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Battle of the Branches

Melissa Dupor

Executive privilege is an implied power of the presidency but a complete “constitutional myth.”¹ However, the myth has not stopped presidents from both sides of the political map, dating back to George Washington, from claiming the privilege.² Ronald Reagan asserted executive privilege three times, George W. Bush six times, and Bill Clinton an outstanding fourteen times.³ George Washington refused Congress’ request to see records and hear testimony for a failed military operation against Native Americans.⁴ Bill Clinton took measures to prevent prosecutors from questioning White House senior aides in the Monica Lewinsky investigation.⁵ Barack Obama refused to turn over records regarding the fast and furious scandal after the failed firearms operation took the life of a border patrol agent.⁶ These are just a few examples of presidents who called upon the power out of a believed necessity to protect confidential information.⁷

Executive privilege is a power that is meant to protect public interest, but to many, the power looks more like an effort to hide information from the public for the president’s own interest.⁸ While Congress’ power to investigate the executive branch is generally broad, it is not always easy.⁹ The reality is that the White House still has a lot of control when it comes to limiting the scope of what is discoverable by Congress.¹⁰ The age-old battle between congressional requests and executive privilege has been ongoing throughout our

¹ Eric Weiner, What is Executive Privilege, Anyway, NPR (June 28, 2007), <https://www.npr.org/templates/story/story.php?storyId=11527747> (last visited Apr. 3, 2019).

² *Id.*

³ Sarah Childress, When Presidents Invoke Executive Privilege, PBS FRONTLINE (June 20, 2012), <https://www.pbs.org/wgbh/frontline/article/when-presidents-invoke-executive-privilege/>.

⁴ Chris Calabrese, When Presidents use executive privilege, CONSTITUTION DAILY, Mar. 24, 2017, <https://constitutioncenter.org/blog/when-presidents-use-executive-privilege> (last visited Apr. 3, 2019).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ Margert Taylor, Congressional Subpoena Power and Executive Privilege: The Coming Showdown between the Branches, LAWFARE (Jan. 30, 2019), <https://www.lawfareblog.com/congressional-subpoena-power-and-executive-privilege-coming-showdown-between-branches>.

¹⁰ *Id.*

nation's history.¹¹ The fight between the executive and legislative branches begs the questions; when does it make sense to fight and when does it make sense to cooperate?¹²

THE PRIVILEGE

To understand effects of executive privilege it is important to briefly trace its roots.¹³ Executive privilege, first officially termed during the Eisenhower presidency, is the concept that the president has the right to withhold information from Congress and courts.¹⁴ The privilege allows the president to withhold confidential information pertaining to potential threats to national security.¹⁵ Deliberative process privilege is a second type of executive privilege which gives the executive branch the ability to privately discuss matters before informing the legislative branch.¹⁶ Specifically, deliberative process privilege gives members of the executive branch the ability to withhold information that would "impair governmental functions."¹⁷

One reason executive privilege is controversial is because there is no express provision relating to the term written in the Constitution.¹⁸ In fact, as stated earlier, executive privilege is one of the greatest constitutional myths.¹⁹ Article II of the Constitution defines presidential powers.²⁰ Briefly, Article II establishes that the president is the Commander in Chief of the Army and Navy; has power to make treaties with Senate approval; is responsible for nominating heads of government, federal judges, and Supreme Court Justices; and issues executive orders, grants pardons, convenes Congress, and vetoes legislation approved by Congress.²¹ Nowhere in Article II, or anywhere else in the Constitu-

¹¹ *Id.*

¹² *Id.*

¹³ Weiner, *supra* note 1.

¹⁴ *Id.*

¹⁵ Calabrese, *supra* note 4.

¹⁶ Dylan Matthew, *A brief guide to executive privilege, and why it won't save the Trump administration*, VOX (Jan. 17, 2018 10:42 AM), <https://www.vox.com/policy-and-politics/2017/6/19/15795986/executive-privilege-explained>.

¹⁷ Interview with Senator Jacqueline Y. Collins, Illinois State Senate, 16th District Majority Caucus Whip (Feb. 22, 2019).

¹⁸ Weiner, *supra* note 1.

¹⁹ Calabrese, *supra* note 4.

