' question has been finessed successfully at least for the next seven weeks."<sup>100</sup>

In July 1978, Rosenthal requested from the Department of Treasury "access to all documents, records and papers relating to the Committee on Foreign Investment in the United States . . . including all letters, memoranda, minutes of meetings and all other documents."<sup>101</sup> Because this request had raised the sensitive matter of foreign investment in the U.S., members of Treasury met with Rosenthal to work out a compromise. Rosenthal received most of the documents, but some documents and materials had been withheld and portions of others "had been deleted for foreign policy purposes."<sup>102</sup> Rosenthal rejected this arrangement and pursued all of the documents.<sup>103</sup> The Assistant Secretary of the Treasury wrote to Rosenthal that the documents concerned either communications with foreign governments or

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96. See Memorandum from Robert Lipshutz to President Jimmy Carter (Nov. 29, 1977) (available at Carter Library in File: *Executive Privilege, 1977*, Box 15, Robert Lipshutz Files).

97. See Memorandum from Robert Lipshutz to Stuart Eizenstat (Nov. 23, 1977) (available at Carter Library in File: *Executive Privilege, 1977*, Box 15, Robert Lipshutz Files).

98. See *id.*

99. See Memorandum from Robert Lipshutz to President Jimmy Carter (Nov. 30, 1977) (available at Carter Library in File: *Executive Privilege, 1977*, Box 15, Robert Lipshutz Files).

100. *Id.*

101. Letter from Rep. Benjamin S. Rosenthal to James Griffin (July 12, 1978) (available at Carter Library in File: *Executive Privilege, 1978*, Box 15, Robert Lipshutz Files).

102. Memorandum of Conversation (July 25, 1978) (available at Carter Library in File: *Executive Privilege, 1978*, Box 15, Robert Lipshutz Files).

103. See *id.*

confidential policy deliberations.<sup>104</sup> Furthermore, "discussions leading to policy formulation must be free from outside scrutiny lest the full and candid consideration of policy alternatives be harmfully chilled."<sup>105</sup> After a series of negotiations Rosenthal gained access to more materials. In the end, there remained a dispute over only one document, prompting the Treasury General Counsel to recommend that Carter assert "a governmental privilege" if Congress subpoenaed the document.<sup>106</sup> Congress never subpoenaed the document.

In a separate controversy in 1978, a House subcommittee sought Department of Health, Education and Welfare (HEW) documents on the processing methods of drug manufacturers.<sup>107</sup> The Department of Justice ruled that the documents could not be disclosed because they contained trade secrets.<sup>108</sup> The subcommittee subpoenaed the documents and the HEW Secretary, Joseph A. Califano, refused to comply. The subcommittee cited Califano in contempt of Congress.<sup>109</sup> Califano worked out a compromise whereby Congress received edited documents.<sup>110</sup> The White House again avoided executive privilege.

In 1979, a controversy arose over whether Congress could compel testimony from White House personal aides to the President. Senator Harrison A. Williams (D-N.J.) invited Special Assistant to the President Sarah Weddington to testify at a hearing. Unaware of any White House prohibition against personal aides to the President testifying on Capitol Hill, Weddington accepted and then canceled her scheduled appearance on the advice of the Counsel to the President.<sup>111</sup> The cancellation

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104. See Letter from C. Fred Bergsten to Rep. Benjamin S. Rosenthal (July 25, 1978) (available at Carter Library in File: *Executive Privilege, 1978*, Box 15, Robert Lipshutz Files).

105. *Id.*

106. Memorandum from Robert H. Mundheim to Robert Lipshutz (Sept. 13, 1978) (available at Carter Library in File: *Executive Privilege, 1978*, Box 15, Robert Lipshutz Files). Lipshutz agreed with Mundheim's recommendation. See Memorandum from Robert J. Lipshutz to Robert H. Mundheim (Sept. 18, 1978) (available at Carter Library in File: *Executive Privilege, 1978*, Box 15, Robert Lipshutz Files).

107. See STAFF OF SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS, 91ST CONG., HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, CONTEMPT PROCEEDINGS AGAINST SECRETARY OF HEALTH, EDUCATION AND WELFARE, JOSEPH A. CALIFANO, JR., H.R. COMM. PRINT NO. 95-76 (1978).

108. See *id.*

109. See *id.*

110. See *id.*

111. See Letter from Sarah Weddington to Senator Harrison A. Williams

prompted press inquiries into whether the White House had used executive privilege to prevent her testimony. Illustrative of the sensitive nature of the issue was a news conference exchange between a reporter and Press Secretary Jody Powell. The reporter asked if executive privilege had been invoked to prevent the testimony, to which Powell replied: "Oooh, executive privilege! [Laughter] That always scares the hell out of the White House when anybody raises executive privilege. [Laughter] I don't know anything about the thing. I do know that historically that senior advisers to the President are not compelled to appear, cannot be compelled to appear."<sup>112</sup>

This controversy prompted Lipshutz to request a draft of proposed guidelines on how the White House staff should respond to such requests.<sup>113</sup> In February 1979, Lipshutz issued the guidelines to the White House staff.<sup>114</sup> He articulated the traditional arguments against compulsory testimony to Congress by White House advisers (i.e., need for "frank and candid discussions," personal advisers are agents of the President).<sup>115</sup> Significantly, Lipshutz did not mention executive privilege as the legal basis for preventing White House staff testimony but stated instead that, "this immunity is grounded in the Constitutional doctrine of separation of powers."<sup>116</sup>

Two years before, a U.S. Senator had requested a copy of a draft testimony to Congress by an assistant secretary in the Department of Commerce. The draft testimony contained confidential advice to the President. Carter refused to release the draft testimony and a memorandum from Lipshutz and McKenna to the President stated: "We hope to find a sound legal basis to answer the subpoena without using the term executive privilege."<sup>117</sup>

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(Jan. 31, 1979) (available at Carter Library in File: *Executive Privilege, 1979*, Box 15, Robert Lipshutz Files).

112. Transcript of news conference, Jan. 31, 1979 (available at Carter Library in File: *Executive Privilege, 1977*, Box 15, Robert Lipshutz Files).

113. See Memorandum from Robert Lipshutz to Margaret McKenna and Doug Huron (Feb. 2, 1979) (available at Carter Library in File: *Executive Privilege, 1977*, Box 15, Robert Lipshutz Files).

114. See Memorandum from Robert Lipshutz to White House Staff (Feb. 8, 1979) (available at Carter Library in File: *Executive Privilege, 1977*, Box 15, Robert Lipshutz Files).

115. See *id.*

116. *Id.*

117. Memorandum from Robert Lipshutz and Margaret McKenna to President Jimmy Carter (May 23, 1977) (available at Carter Library in File: *Executive Privilege, 1977*, Box 15, Robert Lipshutz Files).



Nonetheless, in late 1980 Cutler wrote to a member of Congress that Carter had directed a Deputy Assistant to the President not to testify before a subcommittee.<sup>118</sup> Cutler stated: "The Congress has always respected the privilege of the President to decline requests that the President himself or his immediate White House advisers appear to testify before congressional committees."<sup>119</sup>

A 1980 controversy illustrates how Carter avoided executive privilege, yet considered that power a possible last resort. Carter issued a proclamation issuing a fee on imported crude oil and gasoline.<sup>120</sup> A House subcommittee requested all of the Department of Energy documents relevant to Carter's decision. The Department refused on the ground that the White House needed time to review the documents before deciding *not* to invoke executive privilege.<sup>121</sup> The subcommittee subpoenaed the documents.<sup>122</sup> Department of Energy Secretary Charles Duncan gave the subcommittee some of the documents while withholding others to protect internal deliberations.<sup>123</sup> The subcommittee subpoenaed Duncan to appear with the disputed documents.<sup>124</sup> Duncan so appeared, but explained that he planned to continue withholding the documents without claiming executive privilege. He explained that executive privilege would be used as a last resort, if necessary.<sup>125</sup> The subcommittee declared Duncan in contempt of Congress.<sup>126</sup> The controversy ended when a district court voided Carter's proclamation and the administration

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118. See Letter from Lloyd Cutler to Rep. Samuel S. Stratton (Sept. 30, 1980) (available at Carter Library in File: *Executive Privilege, 6/77-11/80*, Box 74, Lloyd Cutler Files). Cutler noted that the President had previously taken the exceptional position of waiving the privilege against compulsory testimony by White House aides when the President's brother had been implicated in a scheme to represent Libyan interests in the United States for a substantial fee. See *id.*

119. *Id.*

120. See Proclamation No. 4744, 45 Fed. Reg. 22, 864 (1980).

121. See *The Petroleum Import Fee: Department of Energy Oversight, Hearings Before a Subcommittee of the House Committee on Government Operations*, 96th Cong. 1-8 (1980) (statements of Toby Moffet, chairman, and Thomas Newkirk, Deputy General Counsel, Department of Energy).

122. See *id.* at 35.

123. See *id.* at 96-101.

124. See *id.* at 116-17.

125. See *id.* at 146.

126. See *id.* at 134-39.

agreed to the subcommittee's offer to review the documents in executive session.<sup>127</sup>

### B. EXECUTIVE PRIVILEGE IN THE CARTER ADMINISTRATION

Following his predecessor Gerald R. Ford, Jimmy Carter never issued a presidential directive on executive privilege. It was not until near the 1980 election that the Counsel to the President issued executive privilege procedures to White House staff and the heads of units within the Executive Office of the President.<sup>128</sup>

Carter tried to avoid executive privilege while he still defended his right to withhold information through other sources of authority. Because of the taint of Watergate, the administration generally avoided the phrase "executive privilege" and tried to accommodate requests for information. Nowhere in the White House files does any member of the Carter administration suggest that executive privilege should be avoided because it is of dubious constitutionality.

Carter's strategy of occasionally withholding information while avoiding executive privilege minimized controversy over secrecy issues. Although his administration was not completely free of such controversy, the degree of executive-legislative rancor over access to information pales in comparison to the conflict that took place over such issues during the Reagan and Bush years of divided government. The downside to the Carter strategy is that there was a great deal of internal administration confusion over how to respond to access to information issues. It is remarkable that it took until the week before the 1980 elections for the White House Office of Legal Counsel to issue even the most basic set of internal executive privilege guidelines. It appears that a better strategy would have both avoided public controversy and provided some internal administration guidance.

