"Executive Privilege: Separation of Powers and the Accommodation Process"

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"Breaking the Logjam: Principles and Practices of Congressional Oversight and Executive Privilege"

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Executive privilege is the right of the president and high-level White House officials to withhold information from Congress, the judiciary, and ultimately the public. Customarily presidents invoke executive privilege, or they direct members of their cabinet and staff to do so. As an Article II-based power, only the president possesses this authority. Most claims of executive privilege fall into three categories: (1) protecting the national security under certain circumstances; (2) protecting the candor of White House deliberations; (3) and protecting the confidentiality of ongoing investigations in the executive branch.

Controversies over executive privilege date back to the earliest years of the Republic. Although no presidential administration until the 1950s invoked the term "executive privilege" as the underlying principle for withholding documents or testimony, almost every president has exercised some form of this presidential power.

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[**] Much of the material presented here draws from my book *Executive Privilege: Presidential Power, Secrecy, and Accountability*. Lawrence, Kansas: University Press of Kansas, 2020 (4th edition).

Executive privilege is controversial because it is nowhere mentioned in the Constitution. That fact has led some observers to suggest that executive privilege does not exist and that the congressional power of inquiry is absolute.[1] This view is mistaken.[2] Executive privilege is an implied presidential power and is sometimes necessary to the proper functioning of the executive branch. Presidents and their staffs must be able to deliberate without fear that their every utterance may be made public. Although in a democratic-republic the presumption is in favor of transparency in government, there are occasions when the national interest is best served by secrecy. Executive privilege is firmly established in law and longstanding practice. Contemporary debates about executive privilege center on its scope and limits, and not whether it is a legitimate presidential power. To varying degrees, presidents of both political parties have exercised this power.

The power of executive privilege is not absolute. Like other constitutionally-based powers, it is subject to a balancing test. Presidents and their advisers may require confidentiality, but Congress needs access to information from the executive branch to carry out its lawmaking, oversight, and investigative functions. Any claim of executive privilege must be weighed against Congress's legitimate need for information to carry out its own constitutional role. Independent counsels and special prosecutors also have wielded the power of inquiry and challenged presidential claims of secrecy. Nevertheless, the power of inquiry also

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[1] Raoul Berger, *Executive Privilege: A Constitutional Myth* (Cambridge, Harvard University Press, 1974); Saikrishna Prakash, "A Critical Comment on the Constitutionality of Executive Privilege", *Minnesota Law Review*, Vol. 83, No. 5 (1999), pp, 1143-1190.

[2] Mark J. Rozell, "Restoring Balance to the Debate Over Executive Privilege: Time to Move Beyond Berger", *William and Mary Bill of Rights Journal*, Vol. 8, No. 3 (April 2000), pp. 541-582.

is not absolute, whether it is wielded by Congress or by prosecutors. On occasion, the judicial branch has taken the lead in resolving executive privilege conflicts, although it is preferable that an accommodation between disputing parties resolves these issues instead of a court doing so.

Not all presidents have exercised executive privilege judiciously. Some have used it to cover up embarrassing or politically inconvenient information, or even outright wrongdoing. As it is with all other grants of authority, the power to do good things is also the power to do bad things. The only way to avoid the latter is to strip away the authority altogether and thereby eliminate the ability to do the former. Eliminating executive privilege would hamper the ability of presidents to discharge their constitutional duties effectively and to protect the public interest.

Modern presidential history unfortunately has witnessed a number of occasions of abuse of this authority, which has made almost all executive privilege claims immediately controversial. Most prominently, President Richard M. Nixon invoked executive privilege in an effort to block the release of the transcripts of the White House tapes that revealed the evidence of the president's own participation in a cover-up of criminal activity. In so doing, the president effectively gave executive privilege a bad name, driving it underground for a period of time.[3]

Due to its association with Nixonian abuses of power, Presidents Gerald R. Ford and Jimmy Carter avoided the use of the term executive privilege as much as possible. President

[3] Mark J. Rozell, "Executive Privilege and the Modern Presidents: In Nixon's Shadow", *Minnesota Law Review*, Vol. 83, No. 5 (May 1999), pp. 1069-1126.

