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Thank you Mr. Chairman for the invitation to address the committee on the constitutional principle of executive privilege. Although nowhere mentioned in the Constitution, executive privilege has a long history in presidential politics. Presidents since George Washington have claimed the right to withhold information from either Congress or the judicial branch. Despite this long history and the many precedents for its exercise, executive privilege remains a controversial power. That is understandable because the very notion that a president may withhold information from those who have compulsory powers strikes at the core of our democratic principles, especially accountability in government.

My comments today focus on the proper definition of executive privilege and the evolution of its exercise. Executive privilege is a legitimate presidential power when exercised under the appropriate circumstances. Like most other presidential powers, it is limited by the legitimate needs of the other branches. Executive privilege also is limited by the democratic principle of openness in government. Therefore, throughout U.S. history claims of executive privilege have been subject to various balancing tests. No claim of executive privilege should stand merely because a president or a high ranking administration official has uttered the words “national security” or “ongoing criminal investigation”. A president’s claim of executive privilege must be balanced against other needs and also must meet certain standards of acceptability.

Some scholars have argued that executive privilege is a “myth” (Berger, 1974). During the Watergate scandal former president Richard Nixon claimed that executive privilege was a power that belonged to the entire executive branch of the government and that it was not subject to any limits. Both of these views are unsupportable. The relevant debate today is over the proper scope and limits of executive privilege. Few any longer argue that executive privilege is a “myth”. Fewer still cling to the belief that the privilege is an absolute presidential power not subject to the compulsory powers of the other branches. Presidents have legitimate needs of confidentiality. The other branches and the public have legitimate needs of access to executive branch information. The question is not whether executive privilege is a legitimate power, but rather how to balance competing needs when a president makes a privilege claim.

#### The Definition and Application of Executive Privilege

Critics of executive privilege are quick to point out that the phrase “executive privilege” does not appear in the Constitution. To be precise, that phrase was not a part of the common language until the Eisenhower administration, leading some to suggest that executive privilege therefore cannot be constitutional (Berger, 1974; Prakash, 1999). This argument ultimately fails because every president since Washington has exercised some form of what we today call executive privilege, regardless of the words used to describe their actions. As Louis Fisher has pointed out, “one could play similar word games with ‘impoundment’, also of recent vintage, but only by ignoring the fact that, under different names, Presidents have from an early date declined to spend funds appropriated by Congress” (Fisher, 1978: 181).

Executive privilege is an implied power derived from Article II. It is most easily defined as the right of the president and high-level executive branch officers to withhold information from those who have compulsory power – Congress and the courts (and, therefore, ultimately the public). This right is not absolute. The modern understanding of executive privilege has evolved over a long period, the result of presidential actions, official administration policies, and court decisions.

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

The particular circumstance involved the disastrous November 1791 St. Clair military expedition against Native American Indians in which General St. Clair lost many of his troops and supplies. A huge embarrassment to the administration, Congress convened an investigation and directed the president to turn over any documents or information germane to the decision to initiate the expedition. The political temptation for the president not to cooperate was clear.

With the unanimous advice of his cabinet, the president determined that he had the right under the Constitution to withhold the information, as long as it was in the public interest to do so. Thomas Jefferson attended the Cabinet discussion and later recorded in his notes that the Cabinet members had all determined “that the executive ought to communicate such papers as the public good would permit, and ought to refuse

those, the disclosure of which would injure the public” (Ford, 1892: 189-190). In the end Washington determined that there were no potentially serious public consequences to divulging the information and he cooperated with the congressional investigation.

That Washington turned over all information requested by Congress in this controversy leads some to argue that this incident actually argues against the constitutional legitimacy of executive privilege (Berger, 1974; Prakash, 1999). The key point is that Washington first addressed the issue of the legitimacy of presidential withholding of information from Congress and concluded that the Constitution allows such an action. And of equal importance is that Washington set the precedent for use of executive privilege to protect the public interest, not the president’s own political interests. On other occasions Washington asserted a right to withhold information and he followed through on those claims.

Washington established the appropriate standard when he determined that any presidential withholding of information must be in the service of the public interest, not the administration’s own political interest. Unfortunately, not all of our presidents have acted so honorably. But over the course of U.S. history executive privilege has evolved into a constitutional principal that is recognized as legitimate when used under the proper circumstances. An examination of the modern evolution of executive privilege better helps us to understand how to resolve controversies over the exercise of that power today.

#### Executive Privilege and the Modern Presidents

Most prominently, President Eisenhower holds the presidential record for assertions of executive privilege at more than 40. Many of those assertions amounted to refusals to comply with congressional requests for testimony from White House officials.