### III. REAGAN: DILUTING A CONSTITUTIONAL POWER

President Reagan tried to reestablish the legitimacy of executive privilege, only to back down in the face of congressional demands. Unlike his immediate predecessors, Reagan did not attempt to conceal executive privilege. By making public stands on the issue, Reagan actually encouraged a more vocal

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127. See *id.* at 142; *Independent Gasoline Marketers Council v. Duncan*, 492 F. Supp. 614, 621 (D.D.C. 1980).

128. See *supra* notes 83-84 and accompanying text.

and active opposition. In his two terms in office, Reagan could not claim a single substantial executive privilege victory.

Reagan issued an executive privilege memorandum to heads of executive departments and agencies.<sup>129</sup> The Reagan guidelines upheld the need for the "confidentiality of some communications" and added 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."<sup>130</sup> The memorandum emphasized that "executive privilege shall not be invoked without specific presidential authorization."<sup>131</sup> It also specified causes for the appropriate use of executive privilege: when 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."<sup>132</sup>

Under the Reagan procedures, if a department head believed that a congressional request for information might concern privileged information, he would notify and consult with both the attorney general and the counsel to the President. The three would then decide whether to release the information, or have the matter submitted to the President. At that stage, the department head asked Congress to await a presidential decision. If the President claimed executive privilege, he instructed the department head to inform Congress "that the claim of executive privilege [was] being made with the specific approval of the President."<sup>133</sup>

#### A. REAGAN'S EXERCISE OF EXECUTIVE PRIVILEGE

Four prominent executive privilege controversies occurred in Reagan's two terms. The first happened during Reagan's first year in office and set the tone for executive privilege disputes during his presidency.

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129. See Memorandum from President Reagan to Heads of Executive Departments and Agencies, *Procedures Governing Responses to Congressional Requests for Information* (Nov. 4, 1982) (copy on file with author).

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

1. The Mineral Lands Leasing Act, 1981-1982<sup>134</sup>

In 1981, a House subcommittee investigated the Mineral Lands Leasing Act because of takeovers of U.S. companies by foreign interests. In response to a subcommittee request, Interior Secretary James Watt ruled that thirty-one documents contained sensitive information and refused to supply them to Congress. The subcommittee responded with a subpoena.

Reagan requested the opinion of Attorney General William French Smith regarding the executive's right to withhold the documents. Smith defended an assertion of executive privilege. The documents were "either necessary and fundamental to the deliberative process presently ongoing in the Executive Branch or relate to sensitive foreign policy considerations."<sup>135</sup> Smith maintained that by demanding confidential documents, Congress was trying to participate in executive branch decision-making. In a most controversial opinion adopted by his successors, Smith alleged that Congress lacked an interest in executive branch information when requested for investigative purposes.<sup>136</sup>

Watt appeared before the subcommittee and submitted the attorney general's opinion and a memorandum from the President asserting executive privilege. The Interior Secretary refused to answer subcommittee members' questions about the documents. The President refused a subsequent request to release the documents. The subcommittee did not accept the claim of executive privilege. The General Counsel to the Clerk of the House refuted the Attorney General's legal opinion.<sup>137</sup> The subcommittee voted Watt in contempt and referred the conflict to the full committee. The Committee on Energy and Commerce recommended that Watt be cited by the full House for contempt of Congress.

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134. The following sequence of events is summarized from: STAFF OF SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS, 97TH CONG., HOUSE COMM. ON ENERGY AND COMMERCE, EXECUTIVE PRIVILEGE: LEGAL OPINIONS REGARDING CLAIM OF PRESIDENT RONALD REAGAN IN RESPONSE TO SUBPOENA ISSUED TO JAMES G. WATT, SECRETARY OF THE INTERIOR (Comm. Print 1981) [hereinafter LEGAL OPINIONS] and *Contempt of Congress: Hearings Before the Subcomm. on Oversight and Investigations and the House Comm. on Energy and Commerce, 97th Cong. (1982)* [hereinafter *Contempt Hearings*].

135. LEGAL OPINIONS, *supra* note 134, at 2.

136. *See id.* at 3-4.

137. *See Contempt Hearings, supra* note 134, at 108-17.

Reagan had the option to weigh the importance of protecting these documents against the likelihood of a contempt citation and further feuding. He resolved the issue in Congress's favor and made the documents available to the subcommittee. The Committee dropped the contempt citation.

Having made a strong initial case for executive privilege, Reagan backed down when pushed by Congress, despite the claim that confidentiality and national interests were at stake. The Justice Department did not take part in the settlement. The Assistant Attorney General, Theodore Olson, who had written to the full committee chair expressing the administration's position and had appeared with Secretary Watt before the subcommittee, opposed the settlement terms.<sup>138</sup> Reagan had decided in favor of a short-term political accommodation over defending his powers.

## 2. The EPA and Superfund, 1982-1983<sup>139</sup>

The most contentious executive privilege debate in the Reagan administration concerned the refusal of the Environmental Protection Agency (EPA) to release to Congress certain documents pertaining to agency enforcement of hazardous waste laws. In 1982, the Oversight and Investigations Subcommittee of the House Committee on Energy and Commerce had been investigating the agency's implementation of hazardous waste laws and had become frustrated by delays and non-responses when requesting EPA data.

The Subcommittee on Investigations and Oversight of the House Public Works and Transportation committee experienced similar difficulties in its own examination of the EPA. A pattern developed where the EPA released some documents and the Justice Department forbade the release of others. Justice assessed that it had the duty to protect the administration from disclosure of sensitive materials. Justice maintained that law enforcement efforts could be undermined by public disclosure of enforcement sensitive documents and did not want the

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138. See COMM. OF THE JUDICIARY, INVESTIGATION OF THE ROLE OF THE DEPARTMENT OF JUSTICE IN THE WITHHOLDING OF ENVIRONMENTAL PROTECTION AGENCY DOCUMENTS FROM CONGRESS IN 1982-83, H.R. REP. NO. 99-435, at 28 (1986).

139. This section is summarized from: COMM. ON PUB. WORKS AND TRANSP., CONTEMPT OF CONGRESS, H.R. REP. NO. 97-968 (1982); JONATHAN LASH ET AL., A SEASON OF SPOILS: THE STORY OF THE REAGAN ADMINISTRATION'S ATTACK ON THE ENVIRONMENT (1984).

EPA to determine which documents were enforcement sensitive.

The chair of the House Committee on Energy and Commerce, Rep. John Dingell (D-Mich.), subpoenaed EPA Administrator Anne Gorsuch to appear before the committee with certain documents. A subcommittee chaired by Rep. Elliot Levitas (D-Ga.) also subpoenaed Gorsuch.

Despite Gorsuch's protests, Justice urged the President to assert executive privilege. White House Counsel Fred Fielding assured Gorsuch that the administration would stand behind this claim of executive privilege.

Reagan sent to EPA a memorandum and a copy of the Attorney General's letter to Dingell "setting forth the historic position of the Executive Branch, with which I concur, that sensitive documents found in open law enforcement files should not be made available to Congress or the public except in extraordinary circumstances." Reagan instructed Gorsuch and her colleagues "not to furnish copies of this category of documents to the Subcommittees in response to their subpoenas."<sup>140</sup> The Attorney General issued a defense of executive privilege in which he emphasized the sensitive nature of "internal deliberations" and the need to keep secret "prosecutorial strategy."<sup>141</sup>

Gorsuch appeared before the Levitas subcommittee and conveyed the president's claim of executive privilege. The subcommittee voted Gorsuch in contempt. The House Public Works Committee and then the House of Representatives also voted to hold her in contempt. The Justice Department then filed suit against the House of Representatives.<sup>142</sup> The U.S. District Attorney would not, as specified in the contempt statute, "bring the matter before the grand jury for their action" while the suit against the House was pending.<sup>143</sup>

The district court of the District of Columbia granted the defendants' motion to dismiss the suit.<sup>144</sup> The court encouraged the two branches "to settle their differences without fur-

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140. COMM. ON PUB. WORKS AND TRANSP., CONTEMPT OF CONGRESS, H.R. REP. NO. 97-968, at 43 (1982).

141. *Id.* at 36.

142. *See* United States v. House of Representatives, 556 F. Supp. 150 (D.D.C. 1983).

143. LASH ET AL., *supra* note 139, at 76.

144. *See* United States v. House of Representatives, 556 F. Supp. at 155.

ther judicial involvement."<sup>145</sup> The court stated: "[i]f these two co-equal branches maintain their present adversarial positions, the Judicial Branch will be required to resolve the dispute by determining the validity of the Administrator's claim of executive privilege."<sup>146</sup>

Soon after the dismissal of the suit, the administration struck a bargain with the Levitas subcommittee, agreeing to allow limited disclosure. Dingell did not consider the Levitas agreement acceptable and continued to press for full disclosure. The White House released the documents to the Dingell committee.

Although the administration initially had taken a strong stand on executive privilege, it backed down in the face of pressure. The decision to compromise did not settle the controversy. The House Committee on the Judiciary investigated the Justice Department role in the controversy and concluded that the Department had misused executive privilege by advocating withholding documents that had not been thoroughly reviewed. The Committee also alleged that the Department withheld documents to cover-up EPA wrongdoing.<sup>147</sup> The Administration's compromise enabled Congress to examine previously withheld documents and draw broader conclusions about the exercise of executive privilege. Reagan won a temporary reprieve from political pressures, but once again he weakened executive privilege.

### 3. The Rehnquist Memoranda, 1986

On June 17, 1986, President Reagan nominated Associate Justice of the Supreme Court William H. Rehnquist for the position of Chief Justice.<sup>148</sup> Although eventually confirmed, Rehnquist's nomination was somewhat controversial.<sup>149</sup> The

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145. *Id.* at 153.

146. *Id.* at 152.

147. See COMM. OF THE JUDICIARY, *supra* note 138, at 11-17.

148. See Nadine Cohdas, *Nominee Denies Bias, Extremism: Rehnquist Rebutts Criticism, Confirmation Seems Likely*, CONG. Q. WKLY. REP., Aug. 2, 1986, at 2.