Ronald Reagan backed off each of his several claims of that power, and President George H. W. Bush largely concealed its exercise to avoid controversy while still protecting secrecy. Of the post-Watergate presidents, it is President Bill Clinton who most often claimed executive privilege and any embarrassment associated with its exercise has since largely disappeared. Like Clinton, President George W. Bush made some executive privilege claims that stretched the credible limits of that power.[4] President Barack Obama exercised that power much less often than his predecessors, but when he did, his actions were quite similar in adopting an expansive definition of the president's authority. President Donald J. Trump further stretched the boundaries of executive privilege when he claimed a kind of "protective" privilege that allows a president effectively to prevent any White House aide from testifying before Congress on the basis that a witness might reveal privileged information.[5] President Trump used executive privilege several times to try to block testimony by current and former officials as well as access to documents that were germane to legislative and special counsel investigations.

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[4] Mark J. Rozell, "Executive Privilege Revived: Secrecy and Conflict in the Bush Presidency", *Duke Law Journal*, Vol. 52, No. 2 (November 2002), pp. 403-421.

[5] See Mark J. Rozell, *Executive Privilege: Presidential Power, Secrecy, and Accountability*. Lawrence, Kansas: University Press of Kansas, 2020 (4th edition), pp. 198-205. Trump's assertion of a "protective" executive privilege is somewhat similar, but broader in scope, to a 1996 legal opinion by Attorney General Janet Reno that maintained that White House Counsel's Office documents have such broad protection from disclosure. See "Protective Assertion of Executive Privilege Regarding White House Counsel's Office Documents", 20 Op. O.L.C., 1996 (https://www.justice.gov/file/20031/download (accessed July 27, 2021). The Clinton White House also created a category of documents that it considered "subject to a claim of executive privilege", in order to withhold those documents without the president actually invoking a privilege claim (Rozell, 2020: pp. 124-147).

The temporary advantages that presidents might obtain from exercising executive privilege outside of its customary boundaries are far outweighed by the long-term damage to democratic institutions, especially when such practices become established precedents that appear to justify similar actions in the future. Presidents rarely scale back powers once established and the common pattern is for chief executives to push the limits of their powers even further than before.[6] There is no discernible partisan pattern found in my analyses of presidential overreaches in use of executive privilege other than presidents of both political parties have tested the limits of this power.

Justifications for Executive Privilege

A review of past practices and of evolving constitutional interpretation reveals common justifications and parameters for the proper exercise of executive privilege. After describing the justifications, I offer recommendations for reestablishing the proper parameters of executive privilege and the important role that Congress must play to hold presidents accountable for any of their actions that violate constitutional limits on executive branch secrecy.

The Need for Candid Advice

The constitutional duties of presidents require that they be able to consult with advisers without fear that the advice will be made public. If the president's aides believe that their confidential advice could be disclosed, the quality of that advice might be seriously damaged. Advisers cannot be completely honest and frank in their discussions if they know that their

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

every word might be disclosed to partisan opponents or to the public. The principle of protecting candor has been at the heart of many controversies in which presidents have attempted to stop White House aides from testifying on Capitol Hill. President Dwight D. Eisenhower felt so strongly about this 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".[7]

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".[8]

Protecting the public interest is the major rationale for determining whether a president has cause to prohibit testimony, or the release of documents as well. Executive privilege does not exist to protect the political interests of the president, or to conceal information that might lead to evidence of possible wrongdoing.

In *United States v. Nixon* (1974), the U.S. Supreme Court recognized that the need for candid interchange is an important basis for executive privilege: *"The valid need for protection of communications between high government officials and those who advise and assist them in the performance of their manifold duties is too plain to require further discussion. Human*

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[7] Fred Greenstein, *The Hidden-Hand Presidency: Eisenhower as Leader*. New York: Basic Books, 1982, p, 205.