²⁰ *Executive Power*, CORNELL LAW SCHOOL, https://www.law.cornell.edu/wex/executive_power (last visited Apr. 3, 2019) (citing 152 Cong. Rec. (daily ed. Jan. 26, 2006)).

²¹ *Id.*

tion, is the concept of executive privilege mentioned.²² As Illinois State Senator Jacqueline Collins states, “Executive privilege is the President’s prerogative to withhold information from the public in situations where doing so would be in [the nation’s] interest.”²³

Another reason executive privilege is problematic is that it can interfere with Congress’ ability to investigate illegal or unethical activity by the executive branch.²⁴ There are no standards pertaining to what falls under executive privilege, which can lead to an assumption of secrecy in the executive branch and the erosion of checks and balances.²⁵ Moreover, it causes tension between the legislative and executive branches, requiring the judicial branch to step in and make decisions favoring one branch over the other.²⁶

THE NEW WATERGATE

One of the most famous showdowns between Congress and the executive branch was the Watergate investigation during the Nixon Administration.²⁷ In 1972, five men carrying surveillance and electronic equipment were arrested for breaking into the Democratic National Committee headquarters at the Watergate office complex.²⁸ Two Washington Post journalists uncovered connections to the burglary and Nixon’s reelection campaign.²⁹ A special prosecutor returned indictments for seven of President Nixon’s closest aides, and a special prosecutor subpoenaed audio tapes of recorded conversations that occurred within the Oval Office.³⁰

President Nixon asserted immunity from compliance with the subpoena based on the confidential nature of communications within the White House,

²² Weiner, *supra* note 1.

²³ Collins Interview, *supra* note 17.

²⁴ *The Separation of Powers: The Roles of Independent Counsels, Inspectors General, Executive Privilege and Executive Orders*, MILLER CTR. OF PUBLIC AFFAIRS 1, 5 (1998), available at http://web1.millercenter.org/commissions/comm_1998.pdf.

²⁵ Emily Berman, *Executive Privilege: A Legislative Remedy*, BRENNAN CENTER FOR JUSTICE (June 21, 2009), <https://www.brennancenter.org/publication/executive-privilege-legislative-remedy>.

²⁶ *Executive Privilege*, MILLER CTR. OF PUBLIC AFFAIRS, <https://millercenter.org/the-presidency/educational-resources/executive-privilege> (last visited Apr. 5, 2019).

²⁷ Mark Rozell, *The Constitution and Executive Privilege*, L & LIBERTY (July 12, 2012), <https://www.lawliberty.org/2012/07/12/the-constitution-and-executive-privilege/>.

²⁸ Senate Select Committee on Presidential Campaign Activities (The Watergate Committee), U.S. SENATE HISTORICAL OFFICE, <https://www.senate.gov/artandhistory/history/common/investigations/Watergate.htm> (last visited Apr. 5, 2019).

²⁹ *Id.*

³⁰ *United States v. Nixon*, 418 U.S. 683, 686-687 (1974).

contending that complying with the subpoena would potentially constitute a breach of national security.³¹ The Nixon Administration further argued that its independence insulated the president from judicial subpoenas in an ongoing criminal prosecution and protected confidential communications.³² The Supreme Court held that executive privilege was constitutional and sometimes necessary for national security purposes but was not all-encompassing.³³ In Nixon's case, his claim of confidentiality was not based on military or security reasons and was thus seen as an obstruction of justice in an ongoing criminal investigation.³⁴

Many liken the congressional and special counsel investigations into Russia's possible collusion with the Trump Administration to the Watergate investigation.³⁵ Former FBI Director James Comey testified as to the existence of recorded conversations between him and President Trump, leaving many to question whether these conversations would be subpoenaed.³⁶ President Trump's legal team, however, strongly believed that the president could reasonably resist a subpoena under these circumstances.³⁷

In fact, attorney Rudy Giuliani went as far as claiming that President Trump could "shoot former Director Comey" and not be indicted.³⁸ Mr. Giuliani's statement is not too far-fetched, rhetoric aside, considering a sitting president cannot "be liable to arrest, imprisonment, or detention while he is in the discharge of the duties of his office."³⁹ However, there can be little doubt that if a sitting president were to shoot and kill a person, he would presumably be impeached by the House of Representatives and convicted by the Senate.⁴⁰

In reality, what Rudy Giuliani alluded to was Congress' subpoena powers, which are a little less swift.⁴¹ Congress has three methods to fight non-compli-

³¹ Erwin Chemerinsky, *CONSTITUTIONAL LAW* 333 (5th ed. 2017).