149. See generally *id.*; David S. Broder, *Those Memos Will Tell*, WASH. POST, Aug. 6, 1986, at A15; Nadine Cohdas, *Rehnquist, Scalia Headed for Confirmation*, CONG. Q. WKLY. REP., Aug. 9, 1986 [hereinafter Cohdas, *Headed for Confirmation*]; Nadine Cohdas, *Rehnquist, Scalia Win Panel's Endorsement*, CONG. Q. WKLY. REP., Aug. 16, 1986 [hereinafter Cohdas, *Win Panel's Endorsement*]; Al Kamen & Howard Kurtz, *Rehnquist Told in 1974 of Restriction in Deed: Reagan Permits Access to Some Documents*, WASH. POST,

Senate Judiciary Committee requested Justice Department documents that Rehnquist had written as the head of the Nixon administration Office of Legal Counsel.<sup>150</sup> The Justice Department refused and Reagan invoked executive privilege to protect the documents.<sup>151</sup>

A majority of the Judiciary Committee insisted on reviewing the documents.<sup>152</sup> The Committee had the votes to subpoena the documents and even to delay the confirmation proceedings. Reagan waived executive privilege.<sup>153</sup> The Justice Department and Judiciary Committee agreed upon an arrangement in which selected senators and staff could review certain documents.<sup>154</sup> Although the President had again backed away from an executive privilege claim, in this case he was able to ensure that only a fairly narrow range of documents would be made available.<sup>155</sup>

The controversy ended when Senators expressed satisfaction that the Rehnquist memoranda contained no damaging information.<sup>156</sup> Reagan may have weakened somewhat his claim to executive privilege by turning over specific documents, but he did not want to threaten the Rehnquist confirmation or invite another congressional subpoena of executive branch documents.<sup>157</sup>

#### 4. The President's Diaries, 1987

During the Iran-contra controversy the Reagan administration furnished over 300,000 White House, State Department, Defense Department, CIA, and Justice Department documents to Congress.<sup>158</sup> The investigating committees de-

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Aug. 6, 1986, at A1 [hereinafter Kamen & Kurtz, *Rehnquist Told*]; Al Kamen & Howard Kurtz, *Rehnquist Bid Not in Danger over Papers: Sen. Mathias Finds 'Nothing Dramatic'*, WASH. POST, Aug. 7, 1986, at A1 [hereinafter Kamen & Kurtz, *Nothing Dramatic*]; Howard Kurtz, *Rehnquist Memos Described*, WASH. POST, Aug. 7, 1986, at A15.

150. See Kamen & Kurtz, *Rehnquist Told*, *supra* note 149, at A1.

151. See *id.*

152. See *id.*

153. See *id.*

154. See *id.*

155. See Kurtz, *supra* note 149, at A15 (listing the papers from the Nixon Administration that the Senate Judiciary Committee reviewed).

156. See generally Cohdas, *Win Panel's Endorsement*, *supra* note 149.

157. See Broder, *supra* note 149.

158. See Louis Fisher, *Congress As Micromanager of the Executive Branch*, in *THE MANAGERIAL PRESIDENCY* 225, 232 (James P. Pfiffner ed., 1991).



posed numerous executive branch officials.<sup>159</sup> The President waived executive privilege for executive branch officials who testified before Congress.<sup>160</sup> Nonetheless, certain Senators raised the issue of executive privilege when Chief of Staff Donald Regan revealed that the President kept a personal diary.<sup>161</sup> Some committee members demanded access to the diaries.<sup>162</sup> Regan protested that the President's diaries were personal and not subject to disclosure.<sup>163</sup> The White House initially took the position that disclosure of the diaries "would infringe on the privacy of the President and others."<sup>164</sup>

A battle over executive privilege appeared imminent. Senator George Mitchell (D-Maine) declared: "The decision ought not to be whether they are personal or not, but . . . whether they are relevant to our investigation, whether they shed light on answers to questions the committee wants."<sup>165</sup> The Assistant Attorney General William Bradford Reynolds defended executive privilege, arguing that acquiescence to congressional demands for information was tantamount to "near abdication" of the executive's constitutional powers.<sup>166</sup>

White House spokesman Marlin Fitzwater said that Reagan's notes were not relevant to the inquiries and were "very personal in nature," leading the White House to favor nondisclosure.<sup>167</sup> Soon after making these comments Fitzwater learned that the President decided not to assert executive privilege over the diaries.<sup>168</sup> Fitzwater later emphasized the White House position of full cooperation with the investigation: "The President wants to get to the bottom of the matter and fix what went wrong."<sup>169</sup>

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159. *See id.*

160. *See id.*

161. *See* David Hoffman & Bob Woodward, *President's Memoir File Includes Iran Notes; Senate Investigators May Seek Access*, WASH. POST, Feb. 1, 1987, at A1.

162. *See id.*

163. *See id.*

164. W. Dale Nelson, *Reagan Iran Notes Report Confirmed*, WASH. POST, Feb. 2, 1987, at A16.

165. *Id.*

166. Al Kamen, *Executive Privilege Hailed*, WASH. POST, Feb. 1, 1987, at A16.

167. David Hoffman, *President Offers to Share Iran Sales Notes with Hill*, WASH. POST, Feb. 3, 1987, at A1.

168. *See id.*

169. *Id.*

Perhaps no action by Reagan did more to harm executive privilege than to establish the precedent of turning over his own personal diaries. If such materials are not entitled to protection, it is hard to imagine executive privilege being accepted for anything but the most compelling national security information. Even if Congress had subpoenaed the diaries, it is likely that the courts would have favored the president's claim of privilege. Although the *United States v. Nixon* case made it clear that in a criminal investigation a President must supply subpoenaed evidence,<sup>170</sup> the case makes no such absolute claim for congressional subpoenas. In this case, as well as the earlier ones, Reagan chose not to defend his prerogatives and instead sought the most expedient solution to his immediate political problems.

## B. CONCLUSION: DILUTING A CONSTITUTIONAL DOCTRINE

Although Reagan invoked executive privilege on several occasions, he never fully defended that power. When confronted by congressional demands for information, he followed a pattern of initial resistance followed by accommodation of Congress. Reagan further weakened a presidential power that already had lost stature because of Watergate.

The Reagan experiences also show that any effort to adopt a statutory definition or limitation on executive privilege would be frivolous. Limitations on the exercise of that power are provided for by the traditional separation of powers doctrine in which each branch employs whatever powers it has to resist encroachments by another branch.<sup>171</sup> Congress has available many means by which to resist the exercise of executive privilege. As the Reagan examples show, when Congress feels strongly about disclosure of executive branch information, it can force the President into a very difficult situation.

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170. 418 U.S. 683, 713 (1974):

[W]hen the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.

171. Compare U.S. CONST. art. I, § 1, with *id.* art II, § 1, cl. 1 and *id.* art. III, § 1. See also THE FEDERALIST NO. 47 (James Madison) (noting the "political maxim" that the legislative, executive, and judiciary departments ought to be separate and distinct).

The President, of course, has the option of further resisting Congress's demands. He can even allow the dispute to rise to the level of a constitutional crisis to be decided at the judicial level. Reagan didn't do that. He sought accommodations with Congress that would satisfy his short-term political needs.

#### IV. BUSH: PROTECTING PRESIDENTIAL SECRECY

The Bush administration never adopted its own formal policy on the use of executive privilege. Instead, the Reagan memorandum remained in effect as the official Bush administration procedures.

Bush maintained in theory the Reagan policy of requiring the President personally to approve the use of executive privilege. His administration withheld information from Congress on many occasions without invoking executive privilege—in effect, without calling attention to the controversial doctrine. Bush's strategy was to further the cause of withholding information by *not* invoking executive privilege.

Perhaps there is no stronger indication of how far executive privilege has fallen into political disrepute than how the Bush administration sought to secure all of the benefits of governmental secrecy without making a case for this presidential prerogative. Bush understood that to draw too much attention to the controversial doctrine only would have the effect that his predecessor experienced—public confrontations with Congress, congressional contempt citations, and critical media coverage.

On many occasions, rather than invoke executive privilege, the Bush administration used other names for justifying withholding information or cited some other source of authority for doing the same. Among the justifications were deliberative process privilege, attorney-client privilege, attorney work product, internal departmental deliberations, deliberations of another agency, secret opinions policy, sensitive law enforcement materials, and ongoing criminal investigations.

These justifications are not all original to the Bush administration. Numerous administrations have, for example, withheld documents pertaining to ongoing criminal investigations in the Department of Justice without specifically citing executive privilege. What is telling, though, is the extent to which the Bush administration went to cloak the use of executive privilege under different names. As the Chief Investigator to the House Committee on the Judiciary, Jim Lewin, explained:

Bush was more clever than Reagan when it came to executive privilege. You have to remember that Bush really was our first bureaucrat President. He knew how to work the system. He avoided formally claiming executive privilege and instead called it other things. In reality, executive privilege was in full force and effect during the Bush years, probably more so than under Reagan.<sup>172</sup>

Bush downplayed—and hence weakened—the doctrine of executive privilege by failing to articulate or defend any constitutional arguments for its exercise. Bush was content to concede the constitutional issues to the opponents and to ensure his short-term political need to avoid constitutional conflict while at the same time blocking congressional committees and the public from attaining certain information.

None of this is to suggest that Bush either did not believe in or never personally invoked executive privilege. On a few occasions Bush resorted to executive privilege when no other option was available to achieve the purpose of withholding information.

#### A. BUSH'S EXERCISE OF EXECUTIVE PRIVILEGE

Although President Bush never established his own formal procedures for using executive privilege, a number of controversies during his presidency bring to light how his administration exercised that power in a crafty, even hidden-hand, fashion.