[8] *Public Papers of the Presidents: Dwight D. Eisenhower, 1954*: Washington, DC: Government Printing Office, pp. 483-4.

experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision-making process. The confidentiality of presidential communications….has constitutional underpinnings... The privilege is fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution".[9]

That basis for an executive privilege claim would become known as the presidential communications privilege. It is considered to be the strongest area in which to make such a claim, as it is constitutionally based. However, like all other constitutional powers, it is limited, as our governing system is designed to permit each branch to check the other. The contours of its scope have been shaped not only by the Supreme Court but the lower courts. The D.C. Circuit Court has explained that presidential communications apply to a president's decision making when carrying out a "quintessential and non-delegable Presidential power" such as the nomination or pardon powers.[10] Such a privilege claim will cover all documents, whether pre-decisional or post-decisional. The claim is not expansive as it only protects the communications of those who are personally advising, or preparing to advise, the president (i.e., White House staff). Congress can overcome this privilege with a showing of need and by providing evidence that the information sought cannot be found elsewhere. In addition, the courts have recognized "where there is reason to believe the documents sought may shed light on government misconduct, the privilege is routinely denied on the grounds that shielding internal government

[9] *United States v. Nixon*, 483 U.S. 683, 705-706, 708 (1974).

[10] *In re Sealed Case*, 121 F.3d 230, 729, 752 (1997).

deliberations in this context does not serve 'the public interest in honest, effective government'".[11]

Another variant is the deliberative process privilege that has a much lower threshold to overcome, partially because it is a common law privilege.[12] All executive branch officials are protected generally; however, only pre-decisional documents are covered and not those that state a policy decision or only contain factual information.[13] The privilege claim can be overcome by a "sufficient showing of need"[14] with there being a presumption for disclosure when Congress is seeking information. In addition, like the presidential communications privilege, a showing of corruption or other wrongdoing will wipe away any protection that results from a claim of deliberative process privilege.

Finally, there are variants of executive privilege that often go overlooked as presidents and their administrations rely on the underlining privilege rationale and do not necessarily resort to an explicit executive privilege claim. Such privileges range from an ongoing criminal investigation to national security/state secrets, as some court decisions have acknowledged as separate fields for the protection of executive branch information.[15]

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[11] Ibid., 737-738.

[12] Ibid., 746.

[13] Ibid., 737.

[14] Ibid., 738.

[15] *U.S. v. Nixon*, 706 (1974); *Harlow v. Fitzgerald* 457 U.S. 800, 812 (1982); *Committee on Judiciary v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008).

Limits on Congressional Inquiry

Although Congress needs access to information from the executive branch to carry out its lawmaking, oversight, and investigative duties, it does not follow that Congress must have full access to the details of every executive branch communication. Congressional inquiry, like executive privilege, has limits. That is not to suggest that presidents can claim the need for candid advice to restrict any and all information. The president must demonstrate a need for secrecy in order to trump Congress's power of inquiry.

Congress's power of inquiry, though broad, is not unlimited.[16] A distinction must be drawn between sources of information generally and those necessary to Congress's ability to perform its legislative, oversight, and investigative functions.[17] There is a strong presumption of validity to a congressional request for information relevant to these critical functions. The presumption weakens in the case of a congressional "fishing expedition" - a broad, sweeping quest for any and all executive branch information that might be of interest to Congress for one reason or another. Indeed, Congress itself has recognized that there are limits on its power of inquiry. For example, in 1879 the House Judiciary Committee issued a report stating that neither the legislative nor the executive branch had absolute compulsory power over the records of the other. Congress gave the executive branch the statutory authority to withhold

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16. *Watkins v. United States, 354 U.S. 178 (1957); Wilkinson v. United States*, 365 U.S. 399 (1961).

17. *Senate Select Committee v. Nixon*, 498 F.2d 725 (1974) at 731.

information when it enacted the “sources and methods proviso” of the 1947 National Security Act, the implementation provision of the 1949 CIA Act, and the 1966 Freedom of Information Act.

Nevertheless, some critics of executive privilege argue that Congress has an absolute, unlimited power to compel disclosure of all executive branch information. In 1982, Rep. John Dingell, D-Mich., for example, said that members of Congress "have the power under the law to receive each and every item in the hands of the government."[18] But this expansive view of congressional inquiry is as wrong as the belief that the president has the unlimited power to withhold all information from Congress. The legitimacy of the congressional power of inquiry does not confer an absolute and unlimited right to all information. The debates at the 1787 Constitutional Convention and at the subsequent ratifying conventions provide little evidence that the framers intended to confer such authority on Congress. There are inherent constitutional limits on the powers of the respective governmental branches. The common standard for legislative inquiry is whether the requested information is vital to the Congress's lawmaking, oversight, and investigative functions.

