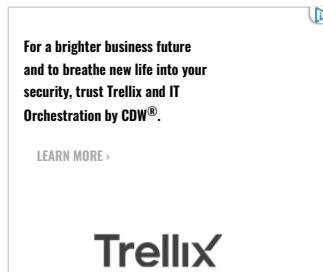




Steve Bannon, President Donald Trump's former chief strategist, in New York City on Aug. 20, 2020. (AP)



By [Louis Jacobson](#) October 22, 2021

In recent days, former President Donald Trump [filed a lawsuit](#) against the House committee investigating the Jan. 6 Capitol riot, and former Trump adviser Steve Bannon rebuffed a subpoena from the same panel.

At the center of both defiant acts is the concept of executive privilege.

We previously [delved](#) into executive privilege in 2019, when Trump was president and asserted executive privilege over unreleased and underlying materials in special counsel [Robert Mueller's final report](#) on alleged Russian collusion with the Trump campaign.

The more recent moves by Trump and Bannon have returned executive privilege to the spotlight. Now, some of the key issues in play include how strong the executive privilege claims of former presidents are, how to balance divergent claims by a former and a sitting president, and whether an outside adviser who hasn't worked in the White House for years has a valid claim to assert executive privilege.

The Supreme Court has granted former presidents some rights of executive privilege, but within limits. As for Bannon, the full House [voted](#) on Oct. 21, mostly along party lines, to hold Bannon in criminal contempt of Congress, which sends the matter to the Justice Department to decide whether to prosecute him.

Here's an updated explanation of how executive privilege works and what's at stake.

What is executive privilege?

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," [wrote](#) Mark Rozell, George Mason University professor.

It's not written into the Constitution, but presidents have asserted it frequently.

The privilege can be asserted for two reasons: for national security needs, and for "protecting the privacy of White House deliberations when it is in the public interest to do so," Rozell wrote.

The underlying [argument](#) is that the public's right to know can, at least in some cases, be outweighed by the broader national interest. If sensitive deliberations were to be routinely disclosed in the future, the candor of top presidential advisers could be undercut, harming the national interest.

How have presidents tried to use executive privilege?

Generally, executive privilege has been upheld most strongly when it involves national security matters. And competing constitutional principles have been able to outweigh executive privilege.

Prior to Trump, executive privilege was most famously asserted by Richard Nixon during Watergate, when he sought to keep secret the tapes that had been made of conversations in the Oval Office.

The Supreme Court ruled that Nixon had to turn over the White House tapes, rejecting any national security concerns and concluding that the tapes should be released due to the "fundamental demands of due process of law in the fair administration of criminal justice." The ruling hastened Nixon's resignation.

Nixon's assertion of the privilege was widely seen as self-serving, and the next few presidents didn't assert it often. "Invoking privilege makes it look like the president is trying to hide something," said Josh Chafetz, a Cornell University law professor.

Even when he was facing [the Iran-Contra investigation](#) during his second term, Ronald Reagan decided against asserting executive privilege, said Malcolm Byrne, deputy director and director of research with the National Security Archive. Reagan ended up providing extracts to congressional committees instead, Byrne said.

Eventually, presidents began to assert executive privilege again, including Bill Clinton, during the investigation into his affair with Monica Lewinsky, and President Barack Obama, during the investigation into the "Fast and Furious" program, in which federal agents allowed guns to be sold and brought into Mexico so they could trace the weapons.

But the presidential win-loss tally in the courts didn't improve much. Clinton lost his court battle over executive privilege, as did Obama. Both rulings built on the precedent of the Nixon case.

How has Trump used executive privilege?

Trump has used executive privilege with unusual aggressiveness, legal experts say, both during and after his presidency.

Trump has leveraged the legal argument "as a weapon to shield himself from investigations into the truth," said Barbara McQuade, a University of Michigan law professor and a former U.S. attorney for the Eastern District of Michigan. "After the Trump presidency, claims of executive privilege will sound like obstruction of justice rather than a protection of the office."

The most recent example of Trump's efforts is the [26-page complaint](#) in which he sued the chair of the Jan. 6 panel, Rep. Bennie Thompson, D-Miss., as well as David S. Ferriero, the head of the National Archives. The lawsuit argues that as a former president, Trump has a right to prevent certain documents — such as schedules and communications between him and individuals believed to have a role in the events before and on Jan. 6 — from being turned over to Congress, even though the current president, Joe Biden, [has declined](#) to invoke executive privilege to block the congressional demand.