##### 1. The "Kmiec Memo," 1989

The first executive privilege statement by the Bush administration never involved the President and did not result in any policy decision. In March 1989 Assistant Attorney General Douglas M. Kmiec issued a memorandum and proclaimed that under the doctrine of executive privilege, Inspectors General are not obligated to provide to Congress "confidential information about an open criminal investigation, established executive branch policy and practice . . . absent extraordinary circumstances."<sup>173</sup> Kmiec did not issue the memorandum in reaction to any controversy. Nobody from the Bush administration requested the opinion. Kmiec offered the opinion as a response to a June 1987 Reagan administration inquiry into how Inspectors

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172. Telephone Interview with Jim Lewin, Chief Investigator to the House Committee on the Judiciary (Nov. 19, 1992).

173. Memorandum from Douglas W. Kmiec to Oliver B. Revell (Mar. 24, 1989), reprinted in *Department of Justice Authorization for Appropriations for Fiscal Year 1990: Hearings before the Comm. on the Judiciary House of Representatives*, 101st Cong. 64 (1989) [hereinafter Kmiec Memo].

General should respond to congressional demands for information.<sup>174</sup>

The Kmiec memo provided a brief historical justification for executive privilege. It stated:

Congress has a limited oversight interest in the conduct of an ongoing criminal investigation and the executive branch has a strong interest in preserving the confidentiality of such investigations. Accordingly, in light of established executive branch policy and practice, and absent extraordinary circumstances, an IG should not provide Congress with confidential information concerning an open criminal investigation.<sup>175</sup>

In terms of influencing Bush administration use of executive privilege, the Kmiec memo amounted to nothing. The General Counsel to the Clerk of the House, Steven R. Ross, and the Deputy General Counsel, Charles Tiefer, responded that congressional committees did indeed have the "authority to obtain information on agency waste, fraud, and wrongdoing, from Inspectors General as from other agency officers. The Kmiec memo represents a gratuitous and unjustified break with a clear historic tradition and attempts to put aside explicit statutory language. It should [be] regarded as simply an error."<sup>176</sup> As Tiefer later explained, the Kmiec memo represented nothing more than an "abstract statement" that had no bearing on official policy or administration action.<sup>177</sup> According to Tiefer, during the Bush years, Congress met no resistance from Inspectors General in its various requests for information.<sup>178</sup>

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174. See Memorandum from Steven R. Ross & Charles Tiefer to Jack Brooks (May 2, 1989), reprinted in *Department of Justice Authorization for Appropriations for Fiscal Year 1990: Hearings before the Comm. on the Judiciary House of Representatives*, 101st Cong. 64, 77-78 (1989) [hereinafter Ross & Tiefer].

175. Kmiec Memo, *supra* note 173, at 71-72.

176. Ross & Tiefer, *supra* note 174, at 88.

177. Telephone Interview with Charles Tiefer, Deputy General Counsel to the Clerk of the House of Representatives (Nov. 23, 1992).

178. See *id.*

## 2. The Reagan Diaries, 1990<sup>179</sup>

The Bush administration asserted executive privilege over the personal diaries of Ronald Reagan when the former national security adviser, John M. Poindexter, sought access to portions of those materials.<sup>180</sup> Poindexter had sought to substantiate the claim that Reagan had authorized certain activities in the Iran-contra affair.<sup>181</sup>

In January 1990, Federal district court judge Harold H. Greene ordered Reagan to turn over diary excerpts.<sup>182</sup> Reagan's attorneys had been attempting to persuade Greene to cancel a subpoena for the diaries.<sup>183</sup> Greene instead ordered that the diary excerpts be released and gave Reagan's attorneys time to challenge that decision with an assertion of executive privilege.<sup>184</sup> Greene had privately reviewed the Reagan diary excerpts and determined "that some but not all the diary entries produced in response to various subpoena categories are relevant to defendant's claim."<sup>185</sup>

The Department of Justice moved in federal court to delay the order that Reagan's diary excerpts be produced for Poindexter's trial. The Department so moved to avoid Reagan's attorneys from having to assert executive privilege. The Department maintained that the court order could become a "significant intrusion into what are probably a president's most personal records" and result in a "serious constitutional confrontation."<sup>186</sup>

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179. This section is summarized from: Paul M. Barrett & Amy Dockser Marcus, *Judge Orders Reagan to Submit to a Videotape in Poindexter Case*, WALL ST. J., Feb. 6, 1990, at B10; David Johnston, *Reagan Is Ordered to Provide Diaries in Poindexter Case*, N.Y. TIMES, Jan. 31, 1990, at A1 [hereinafter Johnston, *Provide Diaries*]; David Johnston, *Reagan Rejects Poindexter Plea to Yield Diaries*, N.Y. TIMES, Feb. 6, 1990, at A1 [hereinafter Johnston, *Reagan Rejects Plea*]; David Johnston, *Reagan to Give Tape Testimony on Iran-Contra*, N.Y. TIMES, Feb. 10, 1990, at A1 [hereinafter Johnston, *Tape Testimony*]; David Johnston, *Poindexter Loses Fight for Reagan Notes*, N.Y. TIMES, Mar. 22, 1990, at A20 [hereinafter Johnston, *Poindexter Loses*]; Joe Pichirallo, *Reagan Attorneys Assert Executive Privilege; Withholding Diary Excerpts from Poindexter Is Based on Confidentiality, Court Told*, WASH. POST, Feb. 8, 1990, at A4.

180. See Johnston, *Provide Diaries*, *supra* note 179, at A1.

181. See *id.*

182. See *id.*

183. See Johnston, *Reagan Rejects Plea*, *supra* note 179, at A1.

184. See Pichirallo, *supra* note 179, at A4.

185. Johnston, *Provide Diaries*, *supra* note 179, at A20.

186. Tracy Thompson, *Justice Department Asks Delay on Reagan Diary Ruling*, WASH. POST, Feb. 3, 1990, at A3.

The tactic failed and Reagan asserted executive privilege. The attorney's brief for Reagan stated: "These materials are the private reflections of the former President prepared for his personal deliberations and touch the core of the presidency."<sup>187</sup> The former president's spokesman maintained that Reagan had decided to invoke executive privilege to protect the privacy of future presidents.<sup>188</sup> Reagan maintained that he had no choice because Judge Greene refused to disclose Poindexter's statements of why the diary excerpts were important to the case, unless the former President claimed executive privilege.<sup>189</sup> Greene maintained that such a claim would require him to reexamine his earlier decision to compel release of the diary excerpts.<sup>190</sup> In other words, Greene would have to determine whether the need for the excerpts in the trial must override any claim of executive privilege. The Bush administration then issued its own claim of executive privilege over the diaries.<sup>191</sup>

To further complicate the controversy, Judge Greene separately ordered Reagan to provide videotaped testimony in the Poindexter trial.<sup>192</sup> Reagan had to decide once again whether to assert executive privilege. Reagan agreed to provide the videotaped testimony. The Bush Administration Department of Justice waived its claim of executive privilege to enable Reagan to testify. Nonetheless, Reagan's attorneys stated that the former President would defer to President Bush "with respect to issues of executive privilege concerning national security or foreign af-

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187. Johnston, *Reagan Rejects Plea*, *supra* note 179, at A1.

188. *See id.*

189. *See* Paul M. Barrett & Amy Dockser Marcus, *Reagan's Videotaped Testimony Ordered*, WALL ST. J., Feb. 6, 1990, at B10. Reagan's attorney had met the February 5, 1990 deadline for formally refusing to release the diary entries but never used the phrase "executive privilege" in so refusing. That led to some confusion over whether Reagan had met Judge Greene's condition of having to assert executive privilege by that date as the basis for the refusal. Reagan's attorney, Theodore B. Olson, made it clear on February 7, 1990, that Reagan indeed had relied upon executive privilege as the basis for withholding the diaries.

No court has declared that the protection afforded the privilege for confidential presidential communications may be invoked only by reciting the phrase "executive privilege[ ]" . . . . However, if this court intended . . . that the privilege may only be invoked in that fashion, the former President reaffirms that was, indeed, [his] intention.

Pichirallo, *supra* note 179, at A4 (quoting Olson's comments to Judge Greene).

190. *See* Johnston, *Tape Testimony*, *supra* note 179, at A10.

191. *See* *Reagan Testifies on Tape*, DALLAS MORNING NEWS, Mar. 22, 1990, at 4A.

192. *See* Johnston, *Tape Testimony*, *supra* note 179, at A1.

fairs that may arise during the taking of the videotaped testimony.”<sup>193</sup>

In March 1990, Judge Greene ruled in favor of the Reagan and the Bush administration claims of executive privilege. Greene had again privately reviewed the disputed diary entries and determined that they offered “no new insights” into the Iran-Contra affair and, consequently, that the claims of executive privilege outweighed Poindexter’s claim. Greene determined that “[t]he claims of executive privilege filed on behalf of the former President and of the incumbent President are sufficient under the facts presented here to defeat the defendant’s demand.” Furthermore, Poindexter’s “showing of need for the diary excerpts and their indispensability for the achievement of justice in this case is meager.” He explained that Poindexter’s case might have been stronger if Reagan had earlier refused to provide videotaped testimony. Greene made clear that he had overturned his earlier decision to compel release of the diary entries because of the assertions of executive privilege. He determined that “courts must exercise both deference and restraint when asked to issue coercive orders against a president’s person or papers.”<sup>194</sup>

The doctrine of executive privilege prevailed in this controversy. Significantly, it was Judge Greene, not the Reagan attorneys or the Bush administration, who forced the issue of executive privilege. Reagan’s attorneys avoided the use of the phrase “executive privilege” in their formal response to Judge Greene’s deadline for asserting such authority. The Bush administration initially tried to get around the issue of executive privilege.

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193. *Id.* (quoting comments by Reagan’s attorneys).

194. Johnston, *Poindexter Loses*, *supra* note 179, at A20. The issue of executive privilege also arose in connection to the Iran-Contra trial of Lt. Col. Oliver North. In that case, North sought to subpoena Reagan’s diaries and the testimonies of then President Reagan and President-elect Bush. The three subpoenas were quashed. Because earlier conspiracy charges against North had been dropped, Judge Gerhard A. Gesell determined that the defendant’s needs in this case did not overcome the “presumptive privilege” accorded to the President and the President-elect. See Christopher Walther, Comment, *Legitimacy: The Sacrificial Lamb at the Altar of Executive Privilege*, 78 KY. L.J. 817, 822-25 (1989-90); George Lardner, Jr., *North Asks Court To Overturn Convictions*, WASH. POST, Feb. 7, 1990, at A3; Ruth Marcus, *Subpoenaing the President: Not Without Precedent*, WASH. POST, Jan. 1, 1989, at A7; Joe Pichirallo & Ruth Marcus, *Reagan, Bush Subpoenaed by North*, WASH. POST, Dec. 31, 1988, at A1; Michael Wines, *Key North Counts Dismissed by Court*, N.Y. TIMES, Jan. 14, 1989, at 1.