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18. Quoted in House Committee on Public Works and Transportation, *Contempt of Congress*, 97th Cong., 2d sess., December 15, 1982, 83n. A classic study of secrecy and legislative inquiry is Irving Younger, "Congressional Investigations and Executive Secrecy: A Study in the Separation of Powers," *University of Pittsburgh Law Review* 20 (1959): 755-784.

The Other Branches and Confidentiality

Executive privilege can also be defended on the basis of accepted practices of secrecy in the other branches of government. In the legislative branch, members of Congress receive candid, confidential advice from committee staff and legislative assistants.[19] Meanwhile, congressional committees meet on occasion in closed session to mark-up legislation. Congress is not obligated to disclose information to another branch. A court subpoena will not be honored except by a vote of the legislative chamber concerned. Members of Congress enjoy a constitutional form of privilege that absolves them from having to account for certain official behavior, particularly speech, anywhere but in Congress. But as with the executive, this protection does not extend into the realm of criminal conduct or credible allegations of wrongdoing.

Secrecy is found as well in the judicial branch. It is difficult to imagine more secretive deliberations than those that take place in Supreme Court conferences. Court observer David M. O'Brien referred to secrecy as one of the "basic institutional norms" of the Supreme Court. "Isolation from the Capitol and the close proximity of the justices' chambers within the Court promote secrecy, to a degree that is remarkable…. The norm of secrecy conditions the employment of the justices' staff and has become more important as the number of employees increases".[20] Members of the judiciary claim immunity from having to respond to congressional

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19. *Gravel v. United States*, 408 U.S. 606 (1972).

20. David M. O'Brien, *Storm Center: The Supreme Court in American Politics*, 2d ed. (New York: Norton, 1990), pp. 150-151.

subpoenas. The norm of judicial privilege also protects judges from having to testify about their professional conduct. It is thus inconceivable that secrecy, so common to the legislative and judicial branches, would be uniquely excluded from the executive.[21] Indeed, the executive branch regularly engages in activities that are secret in nature.

Legislative, judicial, and executive branch secrecy serves a common purpose: under certain circumstances, decisionmakers can arrive at more prudent policy decisions than those that would be made through an open process. And in each case, the end result is subject to scrutiny.

Resolving the Dilemma of Executive Privilege

The dilemma of executive privilege is how to permit governmental secrecy while maintaining accountability. On the surface, the dilemma is a difficult one to resolve: how can democratically elected leaders be held accountable when they are able to deliberate in secret or to make secretive decisions?

The post-Watergate period witnessed a breakdown in the proper exercise of executive privilege. Because of former president Richard Nixon's abuses, Presidents Gerald R. Ford and Jimmy Carter avoided using executive privilege as much as possible. Ford and Carter still sought to preserve presidential secrecy, but they relied on other constitutional and statutory means to achieve that goal. President Ronald Reagan tried to restore executive privilege as a presidential prerogative, but he ultimately retreated when congressional committees threatened

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21. *Souicie v. David*, 448 F.2d 1067, 1080 (D.C.C. 1971).

administration officials with contempt citations and adopted other retaliatory actions to compel disclosure. President George H.W. Bush, like Ford and Carter before him, avoided executive privilege whenever possible and used other strategies to preserve secrecy. President Bill Clinton exercised executive privilege more often than all of the other post-Watergate presidents combined, but often improperly, such as in the investigation into his sexual relationship with a White House intern. President George W. Bush exercised the privilege somewhat more sparingly than his predecessor, but he also exercised this power in some questionable circumstances, such as his attempt to deny Congress access to decades-old Department of Justice documents.[22] President Barack Obama made few claims of executive privilege, but he framed those actions around broad interpretations of presidential powers, similar to the positions adopted by his immediate predecessor. President Donald J. Trump claimed an expansive "protective" executive privilege that recognized no countervailing or balancing powers against those of the executive branch.