³² *Id.*

³³ Calabrese, *supra* note 4.

³⁴ *Id.*

³⁵ Matthew, *supra* note 16.

³⁶ John. E. Bies, Primer on Executive Privilege and the Executive Branch Approach to Congressional Oversight, *LAWFARE* (June 16, 2017), <https://www.lawfareblog.com/primer-executive-privilege-and-executive-branch-approach-congressional-oversight>.

³⁷ David A. Graham, The Strangest Thing About Trump's Approach to Presidential Power, *THE ATLANTIC* (June 7, 2018), <https://www.theatlantic.com/politics/archive/2018/06/the-strangest-thing-about-trumps-approach-to-presidential-power/562271/>.

³⁸ *Id.*

³⁹ Philip Bobbitt, *Indicting and Prosecuting a Sitting President*, *LAWFARE* (Jan. 14, 2019), <https://www.lawfareblog.com/indicting-and-prosecuting-sitting-president>.

⁴⁰ *Id.*

⁴¹ Taylor, *supra* note 9.

ance with a formally issued subpoena.⁴² First, Congress may rely on its own constitutional power to detain and imprison a party that is in contempt until they comply with the subpoena.⁴³ Second, under the criminal contempt statute Congress can send a contempt citation to the executive branch for criminal prosecution.⁴⁴ Third, Congress can rely on the judicial branch to enforce a congressional subpoena by seeking a civil judgment that obligates compliance with the subpoena.⁴⁵ This last method of enforcement by Congress is what was used in *United States v. Nixon*.⁴⁶

While the Trump administration has not formally taken a stance on executive privilege, Trump's personal attorneys have made vague references as to his ability to invoke executive privilege.⁴⁷ Specifically, President Trump's attorneys have stated in court documents that the privilege extends not only to him but also to his staff.⁴⁸ Many members of his administration, from Mike Pompeo, to former Attorney General Jeff Sessions and former Chief Strategist Stephen Bannon, have unofficially claimed executive privilege with regard to conversations had with the president.⁴⁹ Regarding the special counsel's investigation, the president's attorneys touted the president's transparency and willingness to cooperate but preemptively highlighted his ability to invoke executive privilege.⁵⁰ While the cooperation by the Trump administration thus far is notable, it is not all encompassing.⁵¹

MOVING FORWARD

The real question that remains going forward is what will happen now that Democrats control the House of Representatives, considering that this change in leadership has been more stringent on the Trump Administration than the previous House.⁵² Will the Trump administration be as forthcoming or will Congress finally start reaching into its arsenal of weapons?⁵³ Interestingly enough, the House Judiciary Committee recently voted to issue subpoenas for

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

the full special counsel report, which could set the stage for a legal battle between Democrats and the Trump Administration.⁵⁴ Whether President Trump will finally invoke executive privilege remains to be seen.⁵⁵

To quote Supreme Court Justice Samuel Alito, “the president has not just some executive powers, but the executive power—the whole thing.”⁵⁶ If this is true, and the president does hold all executive power, the FBI would essentially have no authority to investigate him and, subsequently, the Attorney General no authority to contradict him.⁵⁷ To allow the president to routinely withhold information sets a precedent that destroys the legislative branch’s ability to exercise checks and balances.⁵⁸ For Illinois State Senator Jacqueline Collins, the idea of the president not being held accountable for his actions is more akin to a dictatorship than a democracy.⁵⁹ Whether one agrees with Senator Collins or not, conversations between all three branches of government and the American people must continue in order to ensure administrations are held accountable to the interests of the people.⁶⁰

⁵⁴ *House Democrats authorize subpoenas for Mueller report*, ABC NEWS (Apr. 3, 2019), <https://www.msn.com/en-us/news/politics/house-democrats-authorize-subpoenas-for-mueller-report/ar-BBVz0Ez>.

⁵⁵ *Id.*

⁵⁶ Executive Power, *supra* note 20.

⁵⁷ Collins Interview, *supra* note 17.

⁵⁸ Rozell, *supra* note 27.

⁵⁹ Collins Interview, *supra* note 17.

⁶⁰ *Id.*