When compelled to do so, Reagan's attorneys and the Bush administration claimed executive privilege.<sup>195</sup>

### 3. The Persian Gulf War, 1990-1991

The Persian Gulf war raised access-to-information controversies. As with any military operation, certain restrictions had to be placed on information about troop movements, campaign strategy, and weapons capabilities.

An executive privilege dispute arose concerning congressional access to information regarding U.S.-Persian Gulf policy. Rep. Barbara Boxer (D-Cal.) introduced a privileged resolution of inquiry seeking specific information on Operation Desert Shield. That resolution sought detailed information about many sensitive aspects of the Operation.<sup>196</sup> Counsel to the President C. Boyden Gray responded:

The resolution requests extremely sensitive information that, if disclosed, could cause grave damage to the national security . . . . The courts have long recognized that the Constitution permits the President to protect such information from disclosure under the national security component of the executive privilege doctrine. This component of executive privilege also insulates from disclosure information relating to diplomatic discussions with foreign governments. Moreover, insofar as documents requested by H. Res. 19 reflect predecisional discussions, advice, recommendations, and budgetary or other analyses, they are also protected from disclosure by the deliberative process component of executive privilege.<sup>197</sup>

The chairman of the House Committee of Foreign Affairs, Rep. Dante B. Fascell, and the chairman of the House Committee on Armed Services, Rep. Les Aspin, wrote to President Bush requesting "a more responsive answer than the initial reply by Mr. Gray." The letter requested that the information be presented in "timely fashion" so that Congress could fulfill its oversight duties.<sup>198</sup>

Congress eventually received much of the requested information. The use of executive privilege, raised in Gray's letter, had been dropped and the administration substantially accommodated Congress's need for information. The National Security Adviser, Brent Scowcroft, responded to the Fascell-Aspin letter

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195. See *supra* notes 186-191 and accompanying text.

196. See H.R. Res. 19, 102d Cong. (1991).

197. Letter from C. Boyden Gray, Counsel to the President, to Rep. Dante B. Fascell (Jan. 23, 1991) (copy on file with author).

198. Letter from Rep. Dante B. Fascell and Rep. Les Aspin to President George Bush (Feb. 7, 1991) (copy on file with author).

by providing summary information from the White House, the Department of Defense, and the Department of State. He also explained that Central Intelligence Agency information relevant to the areas of inquiry would be provided separately in classified form. Although the White House presented the information in less detailed form than requested, Congress received much of the desired information and did not dispute the administration's final response that some details could not be provided given time constraints.<sup>199</sup> Widespread public support for Bush's military action also made Congress's efforts to compel release of all of the detailed information about the allied war effort politically difficult. Bush was able to protect some information without fully exercising executive privilege. Furthermore, by delaying a response to Boxer's request and then temporarily raising executive privilege, Bush succeeded in denying Congress timely information that legislators could have used in their decision-making process.

#### 4. College Accreditation Standards, 1991<sup>200</sup>

In 1991, Secretary of Education Lamar Alexander challenged the Middle States Association of Colleges and Schools practice of considering the degree of faculty, staff, and student diversity in colleges in deciding whether to grant accreditation. A House subcommittee requested Department of Education documents pertaining to Alexander's action. The Department claimed the "attorney-client privilege" and "deliberative process privilege."<sup>201</sup>

The subcommittee rejected these claims of privilege. Staff members of the subcommittee and of the Department of Education met to try to resolve the dispute. No agreement could be reached and the Department ruled: "The Department of Justice's Office of Legal Counsel has reviewed these documents and advised the [Education] Department that they are protected by the doctrine of executive privilege."<sup>202</sup> The subcommittee subpoenaed

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199. See Letter from Brent Scowcroft, National Security Adviser, to Rep. Dante B. Fascell (Feb. 20, 1991) (copy on file with author).

200. This section is summarized from: Kenneth J. Cooper, *Executive Privilege at Education Department*, WASH. POST, May 17, 1991, at A23; Letter from Rep. Ted Weiss to Rep. John Conyers, Jr., (May 21, 1991) (copy on file with author); Memorandum from Steven R. Ross and Charles Tiefer to Rep. Ted Weiss, (June 20, 1991) (copy on file with author).

201. Letter from Edward Stringer to Rep. Ted Weiss (May 7, 1991) (copy on file with author).

202. Letter from Edward Stringer to Rep. Ted Weiss (May 13, 1991) (copy on

naed the documents. The Department of Education withdrew its claim of executive privilege and turned over the documents.

President Bush never personally got involved in this controversy. Despite administration policy that executive privilege could only be invoked either by the President or with his personal approval, the Department of Justice's Office of Legal Counsel advised the Department of Education in this case to claim executive privilege. As the General Counsel and the Deputy General Counsel to the Clerk of the House wrote:

What was novel about this claim of privilege was the frankness with which the Office of Legal Counsel admitted that it was claiming executive privilege. The Justice Department's willingness to apply the term "executive privilege" to the decisional documents of a department, and to documents for which attorney-client privilege was attempted to be asserted, contrasts with other occasions when, for tactical reasons, the Justice Department has [devised] attempts at the withholding of similar records without admitting that it is really invoking executive privilege.<sup>203</sup>

Without presidential approval the Department had no grounds for executive privilege. Bush did not believe that the documents were so important to protect that he was willing to risk a constitutional conflict over executive privilege. Congress proved its ability to compel production of documents through use of its power to investigate and to subpoena evidence.

#### 5. McDonnell Douglas A-12 Navy Aircraft Program, 1991<sup>204</sup>

In this controversy, President Bush successfully asserted executive privilege. A House subcommittee subpoenaed Secretary of Defense Richard Cheney for a document regarding cost overruns on the McDonnell Douglas A-12 Navy Aircraft program. The subcommittee, chaired by Rep. John Conyers (D-Mich.), instructed Cheney either to turn over the information or

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file with author).

203. Memorandum from Steven R. Ross and Charles Tiefer to Rep. Ted Weiss (June 20, 1991) (copy on file with author).

204. This section is summarized from: *Oversight Hearing on the A-12 Navy Aircraft: Hearings Before the Legislation and Nat'l Sec. Subcomm. of the Comm. on Gov't Operations*, 102d Cong. (1992); COMM. ON GOV'T OPERATIONS, A-12 NAVY AIRCRAFT: SYSTEM REVIEW AND RECOMMENDATIONS, H.R. REP. NO. 102-853 (1992); Patricia A. Gilmartin, *Congress Increases C-17 Scrutiny in Wake of Reported Cost Overruns*, AVIATION WK. & SPACE TECH., Sept. 2, 1991, at 25-26; Telephone Interview with Charles Tiefer, Deputy General Counsel to the Clerk of the House of Representatives (Nov. 23, 1992); Telephone Interview with Eric Thorson, staff member, House Comm. on Gov't Operations (Nov. 20, 1992); Telephone Interview with Morton Rosenberg, Specialist in American Public Law, Congressional Research Service, American Law Division (Nov. 21, 1992).

to respond to the subpoena. Bush instructed Cheney to claim executive privilege:

It is my decision that you should not release this document. Compelled release to Congress of documents containing confidential communications among senior Department officials would inhibit the candor necessary to the effectiveness of the deliberative process by which the Department makes decisions and recommendations concerning national defense, including recommendations to me as Commander-in-Chief. In my judgment, the release of the memorandum would be contrary to the national interest because it would discourage the candor that is essential to the Department's decision-making process. Therefore, I am compelled to assert executive privilege with respect to this memorandum and to instruct you not to release it to the subcommittee.<sup>205</sup>

Although governmental appropriations—not national security concerns—were at issue, the Conyers committee chose not to challenge Bush's claim of executive privilege. Bush prevailed for a number of reasons. First, the White House successfully lobbied the minority party members of the committee to back the President. Second, Conyers determined that with a committee divided along partisan lines there would be little support for a contempt citation against Cheney, a former member of Congress himself.

Congress could claim one small achievement. That is, the Conyers committee forced Bush to personally claim executive privilege, establishing a precedent for the view that executive privilege only can be claimed or approved by the President himself, and not by any other member of the executive branch of government.

#### 6. The Quayle Council and the FDA, 1991-1992<sup>206</sup>

In September 1991, a House subcommittee investigated Food and Drug Administration (FDA) dealings with the Quayle Council on Competitiveness. In brief, the Quayle Council had recommended a series of reforms of the FDA's drug approval process. The FDA accepted the recommendations, some of which were controversial.

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205. Memorandum from President George Bush to Richard Cheney, Secretary of Defense (Aug. 8, 1991) (copy on file with author).

206. This section is summarized from: COMM. ON GOV'T OPERATIONS, THE QUAYLE COUNCIL'S PLANS FOR CHANGING FDA'S DRUG APPROVAL PROCESS: A PRESCRIPTION FOR HARM, H.R. REP. NO. 102-1050 (1992); Dana Priest, *Competitiveness Council Under Scrutiny*, WASH. POST, Nov. 26, 1991, at A19.

The FDA refused to provide documents that concerned "deliberative communications within the Council or otherwise reveal its deliberations."<sup>207</sup> The subcommittee subpoenaed the documents and informed the FDA Commissioner, David Kessler, that only the President could claim executive privilege. The subcommittee informed Kessler that he would be voted in contempt of Congress if he did not deliver the documents.

After negotiations by the subcommittee with the White House Counsel and the FDA, the White House decided against executive privilege and released the documents.<sup>208</sup> The Bush administration gave in to the pressure from the subcommittee one day before Kessler was to be held in contempt. After weighing the options, the administration chose not to assert executive privilege. Congress succeeded again in forcing the issue of executive privilege from the Cabinet level to the White House.