Thus, in the post-Watergate era, either presidents have avoided uttering the words "executive privilege" and protected secrecy through other sources of authority (Ford, Carter, George H.W. Bush, Obama), or they have tried to restore, and in some cases expand, executive privilege with very mixed outcomes (Reagan, Clinton, George W. Bush, Trump). Clinton's aggressive use of executive privilege in the scandal that led to his impeachment served to

[22] In 2001-2002 a congressional committee requested Justice Department documents from the 1960s and 1970s that were germane to an investigation of corruption in the FBI's Boston office in its handling of organized crime. See Statement of Mark J. Rozell, in Committee on Government Reform, House of Representatives, 107th Congress. *Investigation into Allegations of Justice Department Misconduct in New England – Volume 1*. Washington, D.C.: Government Printing Office, 2002, pp. 513-519.

revive the national debate over this presidential power and the more recent actions by the Trump administration reignited the debate even more. It is therefore an appropriate time to discuss how to restore a sense of balance to the executive privilege debate.

First, it needs to be recognized that executive privilege is a legitimate constitutional power - not a "constitutional myth". Consequently, presidents should not be devising schemes for achieving the ends of executive privilege while avoiding any mention of this principle. Furthermore, Congress (and the courts) must recognize that the executive branch - like the legislative and judicial branches - has a legitimate need under certain circumstances to deliberate in secret and that every assertion of executive privilege is not a devious attempt to conceal wrongdoing.

Second, executive privilege is not an unlimited, unfettered presidential power. It should be exercised rarely and only for the most compelling reasons. Congress has the right - and often the duty - to challenge presidential assertions of executive privilege.

Third, there are no clear, precise constitutional boundaries that determine, *a priori*, whether any particular claim of executive privilege is legitimate. The resolution to the dilemma of executive privilege is found in the political ebb and flow of the separation of powers system. Indeed, there is no need for any precise definition of the constitutional boundaries surrounding executive privilege. Such a power cannot be subject to precise definition, because it is impossible to determine in advance all of the circumstances under which presidents may have to exercise that power. The separation of powers created by the framers provides the appropriate resolution of the dilemma of executive privilege and democratic accountability.

Congress already has the institutional capability to challenge claims of executive

privilege by means other than eliminating the right to withhold information or attaching statutory restrictions on the exercise of that power. For example, if members of Congress are not satisfied with the response to their demands for information, they have the option of withholding support for the president's agenda or for the president's nominees for executive branch and judicial positions. In one case during the Nixon years, the Senate Judiciary Committee threatened not to confirm Richard Kleindienst as Attorney General until the president dropped an executive privilege claim to prevent White House staff from testifying before Congress. Senator Sam Ervin even threatened to filibuster the nomination if it cleared the Senate: He added: "If the president wants to make his nominee for Attorney General a sacrificial lamb on the altar of executive privilege, that will be his responsibility and not mine".[23] The Senate's pressure resulted in President Nixon withdrawing his privilege claim and allowing a White House aid to testify in person and to answer additional written questions from the committee.[24]

Similarly, members of the Senate Judiciary Committee in 1986 threatened not to confirm the nomination of William Rehnquist as chief justice of the U.S. Supreme Court until President Reagan dropped an executive privilege claim over documents from Rehnquist's tenure in the Nixon Administration Department of Justice. A bipartisan majority of the committee supported a subpoena of key documents, leading the president to compromise and agree to allow committee access to selected categories of documents. Under the compromise,

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[23] Sanford G. Ungar, "GOP Move Imperils Kleindienst", *Washington Post*, April 13, 1972, p. A24.

[24] Howard Kurtz and Al Kamen, "Rehnquist Not in Danger Over Papers", *Washington Post*, August 7, 1986, pp. A1, 14.

six senators and six staff members received access to the documents. The committee, and then the Senate, proceeded to confirm Rehnquist.

If information can be withheld only for the most compelling reasons, it is not unreasonable for Congress to try to force the president's hand by making him weigh the importance of withholding the information against that of moving forward a nomination or piece of legislation. Presumably, information being withheld for purposes of vital national security or constitutional concerns would take precedence over pending legislation or a presidential appointment. If not, then there appears to be little justification in the first place for withholding the information.