Eisenhower felt so strongly about the principle that at one point he stated “any man who testifies as to the advice he gave me won’t be working for me that night” (Greenstein, 1982: 205). A key event in the development of executive privilege was Eisenhower’s letter of May 17, 1954 to the secretary of defense instructing department employees not to comply with a congressional request to testify about confidential matters in the army-McCarthy hearings. Eisenhower articulated the principle that candid advice was essential to the proper functioning of the executive branch and that limiting candor would ultimately harm “the public interest” (Public Papers of the Presidents, 1954: 483-484).

Although many of Eisenhower’s uses of executive privilege were clearly justified, the breadth of his understanding of that power disturbed many. At one point he effectively declared that executive privilege belonged to the entire executive branch, when in fact over the course of history the practice had been to confine its use to the president and high-level White House officials when directed by the president. He declared all advice to the president not subject to the compulsory powers of the other branches, although the development of executive privilege law more recently has resulted in a key distinction between discussions about official governmental matters and those about private matters.

Eisenhower’s administration originated the use of the phrase executive privilege and expanded the actual practice of that power. Members of Congress rightfully concerned about the expanded practice sought to rein in Eisenhower’s successors through the articulation of standards for the use of executive privilege. Rep. John Moss (D-CA), the chairman of the House Subcommittee on Government Information, led the effort. Beginning with the Kennedy administration, Moss sent letters to successive presidents

requesting written clarification of policy toward the use of executive privilege. President John Kennedy replied that executive privilege “can be invoked only by the president and will not be used without specific presidential approval” (Mollenhoff, 1962: 239).

President Lyndon Johnson similarly responded to a letter from Moss that “the claim of ‘executive privilege’ will continue to be made only by the president” (Executive Privilege, 1971: 35).

Ironically, President Richard Nixon responded most forthrightly to Moss’s inquiry when he wrote: “the scope of executive privilege must be very narrowly construed. Under this Administration, executive privilege will not be asserted without specific presidential approval.... I want open government to be a reality in every way possible” (Letter from President Richard M. Nixon to Rep. John E. Moss). Nixon issued the first detailed presidential memorandum specifically on the proper use of executive privilege.

The policy of this Administration is to comply to the fullest extent possible with Congressional requests for information. While the Executive branch has the responsibility of withholding certain information the disclosure of which would be incompatible with the public interest, this Administration will invoke this authority only in the most compelling circumstances and after a rigorous inquiry into the actual need for its exercise. For those reasons Executive privilege will not be used without specific Presidential approval (Memorandum from President Richard M. Nixon to Executive Department Heads).

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

privilege with presidential approval, or request that Congress give some time to the president to make a decision.

The story of Nixon's vast abuse of executive privilege is well known and analyzed in detail elsewhere (Rozell, 1994: chapter 3). Nonetheless, Nixon's response to Moss and the executive privilege memorandum were important to the development of standard procedures on the scope and application of that doctrine.

Unfortunately Nixon's practices gave executive privilege a bad name and had a profoundly chilling effect on the ability of his immediate successors either to clarify procedures or properly exercise that power. President Gerald Ford began what became a common post-Watergate practice of avoiding executive privilege inquiries and using other constitutional or statutory powers to justify withholding information. Within a week of Ford's inauguration, Rep. Moss sent his usual inquiry to the president requesting a statement on executive privilege policy (Letter from Rep. John E. Moss to President Gerald R. Ford). Unlike Presidents Kennedy, Johnson, and Nixon, Ford ignored the letter. Other members of Congress weighed in with their own requests and Ford ignored their letters too. Numerous discussions took place within the White House over the need for the president to either reaffirm or modify Nixon's official executive privilege procedures. Ford took no action on the recommendations.

The associate counsel to the president summed up the dilemma nicely when he suggested three options: (1) cite exemptions from the Freedom of Information Act as the basis for withholding information "rather than executive privilege"; (2) use executive privilege only as a last resort – even avoid the use of the phrase in favor of "presidential" or "constitutional privilege"; (3) issue formal guidelines on executive privilege

(Memorandum from Dudley Chapman to Philip W. Buchen). Ford chose to handle executive privilege controversies on a case-by-case basis rather than to issue general guidelines. He understood that for many people "executive privilege" and "Watergate" had become joined.

President Jimmy Carter similarly did not respond to congressional requests for clarification of administration policy on executive privilege. It was not until the week before the 1980 election that the Carter administration established some official executive privilege procedures. On October 31, 1980, the White House Counsel Lloyd Cutler issued an executive privilege memorandum to White House staff and heads of units within the Executive Office of the President. The memorandum established that those considering the use of executive privilege must first seek the concurrence of the office of counsel to the president. The memorandum also emphasized that only the president had the authority to waive executive privilege (Memorandum from Lloyd Cutler, 1980). Cutler later would become counsel to the president in the Clinton administration and would write new procedures on the use of executive privilege in 1994.