#### 7. Rocky Flats Nuclear Weapons Plant Investigation, 1992<sup>209</sup>

In September 1992, a House subcommittee sought testimony from individuals with knowledge of a five-year long FBI investigation into environmental crimes committed by Rockwell International at its Rocky Flats nuclear weapons plant in Colorado. Although ten criminal violations of environmental law had been acknowledged in the Rockwell plea bargain, no individual culpability had been assigned. The subcommittee, chaired by Rep. Howard Wolpe (D-Mich.), became interested in examining the plea bargain.

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207. Letter from Kay Holcombe, Acting Associate Commissioner for Legislative Affairs, FDA, to Rep. Ted Weiss (Oct. 16, 1991), reprinted in *Council on Competitiveness and FDA Plans to Alter the Drug Approval Process at FDA: Hearing Before the Human Resources and Intergovernmental Relations Subcomm. of the Comm. on Gov't Operations*, 102d Cong. 151 (1993).

208. More precisely, the administration and the committee arrived at an agreement whereby thirty-one out of thirty-seven disputed documents were released to Congress and the six remaining ones were subjected to a limited disclosure agreement. See Letter from David A. Kessler to Rep. Ted Weiss (Nov. 21, 1991) (copy on file with author).

209. This section is summarized from: *Environmental Crimes at the Rocky Flats Nuclear Weapons Facility: Hearings Before the Subcomm. on Investigations and Oversight of the Comm. on Science, Space, and Tech.*, 102d Cong. 1634-37, 1675-77, 1727-29 (1992) (statements of Rep. Howard Wolpe); Telephone Interview with Morton Rosenberg, Specialist in American Public Law, American Law Division, Congressional Research Service (Nov. 21, 1992); Telephone Interview with Charles Tiefer, Deputy General Counsel to the Clerk of the House of Representatives (Nov. 23, 1992); Telephone Interview with Monica Wroblewski, Legislative Staff of the Comm. on Science, Space, and Tech. (Nov. 22, 1992).

The Department of Justice instructed certain individuals who had been called to testify before the committee not to divulge various kinds of information pertaining to the government investigations. For example, an FBI agent who investigated Rocky Flats had been given Department of Justice instructions on what information to withhold. A Department lawyer accompanied the man during a congressional inquiry to be sure that privileged information would not be compromised. The U.S. District Attorney for Colorado had similarly been instructed and he refused to cooperate with the inquiry.

Wolpe wrote a letter to Bush requesting that the President either personally assert executive privilege or direct the witnesses to the events to testify.<sup>210</sup> Bush never responded and never claimed executive privilege in this case. Gray wrote to Wolpe that the White House had no intention of claiming executive privilege and that the Department of Justice and the investigating committee should work out their differences.<sup>211</sup>

Without presidential support for executive privilege, the Department of Justice could not withstand further pressure from Congress. The Wolpe committee threatened to hold the U.S. District Attorney for Colorado in contempt unless certain conditions were met—most importantly, rescinding the Department of Justice “gag rule” over witnesses.<sup>212</sup> Justice agreed to all of the committee’s demands and waived all privilege claims.<sup>213</sup>

Justice made privilege claims on behalf of the administration—without White House approval—and had to back down when Bush would not support those claims. Congress used its powers to full effect in this case to get the information that it needed. Unlike the A-12 Navy Aircraft case, the President did not become personally involved, making it easier for the Congress to prevail.

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210. See Letter from Rep. Howard Wolpe to President Bush (Sept. 24, 1992) (copy on file with author).

211. See Letter from C. Boyden Gray, Counsel to the President, to Rep. Howard Wolpe (Oct. 1, 1992) (copy on file with author).

212. See Letter from Rep. Howard Wolpe to William P. Barr III, Attorney General (Oct. 5, 1992) (copy on file with author).

213. See Letter from W. Lee Rawls, Assistant United States Attorney General to Rep. Howard Wolpe (Oct. 5, 1992) (copy on file with author).

8. The Overseas Arrests Controversy, 1989-1992<sup>214</sup>

One of the most innovative secrecy devices of the Bush administration was the Department of Justice's secret opinions policy. Under that policy, the Department refused to show Congress legal memorandum opinions from the Office of Legal Counsel (OLC). Congress traditionally has not been denied access to OLC decision memoranda.

In 1989, the OLC issued an opinion that ruled that the FBI could apprehend fugitives abroad without the permission of the host country.<sup>215</sup> News of the memorandum resulted in congressional questions regarding the possible lack of statutory authority for such a policy and conflicts with international law.

The administration did not claim executive privilege. It used the newly created secret opinions policy. The last action taken by Congress was a Judiciary Committee vote to subpoena the memorandum. The issue became sensitive because of the arrest of former Panamanian leader Manuel Antonio Noriega and the Department of Justice claim that disclosure of the memorandum could harm the government's case against the former dictator. The Department added that the attorney-client privilege would be violated by release of the memorandum because federal agencies in the future would become hesitant to rely on the Department for confidential legal advice.

In the end, both sides "won." A Supreme Court decision upheld the practice of apprehending fugitives abroad.<sup>216</sup> The De-

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214. This section is based on: *Department of Justice Authorization for Appropriations, Fiscal Year 1992: Hearings Before the House Comm. on the Judiciary*, 102d Cong. (1991) [hereinafter *Authorization for Appropriations*]; Joan Biskupic, *Panel Challenges Thornburgh over Right to Documents*, CONG. Q. WKLY. REP., July 27, 1991, at 2080; David Johnston, *Administration to Fight House Panel's Subpoena*, N.Y. TIMES, July 30, 1991, at A12; Telephone Interview with Morton Rosenberg, Specialist in American Public Law, American Law Division, Congressional Research Service (Nov. 21, 1992); Telephone Interview with Charles Tiefer, Deputy General Counsel to the Clerk of the House of Representatives (Nov. 23, 1992).

215. See Linda P. Campbell, *Legal Questions Surround Possible Arrest of Noriega*, CHI. TRIB., Oct. 15, 1989, available in 1989 WL 4632547.

216. See *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). This case did not directly address the legality of kidnapping fugitives abroad which had been established under two earlier cases. See *Frisbie v. Collins*, 342 U.S. 519 (1952); *Ker v. Illinois*, 119 U.S. 436 (1886). The *Verdugo-Urquidez* case held that the Fourth Amendment does not apply to the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country. 494 U.S. at 261. Some legal experts had predicted that if the Supreme Court ruled that the Fourth Amendment ban on illegal searches applied outside U.S. borders, that this prohibition would also apply

partment of Justice and the House Committee on the Judiciary agreed to an arrangement whereby committee members could review, but not copy, Department documents pertaining to the memorandum as well as the memorandum itself. The committee declared itself victorious and the Bush administration leaked the full memorandum to the press.

#### 9. INSLAW Documents Controversy, 1991-1992<sup>217</sup>

One government secrecy controversy that remained unresolved during Bush's term concerned an investigation into allegations that Reagan administration Department of Justice officials conspired to force the INSLAW computer company into bankruptcy and to then have INSLAW's leading software product bought by another company. When a subcommittee of the House Committee on the Judiciary sought documents regarding the controversy, the Bush administration initially refused to release the documents, citing the attorney-client privilege. Bush never actually claimed executive privilege over these documents, although he considered that option.<sup>218</sup> Instead, after a subcommittee subpoena of the documents and a vote of the full committee to do the same, the Department of Justice chose to partially comply with the congressional demands. The Department turned over most materials.

The Department of Justice argued that in ongoing proceedings in which members of the Department itself are involved, certain materials must be protected by the attorney-client relationship. Therefore, even though Congress has the power of inquiry, the prerogative of the attorney-client relationship must override that power. Furthermore, Congress's power of inquiry is more compelling when a dispute involves legislation than it is when a dispute concerns the ongoing operations of another branch of government.

By the end of the Bush presidency, there had been no formal resolution to this dispute. The Bush administration never fully

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to the unlawful seizure of people as well. See Campbell, *supra* note 215. The holding that the Fourth Amendment does not apply thus left existing precedent intact.

217. This section is based on: *Authorization for Appropriations*, *supra* note 214; *The Attorney General's Refusal to Provide Congressional Access to "Privileged" INSLAW Documents: Hearing Before the Subcomm. on Economic and Commercial Law of the House Comm. on the Judiciary*, 101st Cong. (1990); Biskupic, *supra* note 214.

218. See Johnston, *supra* note 214, at A12.



complied with the subpoenas and declared numerous requested documents "missing." The Bush administration partially succeeded in withholding information from Congress without any presidential assertion of executive privilege and the Congress partially succeeded in gaining access to disputed executive branch documents.

## B. EXECUTIVE PRIVILEGE IN THE BUSH ADMINISTRATION

The Bush administration demonstrated that it might be easier to withhold information in the post-Watergate environment by not asserting executive privilege. Instead, avoid the controversial doctrine and claim other justifications for withholding materials.

Bush did not avoid executive privilege altogether. He instructed the use of executive privilege in one information dispute with Congress (the A-12 Navy Aircraft controversy) and reluctantly claimed executive privilege to protect his predecessor's diaries from a court subpoena.

Bush usually avoided the controversial doctrine. On a number of occasions, when lower level officials claimed executive privilege, Bush chose not to personally approve the use of that doctrine and instead accommodated Congress's demands (e.g., Persian Gulf War document request, the Quayle Council controversy, Rocky Flats dispute, overseas arrests memorandum controversy, INSLAW investigation). Even though Congress claimed victory in some of these disputes, administration efforts to withhold information often succeeded in denying Congress timely access to materials.

In general, during the Bush years, Congress achieved at least a partial victory when it challenged administration exercise of secrecy policies. But Congress did not, and could not, challenge every such exercise. Although Congress achieved its goal of having the overseas arrests memorandum made public, it was able to do so only after having learned unexpectedly of the existence of such a policy memorandum. The Bush administration Department of Justice "secret opinions policy" undoubtedly shielded vast amounts of information from scrutiny. Consequently, the administration occasionally lost an information battle with Congress, but it may have won the information "war" by employing innovative and far-reaching secrecy devices, using executive privilege cautiously, and denying the timely release of information.