The suit alleges that the committee "has decided to harass President Trump" with a "vexatious, illegal fishing expedition" and "impulsive egregious action against a former President and his close advisors."

The heads of the Jan. 6 committee clapped back at Trump's argument. "It's hard to imagine a more compelling public interest than trying to get answers about an attack on our democracy and an attempt to overturn the results of an election," [wrote](#) Thompson and the panel's vice chair, Rep. Liz Cheney, R-Wyo.

How strong is Trump's argument?

Previous skirmishes over executive privilege were often resolved through negotiation, so the legal jurisprudence is somewhat thin.

The Supreme Court allowed Nixon as a former president to cite executive privilege in a [1977 case](#), and Harry Truman and George W. Bush were allowed to do so after leaving office as well, said James D. Robenalt, an attorney with the firm Thompson Hine LLP and creator of a continuing legal education class on Watergate.

However, ex-presidents' claims on executive privilege have traditionally been considered weaker than those of sitting presidents, and the opposition of the current president to Trump's citation could also be weighed as a factor.

Writing in the [Washington Post](#), Teri Kanefield, a former appellate lawyer in California, argued that Trump's case is weak on the merits. She said the suit argues that the relevant standards were set in the case [Trump v. Mazars](#), which involved access to Trump's tax returns while he was still in office. Kanefield argues that this case isn't relevant since "Trump is no longer president. He no longer has 'official' duties to discharge, and Congress is no longer a 'rival branch of government.'" She added that the information being contested is about political activities, rather than official duties, which are the ones that executive privilege is supposed to protect.

Trump's biggest leverage may lie in the legal uncertainty, since asserting the claim would allow him to keep the case tied up in the courts, possibly for years. And that might be long enough for the Republicans to take over the House in the 2022 midterms, rendering the House subpoena moot. (The legal skirmishing could even drag on long enough for Trump or another Republican to win the White House in 2024.)

"While Trump may have a weak case, he seems to draw strength from ordinary court procedures," said Steve Griffin, a Tulane University law professor. "These procedures will have to be in some way expedited for the committee to get what it wants."

How strong is Bannon's argument?

Legal experts said that any executive privilege claim Bannon may make would be even more of a longshot than Trump's, since Bannon left his [White House](#) job in August 2017, while the documents being sought are related to events in 2020 and 2021.

A claim by a former official who was out of the administration by the time of the events at issue would be "novel," said Mark Osler, a University of St. Thomas law professor. "I would be shocked if these claims are found persuasive, but I am shocked a lot these days."

If a court ordered Bannon to testify and it denied executive privilege defenses, Bannon could assert his Fifth Amendment rights against self-incrimination. But a court could give him immunity and make him testify — "something Judge John Sirica wanted to do with the Watergate defendants," Robenalt said.

McQuade said that while a claim by Bannon of executive privilege "seems to be a stretch," she added that she is "not aware of a court specifically ruling that a conversation with an outside adviser, such as Bannon, can never be privileged."

Still, she said, any privilege that does exist would need to outweigh other interests in order to be upheld. In addition, weight would be given to Biden's assertion that investigating the Jan. 6 attack is more important than executive privilege in this case. Finally, a court could pick and choose which specific requested documents are entitled to privilege, rather than blocking release on a blanket basis.

What leverage does Congress have over Bannon?

Since Congress doesn't have a working jail cell, it effectively depends on the executive branch to enforce its subpoena power.

However, the Justice Department does not have to cooperate, and even if it does, the process could take a long time. The possibility of delay works just as well on Bannon's behalf as it does on Trump's.

"The main obstacle Congress faces is time," McQuade said. "If Congress makes a criminal referral and the Justice Department prosecutes, the case will take many months before it resolves. Even then, the penalty is not compulsion to testify but punishment for defying the subpoena."

Congress does have an alternative, she added — a civil suit that seeks a judicial injunction ordering Bannon to comply. "A failure to comply with the court order would be contempt, for which Bannon could be jailed until he decided to testify, for up to 18 months," McQuade said.

This process, too, could take time. Still, she added, "it might be worthwhile to pursue this case criminally, to deter others who might be similarly inclined to defy congressional subpoenas."

Meanwhile, as much as the Biden White House would like to enable a thorough investigation of the events of Jan. 6, it must also contend with the reality that a weakened executive privilege standard could boomerang at some point.

"They are probably worried, and should be, that any lightening of the privilege could come back on them, especially if Republicans get control of the House," Griffin said.

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