On November 4, 1982 President Ronald Reagan issued an executive privilege memorandum to heads of executive departments and agencies. The Reagan procedures dovetailed closely with the 1969 Nixon memorandum. For example, Reagan's guidelines affirmed the administration policy "to comply with congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the executive branch". The memorandum reaffirmed the need for "confidentiality of some communications" and 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". Finally, "executive privilege shall not be invoked without specific presidential authorization".

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

By avoiding executive privilege, presidents Ford and Carter actually succeeded more than Reagan did at protecting secrecy. Ford and Carter understood in the post-Watergate era the negative connotations of executive privilege. President Reagan tried to reestablish the legitimacy of executive privilege, only to be harshly criticized and fought

every step of the way by the opposition party-led Congress. Reagan ultimately backed down from his several claims of executive privilege and did more to weaken the doctrine as a result (Rozell, 1994: chapters 4-5).

President George H.W. Bush did not initiate any new executive privilege procedures. The 1982 Reagan memorandum remained in effect as official executive privilege policy during the Bush years. Bush frequently withheld information without invoking executive privilege. Like Ford and Carter, he avoided the negative taint of executive privilege and generally used other bases of authority for withholding information. When the Bush administration wanted to withhold information from the Congress, it used a variety of names other than executive privilege to justify that action. Among them were “internal departmental deliberations”, “deliberations of another agency”, and the “secret opinions policy” (Rozell, 1994: chapter 5). The chief investigator to the House Committee on the Judiciary during the Bush years said that Bush “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” (Lewin interview).

President Clinton used executive privilege elaborately. Unlike former president Bush, he did not conceal executive privilege. Like Nixon, he concealed wrongdoing – or tried to – by resorting to executive privilege. Like Nixon, Clinton gave executive privilege a bad name and made it difficult once again for a future president to reestablish the legitimacy of this constitutional doctrine.

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. The memorandum further stated that: "Executive privilege belongs to the President, not individual departments or agencies".

The Cutler memorandum described formal procedures for the use of executive privilege and these were not significantly different from those outlined in the Reagan memorandum. In light of Clinton's aggressive use of executive privilege in the presidential scandal of 1998-1999, one sentence stands out: "In circumstances involving communications relating to investigations of personal wrongdoing by government officials, it is our practice not to assert executive privilege, either in judicial proceedings or in congressional investigations and hearings" (Memorandum from Lloyd Cutler, 1994).

The Clinton administration also adopted the very broad view that all White House communications are presumptively privileged and that Congress has a less valid claim to executive branch information when conducting oversight than when considering legislation (Letters from Attorney General Janet Reno to President Clinton).<sup>i</sup> On several occasions the Clinton administration used executive privilege to thwart congressional investigations of alleged White House wrongdoing.

#### The George W. Bush Administration

The Bush administration is making far-reaching efforts to expand the scope of executive privilege. In one such case the administration has made the claim that Congress

can be refused access to documents in the Department of Justice regarding prosecutorial matters. In this particular case the administration maintains that it has the right to refuse a congressional request for access to such documents, even though the Department of Justice has closed down the particular investigation under dispute. A congressional hearing on that controversy scheduled for September 13 was understandably postponed due the overriding emphasis on fighting terrorism. In due time Congress needs to take up this issue again because if allowed to stand, the administration's position on expanding executive privilege any time the Department of Justice utters the words "prosecutorial" would set an impossible standard for Congress to overcome in trying to conduct its oversight function. In short, it would set a terrible precedent.

Today Congress rightly is concerned about the administration's executive order that would allow executive privilege to be vastly expanded to prevent the release of past presidents' official papers. I have several reactions:

First, the handling of presidential papers is a matter that should be handled by statute and not by executive order. Presidential papers are ultimately public documents – a part of our national records - and they are paid for with public funds. They should not be treated merely as private papers.

Second, there is legal precedent for allowing an ex-president to assert executive privilege. Yet the standard for allowing such a claim is very high and executive privilege cannot stand merely because an ex-president has some personal or political interest in preserving secrecy. An ex-president's interest in maintaining confidentiality erodes substantially once he leaves office and it continues to erode even further over time.

Third, this executive order makes it easy for such claims by former presidents to stand and almost impossible for those challenging the claims to get information in a timely way to be useful. The legal constraints will effectively delay requests for information for years as these matters are fought out in the courts. These obstacles alone will settle the issue in favor of former presidents because many with an interest in access to information will conclude that they do not have the ability or the resources to stake a viable challenge. The burden will shift from those who must justify withholding information to fall instead on those who have made a claim for access to information.