Unlike his predecessor, Bush's agenda on executive privilege never involved trying to restore the pre-Watergate status of that constitutional doctrine. As a generally non-ideological President, Bush was concerned less with broad governing principles of separation of powers and executive prerogatives than he was with managing the powers of his office.

#### V. CLINTON: GIVING EXECUTIVE PRIVILEGE A BAD NAME

In 1994, the Clinton Administration issued its own executive privilege procedures. The memorandum from the 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."<sup>219</sup> The memorandum further stated: "Executive privilege belongs to the President, not individual departments or agencies."<sup>220</sup>

Cutler's memorandum described the formal procedures for handling executive privilege disputes and these were not substantially different from earlier administrations. One sentence nonetheless stands out in light of later events: "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."<sup>221</sup>

As described in the Cutler memorandum, the Clinton administration has adopted the very broad view that all White House communications are presumptively privileged. Furthermore, the Clinton administration position is that Congress has a less valid claim to executive branch information when conducting oversight than when considering legislation.<sup>222</sup>

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219. Memorandum from Lloyd Cutler to All Executive Department and Agency General Counsels (Sept. 28, 1994) (copy on file with author).

220. *Id.*

221. *Id.*

222. See Letter from Janet Reno, United States Attorney General, to President Bill Clinton (Sept. 30, 1996) (copy on file with author); Letter from Janet Reno, United States Attorney General, to President Bill Clinton (Sept. 20, 1996) (copy on file with author). The administration draws its view that Congress lacks a compelling need for executive branch information in cases of

The Clinton administration has made elaborate and mostly indefensible claims of executive privilege. Prior to the so-called Lewinsky scandal, the administration made several claims of executive privilege<sup>223</sup>—only one of which appeared designed to protect the constitutional prerogatives of the executive branch.

The first claim involved a House committee investigation into the White House firings of Travel Office staffers in 1993. In response to a committee subpoena of Travel Office records and ultimately a vote to hold White House counsel Jack Quinn in contempt of Congress, the President claimed executive privilege.<sup>224</sup> Quinn had written to the committee that the requested documents included discussions between the President and legal counsel, among other confidential materials.<sup>225</sup> Ac-

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oversight from a dubious 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 Bush administrations also made such broad claims in this regard. See Memorandum from William Barr, United States Attorney General, to Counsels' Consultive Group (June 19, 1989) (copy on file with author); Letter from William French Smith, United States Attorney General, to President Ronald Reagan (Oct. 31, 1981) (copy on file with author).

223. Clinton has made other unfounded claims of executive privilege that he eventually dropped. In 1996, Clinton claimed executive privilege to shield from the Office of Independent Counsel (OIC) access to records of the First Lady's conversations with White House attorneys. The OIC challenged the claim and Clinton backed down, using instead the attorney-client privilege. See *Communication from Kenneth W. Starr, Independent Counsel, Transmitting a Referral to the United States House of Representatives in Conformity with the Requirements of Title 28, United States Code, § 595(c)*, H.R. DOC. NO. 105-310, pt. XI.C., at n.494 (Sept. 11, 1998) [hereinafter *OIC Referral*]. In 1997 Clinton claimed executive privilege to prohibit the OIC from questioning former Chief of Staff Thomas McLarty regarding his alleged efforts to find employment for Webster Hubbell. Clinton withdrew the claim as the OIC prepared a motion to compel. See *id.*

224. See HOUSE COMM. ON GOVERNMENT REFORM AND OVERSIGHT, 104th CONG., 2D SESS., BUSINESS MEETING IN THE PROCEEDINGS AGAINST JOHN M. QUINN, DAVID WATKINS, AND MATTHEW MOORE AS PART OF THE COMMITTEE INVESTIGATION INTO THE WHITE HOUSE TRAVEL OFFICE MATTER (Comm. Print 1996) [hereinafter *BUSINESS MEETING*].

225. See Letters from Jack Quinn to Rep. William F. Clinger (May 2, 3, 9, 30, June 25, and Aug. 15, 1996) (copies on file with author). The Attorney General backed the President's assertion of privilege in this case. See Letter from Janet Reno, United States Attorney General, to President Bill Clinton (May 8, 1996) (copy on file with author). For the complete record of White House and congressional correspondence over privilege and other issues in the

ording to General Counsel to the committee Kevin Sabo, a "review of the documents proved that declaration to be erroneous."<sup>226</sup> Sabo reports that the White House eventually released the documents and the evidence supports the conclusion that Clinton's claim of executive privilege lacked merit. Documents for which Clinton had claimed executive privilege included those involving discussions between the first lady and White House staff and White House talking points for sympathetic Democratic committee members, among other materials not traditionally covered by the privilege.<sup>227</sup>

In 1994, the Office of the Independent Counsel (OIC) opened an investigation into allegations of wrongdoing by former Department of Agriculture Secretary Mike Espy.<sup>228</sup> The grand jury subpoenaed documents from a separate White House Counsel's office investigation of Espy.<sup>229</sup> President Clinton claimed two forms of executive privilege in withholding eighty-four requested documents.<sup>230</sup> The Office of Independent Counsel challenged these claims and in a key case, the D.C. Circuit upheld one claim of privilege generally, but ruled that the OIC's need for information may, under certain circumstances, outweigh the President's secrecy needs.<sup>231</sup>

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Travel Office controversy, see COMM. ON GOVERNMENT REFORM AND OVERSIGHT, 104th CONG., 2D SESS., CORRESPONDENCE BETWEEN THE WHITE HOUSE AND CONGRESS IN THE PROCEEDINGS AGAINST JOHN M. QUINN, DAVID WATKINS, AND MATTHEW MOORE AS PART OF THE COMMITTEE INVESTIGATION INTO THE WHITE HOUSE TRAVEL OFFICE MATTER (Comm. Print 1996). Indeed, the committee reported that Quinn's category of privileged documents was so broad that it was tantamount to the breadth of privilege claims rejected in *United States v. Nixon*, 418 U.S. 683 (1974). See BUSINESS MEETING, *supra* note 224.

226. Kevin M. Sabo, *Scandal Retardant; Clinton Grabs for Executive Privilege When Congress Turns up Heat*, LEGAL TIMES, Oct. 28, 1996, at 27.

227. See *id.*

228. See *In re Sealed Case*, 121 F.3d 729, 734 (D.C. Cir. 1997).

229. See *id.*

230. See *id.* The White House asserted the deliberative process privilege and the presidential communications privilege. See *id.* at 740. For an explanation of these privileges, see *infra* notes 232-236 and accompanying text.

231. The appellate court held that the presidential communications privilege extends to communications authored by or solicited and received by presidential advisers but that this privilege is qualified and can be overcome by a specified demonstration of need made in regard to a grand jury subpoena. See *id.* at 762. The appellate court remanded the case to the district court, directing the district court to conduct an *in camera* review of the withheld documents. See *id.* at 761-62. The appellate court further directed the district court to "isolate and release [to the grand jury] all evidence that might reasonably be relevant to the question of whether Espy made false statements

In this case, the White House asserted two forms of privilege: the presidential communications privilege and the deliberative process privilege.<sup>232</sup> The presidential communications privilege is rooted in separation of powers, it pertains to "direct decisionmaking by the President,"<sup>233</sup> and it concerns "quintessential and non-delegable" powers.<sup>234</sup> The deliberative process privilege is easier to overcome because it belongs to executive branch officials generally and it "disappears altogether when there is any reason to believe government misconduct has occurred."<sup>235</sup> The key point is that the court defined these two forms of executive privilege more narrowly than did the administration.<sup>236</sup> This precedent made it clear that the privilege is specifically germane to the president's official Article II du-

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to the White House." *Id.*

232. *See id.* at 740.

233. *Id.* at 752.

234. *Id.*

235. *Id.* at 746.

236. Regarding the deliberative process privilege, the White House originally argued that the privilege protects the deliberations and decisionmaking process of executive officials generally. *See id.* at 735. The court noted several exceptions and limitations on the privilege which make it more narrow. For example, the privilege "does not shield documents that simply state or explain a decision the government has already made or protect material that is purely factual, unless the material is so inextricably intertwined with the deliberative sections of the documents that its disclosure would inevitably reveal the government's deliberations." *Id.* at 737 (citations omitted). Another example is that the privilege is commonly denied "where there is reason to believe the documents sought may shed light on government misconduct." *Id.* at 738. Moreover, "[t]he deliberative process privilege is a qualified privilege and can be overcome by a sufficient showing of need." *Id.* at 737 (citation omitted). Regarding the presidential communications privilege, the court stated:

[T]he presidential communications privilege should be construed as narrowly as is consistent with ensuring that the confidentiality of the President's decisionmaking process is adequately protected. Not every person who plays a role in the development of presidential advice, no matter how remote and removed from the President, can qualify for the privilege. In particular, the privilege should not extend to staff outside the White House in executive branch agencies. Instead, the privilege should apply only to communications authored or solicited and received by those members of an immediate White House adviser's staff who have broad and significant responsibility for investigating and formulating the advice to be given to the President on the particular matter to which the communications relate. Only communications at that level are close enough to the President to be revelatory of his deliberations or to pose a risk to the candor of his advisers.

*Id.* at 752.

ties<sup>237</sup> and that it “should never serve as a means of shielding information regarding governmental operations that do not call ultimately for direct decisionmaking by the President.”<sup>238</sup>

During the 1996 campaign, congressional Republicans sought access to a memorandum by FBI Director Louis Freeh that apparently was critical of administration anti-drug policy. Clinton claimed executive privilege and Attorney General Janet Reno backed the President.<sup>239</sup> Reno’s argument in favor of executive privilege in this instance rested on the dubious assumption that in cases of investigations rather than legislation, Congress has a much weaker claim to access to executive branch information.<sup>240</sup>

Although there were allegations of a political motivation for seeking access to an embarrassing internal document in an election year, even if true that does not make an assertion of executive privilege valid. Lacking a real threat to national security or to the public interest posed by revealing internal deliberations, Congress’s request for information must override the president’s claim of privilege, unless it can be specifically demonstrated that Congress’s actions were outside the scope of any legitimate investigation. As Louis Fisher points out, courts consistently have ruled that the congressional power of investigation is available, even for pursuit down “blind alleys.”<sup>241</sup>

The burden is on the President to prove a compelling need to withhold information and not on Congress to prove that it has the right to investigate. Clinton never made a case that releasing the memorandum would cause any undue harm. It appeared that he only stood to harm his own political standing by releasing a document that contained embarrassing informa-

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237. See *id.* The court explained that “the privilege only applies to communications that [presidential] advisers and their staff author or solicit in the course of performing their function of advising the President on official government matters.” *Id.*

238. *Id.*

239. See Letter from Janet Reno, United States Attorney General, to President Bill Clinton (Sept. 30, 1996) (copy on file with author).