Fourth, executive privilege may actually be frivolous in this case because there are already other secrecy protections in place for national security purposes. Why expand executive privilege so dramatically to cover what is already potentially covered by existing statutes and regulations? Furthermore, a general interest in confidentiality is not enough to sustain a claim of executive privilege over old documents that may go back as far as twenty years.

Executive privilege traditionally has been limited to withholding information regarding current matters of substantial national interest. In a democratic system the presumption is generally in favor of openness, not secrecy. There is no denying that presidents have needs of confidentiality. Yet the president's current efforts appear designed to substantially tip the balance in favor of secrecy. If the president's support for limiting access to Department of Justice memoranda and this executive order are allowed to stand, the administration will be able to withhold just about any materials going back many years as long as someone in the administration utters the words "national security"

or “prosecutorial”. Congress and the American public have an interest in making sure that does not happen.

What is striking about these latest executive privilege controversies is that the administration seeks to protect secrecy in the one case over documents regarding a terminated investigation and in the other case over the presidential papers of past administrations. Usually when an administration seeks to protect secrecy with executive privilege, it does so with regard to some matter of immediate national concern. That is not to suggest that all such claims necessarily have been valid, but just that the current administration has chosen some very untraditional cases with which to expand executive privilege. Neither case fits the traditional standards for valid claims of executive privilege.

With regard to legislative-executive disputes over information, the burden is on the president to demonstrate a need for confidentiality and not on Congress to prove that it has the right to conduct oversight. Similarly, the burden should be on a president or ex-president to demonstrate a need to close off access to past presidential records and not on citizens to prove that they have a right to examine public records. The Bush administration actions on executive privilege dramatically shift the burden away from where it belongs.

#### Resolving Executive Privilege Disputes

Executive privilege clearly is a constitutional power when exercised under the proper circumstances. Since the Nixon years, presidents have not made effective use of that power. Some have devised means of concealing executive privilege and some have used that power improperly. Congress has shown little deference toward presidential

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secrecy. The reality is that presidents have some needs of confidentiality and Congress has investigative powers. Executive privilege inevitably leads to interbranch clashes – usually between the president and Congress, but also recently between a president and the Office of the Independent Council (OIC).

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

Resolving such disputes cannot occur through statutory guidelines or court-directed definitions. The proper resolution to conflict over presidential secrecy is rooted in the separation of powers. Congress and the courts already have the institutional means to challenge executive privilege. The proper solution to the potential abuse of executive privilege is not legalistic precision, but rather for the other branches to fully use the powers that they already possess.

If members of Congress are not satisfied with the president's response to their requests for information or testimony, they have numerous options. Congress can issue a subpoena and perhaps ultimately a contempt of Congress resolution, or retaliate by

withholding support for the president's agenda or for one or more of his nominees, or simply withhold funding for presidential favored programs. These actions give the president the option of weighing the importance of secrecy against such interbranch conflict and the problems it may cause for him. If executive privilege can be exercised only for the most compelling reasons – a real threat to the national security or compromising internal discussions in a way that will clearly harm the public – then it is not unreasonable to force the president's hand in this fashion. Presumably, information being withheld for such vital purposes would take precedence over pending legislation or a presidential appointment.

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

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



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

Rarely does either side benefit from disputes over information that result in retaliatory measures. There are powerful incentives for both branches to reach some accommodation. One approach has been for the executive to allow a few members of Congress – for example, the chair and ranking minority member of the committee seeking the information – to privately review confidential documents. There is nothing improper with having the executive limit access to secret information to some members of Congress who can attest to the validity of the need for secrecy.

The judicial branch sometimes is a party to an interbranch dispute over access to information. President Clinton tried to shield White House information and testimony from the Office of Independent Counsel (OIC) in 1998, but a federal judge ultimately decided that the constitutional balancing test weighed in favor of the OIC's need for information. The process of accommodation is obviously more difficult between the president and a judicial entity than between a president and Congress. But the same

principle applies: each side should use the powers already at its disposal as fully as possible.

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

There is also considerable legal precedent for in camera review of sensitive information by the courts. Rather than compelling disclosure of information for open court review, the executive may satisfy the court in secret chambers of the need for non-disclosure. The courts have repeatedly affirmed their right to decide in particular cases whether the necessity of protecting sensitive information does indeed outweigh the need for evidence in criminal justice matters.

Disputes over executive privilege cannot be resolved with constitutional or statutory exactitude. Such disputes can best be resolved through the normal ebb and flow of politics as provided for in the system of separation of powers.

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<sup>i</sup> The administration draws its view that Congress lacks a compelling need for executive branch information in cases of 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). Although the court did not explicitly acknowledge Congress's need for information in cases of oversight, that is not the same as saying that the court over-ruled the well-established investigative powers of legislative committees. The Reagan and Bush administrations made similarly too broad claims in this regard.