240. Attorney General William French Smith first drew this distinction from his erroneous interpretation of *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974) and his successors, including Reno, have repeated the mistake. For a clear refutation of this “extraordinary misconception,” see LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 187 (4th ed. 1997).

241. FISHER, *supra* note 240, at 187.

tion. The President never proved that Congress's inquiry lacked any legitimate basis under the normal legislative power of investigation.

Clinton's one possibly defensible claim of executive privilege concerned a House committee request for White House documents on U.S.-Haiti policy. The White House refused and in September 1996 the committee issued subpoenas. White House-congressional negotiations over certain sensitive documents stalemated and Clinton claimed executive privilege. Reno once again backed the president's claim.<sup>242</sup> In this case the House committee had pushed for memoranda from the National Security Adviser to Clinton, lending credibility to the president's position that releasing the documents would potentially compromise national security. The House committee did not fight the claim of executive privilege, making it impossible to judge at this time the actual seriousness of Clinton's use of that power in this controversy.

How does Clinton's use of executive privilege in the Lewinsky investigation measure up to the legal standards that have been developed to control its applications? There was obviously no national security justification to withholding information about presidential and staff discussions over how to handle that episode, although Clinton's White House counsel tried to make the argument that by harming "the president's ability to 'influence' the public," the investigation undermined his ability to lead foreign policy.<sup>243</sup> The White House case for executive privilege ultimately hinged on the claim that the President had the right to protect the privacy of internal deliberations.

As correctly decided in the Mike Espy case,<sup>244</sup> Presidents are entitled to candid, confidential advice. The executive privilege extends to presidential advisers because they must be able to deliberate and discuss policy options without fear of public disclosure of their every utterance. Without that protection, the candor and quality of presidential advice would clearly suffer.

The Clinton administration maintained that this decision justified any claims of privilege on behalf of discussions be-

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242. See Letter from Janet Reno, United States Attorney General, to President Bill Clinton (Sept. 20, 1996) (copy on file with author).

243. *Ruff's Argument for Executive Privilege* (visited May 28, 1998) <[www.washingtonpost.com/wpsrv/politics/special/clinton/stories/ruff052898.htm](http://www.washingtonpost.com/wpsrv/politics/special/clinton/stories/ruff052898.htm)>.

244. See *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997).

tween the President and his aides, between and among aides, and even between the First Lady and an aide.<sup>245</sup> As a general principle, it is correct that such discussions can be covered by the privilege, although extending such protection to the First Lady is very controversial.

Executive privilege for the first lady is unprecedented and regarding her deliberations during the Lewinsky investigation, quite likely a real stretch of the doctrine. To properly cover the first lady with a claim of executive privilege, it would have to be established that: (1) she has an official position in her husband's administration; (2) in such a capacity, she has played an active role in those matters and participated in some of those official discussions that led to a claim of executive privilege, and (3) such discussions concern matters that actually deserve the protection of the privilege.

The key issue is whether the White House discussions indeed had anything to do with official governmental business as opposed to being merely deliberations over how to handle political strategy during a scandal. Judge Norma Holloway Johnson ultimately ruled against Clinton's use of executive privilege in the Lewinsky investigation, and although much of her reasoning gave credibility to some debatable White House arguments, she correctly determined that the balancing test weighed in favor of Independent Counsel Kenneth Starr's need for access to information that is crucial to a criminal investigation.<sup>246</sup>

For the White House position to have prevailed, Clinton needed to make a compelling argument that the public interest would somehow suffer from the release of information about White House discussions over the Lewinsky investigation. Not only had he failed to do so, for months he even refused to answer basic questions as to whether he had formally invoked the privilege.

Once Judge Johnson ruled against Clinton, the White House dropped its flawed claim of executive privilege. In an obvious face-saving gesture, White House counsel Charles Ruff declared victory because Judge Johnson, in ruling against the

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245. See *White House Motion Seeking Privilege* (visited May 28, 1998) <[www.washingtonpost.com/wpsrv/politics/special/clinton/stories/whitehouse052898.htm](http://www.washingtonpost.com/wpsrv/politics/special/clinton/stories/whitehouse052898.htm)>.

246. See *Judge Johnson's Order on Executive Privilege* (visited May 28, 1998) <[www.washingtonpost.com/wpsrv/politics/special/clinton/stories/order052898.htm](http://www.washingtonpost.com/wpsrv/politics/special/clinton/stories/order052898.htm)>.



President, had nonetheless upheld the legitimacy of the principle of executive privilege and therefore had preserved this presidential power for Clinton's successors.<sup>247</sup>

The doctrine of executive privilege certainly did not need this kind of help. Notwithstanding Raoul Berger's largely discredited thesis, that doctrine already stood as an unarguably legitimate presidential power, although one clearly tainted in the public mind by the Watergate episode. Reestablishing the good reputation of executive privilege required a much more compelling circumstance for its exercise than a personal scandal—a military action, for example.

Furthermore, there is little evidence from this episode to suggest that the Clinton White House undertook this drawn-out battle merely to make a principled stand on executive privilege. All evidence to date suggests that Clinton used executive privilege to frustrate and delay the investigation—all the while successfully convincing most of the public that the blame for the inquiry taking so long and costing so much belonged to the Office of the Independent Counsel.

Although the White House publicly claimed victory in protecting the principle of executive privilege and led everyone to believe that the issue was no longer germane to the investigation, additional claims of the privilege followed. In August 1998 a White House attorney and deputy White House counsel claimed executive privilege in testimony before the grand jury. Clinton told the grand jury that he merely wanted to protect the constitutional principal and did not want to further challenge the Independent Counsel's victory; yet the President several days later challenged one unfavorable court ruling and directed another aide to assert executive privilege.<sup>248</sup>

For months, the Clinton White House clearly did a masterly job of presenting its case before the court of public opinion. The president's approval ratings remained strong; most of the public had tired of the scandal and had become convinced that Starr lacked the objectivity necessary to conduct a fair investigation.

Many observers may ask why this dispute, and the politically motivated effort to delay its obvious resolution, matters. Because executive privilege embodies the principle that no one

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247. See Pete Yost, *Two Aids Ordered to Testify: Judge Says Their Talks with Clinton Fair Game*, DALLAS MORNING NEWS, May 28, 1998, at 1A.

248. See *OIC Referral*, *supra* note 223.

is above the law—not even a President and not even when that President might otherwise be seen as a great foreign policy leader (Nixon) or as contributing to a thriving economy (Clinton). White House efforts to obstruct and delay for the sake of some perceived political advantage cynically undermined both the privilege and the principle. Regarding executive privilege, Clinton's legacy appears not to be that of a President who reestablished this necessary power, but rather, like Nixon before him, as one who gave executive privilege a bad name.

## VI. RESTORING THE BALANCE

Because of the constitutional abuses of two presidencies, executive privilege remains tainted. In the post-Watergate era, Congress shows little deference to presidential efforts to assert that power. Presidents with legitimate causes to assert executive privilege generally avoid that power because of the negative connotations. A President truly with something to hide has made elaborate and mostly bogus claims of executive privilege.

Is it any longer possible to restore the proper balance to the exercise of executive privilege? Because of the Watergate taint and Clinton's more recent abuses, that may take years to happen.

One approach is to establish a statutory definition of executive privilege with specific guidelines for its future exercise. The appeal of that approach is to make the exercise of this power less subject than it is to the whims of the occupants of the White House.

Another approach is to concede the whole debate to such critics of executive privilege as Raoul Berger, who argue that the President simply lacks that power. The appeal of this approach is that there is no ambiguity at all: executive privilege simply doesn't exist and those with compulsory power—especially Congress—have access to any and all executive branch information.

Both of these solutions are worse than the problem that they seek to overcome. It is impossible to establish in advance all of the circumstances that may call for presidential exercise of secrecy. Statutory guidelines would simply take away too much of the discretion that presidents have to exercise this power on behalf of the public good. Presidential prerogatives should not be confined by statutory limits.

One way indeed to eliminate the potential abuse of power is to eliminate the source of authority altogether. That is true for any power given to presidents. Yet to eliminate a source of occasional abuses of power is to also strip away the ability of presidents to do good for the country. Any source of authority can be used for good or ill purposes. At a certain level, we have to trust that those endowed with the powers of the presidency will conduct themselves properly and in accordance with the public interest. If they fail us in that regard, we must resort to the constitutional constraints provided by the separation of powers system.

The solution to the potential abuse of executive privilege is not to eliminate that power and it is not found in some future congressional statute. The solution is to rely upon the constitutional Framers' notion of the separation of powers.

As many of the above cases reveal, the coordinate branches have the ability to challenge presidential exercise of executive privilege through various sources of power. These sources include not only the more obvious use of the power of investigation, litigation, and impeachment, but also confirmation, law-making and budgetary authorization, among others. In other words, Congress can challenge executive privilege by, for example, withholding support for presidential nominations or initiatives or withholding funding for administration-favored programs. The judicial branch can certainly arbitrate constitutional disputes between the political branches, such as over the exercise of executive privilege.

Under the separation of powers, the president's options are quite clear: if, indeed, withholding certain information is crucial to the national security or protecting the privacy of executive branch deliberations, the President should be willing to withstand congressional inquiries or policy threats. The President should have to weigh the importance of secrecy against the prospect of a drawn-out battle with Congress and make the decision that he feels his duties and the national interest require. In a democratic republic, the presumption generally should be in favor of openness, but it is also important to recognize that presidents have legitimate secrecy needs.