Congress possesses numerous other means by which to compel presidential compliance with requests for information. One of those is the control Congress maintains of the government’s purse-strings, which means that it holds formidable power over the executive branch. In addition, Congress often relies on the subpoena power and the contempt of Congress charge to compel release of withheld information. It is not merely the exercise of these powers that matters, but the threat that Congress may resort to such powers. Congress has successfully elicited information from the executive branch using both powers. During the Reagan years, for example, in several executive privilege disputes Congress prevailed and received all the information it had requested from the administration - but only after it issued subpoenas and threatened to hold certain administration officials in contempt. The Reagan White House simply decided it was not worth the political cost to continue such battles with Congress. In these cases, the system worked as it is supposed to. Had the information in dispute been critical to national security or preserving White House candor, certainly Reagan would

have taken a stronger stand to protect documents or prohibit testimony.

In an ideal world, all such issues would be resolved only on the objective merits of the positions of the executive and legislative branches. In reality, political considerations and public opinion play important, often determinative, roles, as in most interbranch disputes and negotiations. In 1987, when the Iran-Contra scandal threatened to derail the Reagan presidency and there even was serious discussion about possible impeachment and removal of the president, President Reagan cooperated with the congressional investigation by waiving executive privilege for the administration officials called to testify, and he allowed Congress to review relevant documents from the White House, Department of Defense, Department of Justice, Department of State, and the Central Intelligence Agency. When Chief of Staff Donald Regan revealed before the Senate Select Committee on Intelligence that the president kept a personal diary, members of Congress demanded access in the case that Reagan had written any recollections relevant to Iran-Contra. Initially the White House resisted disclosure of the diary, but eventually the president made the political calculation that transparency best served his interests in the proceedings and he waived executive privilege.

In 1991, the Subcommittee on Legislation and National Security of the House Committee on Government Operations voted to subpoena Secretary of Defense Richard Cheney for a document regarding cost overruns on a navy aircraft program. President George H.W. Bush claimed executive privilege and he instructed Cheney not to release the document, citing the need to protect “confidential communications among senior Department officials”

and the "candor necessary to the effectiveness of the deliberative process".[25] The subcommittee backed down after it became clear that there was not bipartisan support to challenge the president's executive privilege claim, and that there was little support in the House of Representatives generally to hold Cheney – a respected former member of the Chamber - in contempt.

Congress has the responsibility to consider the president's reasoning for an executive privilege claim. There are occasions when after doing so, Congress has either given deference to the president's position, or decided that the stakes involved were not worth an interbranch fight. In 1996 the House Committee on International Relations subpoenaed 47 Clinton White House and State Department documents concerning U.S. policy toward Haiti. The House requested these materials in light of accusations that U.S. trained security forces of the Haitian regime were involved in political assassinations and that efforts to stop drug trafficking from Haiti to the U.S. were a failure. White House counsel Jack Quinn notified the committee that the president claimed executive privilege over the documents on national security grounds. In this case the House committee had pushed for memoranda from the National Security Adviser to the president, and for some documents that potentially would reveal White House discussions with foreign leaders, thus lending credibility to President Clinton's position that releasing the documents might compromise national security. The House committee ultimately did not fight the president's claim of privilege.

In the extreme case, Congress also has the power of impeachment and removal from

[25] Memorandum from President George Bush to Secretary of Defense Richard Cheney, "RE: Congressional Subpoena for an Executive Branch Document", August 8, 1991.

office - the ultimate weapon with which to threaten the executive. Clearly, this congressional power cannot be routinely exercised as a means of compelling disclosure of information, and thus it will not constitute a real threat in commonplace information disputes. Nevertheless, when a major scandal emerges, and all other remedies have failed, Congress can threaten to exercise its ultimate power over the president.

In the vast majority of cases - and history verifies this point - it can be expected that the president will comply with requests for information rather than withstand retaliation from Congress. Presidential history is replete with examples of chief executives who tried to invoke privilege or threatened to do so, only to back down in the face of congressional challenges.

If members of Congress believe that a particular exercise of executive privilege poses a threat to the constitutional balance of power, the answer resides not in crippling presidential authority, but in exercising to full effect the vast array of tools already at Congress's disposal. Nonetheless, most of the time resolving executive privilege disputes does not result from such escalating of conflict between the branches.

Over the course of U.S. history, the process of accommodation and compromise between presidents and Congresses has resolved most executive privilege controversies. Oftentimes, the president claims some vital national interest in prohibiting the release of requested documents, members of Congress push back and eventually a compromise is reached that allows access to certain categories of documents to be released publicly while others are subject to private review by legislators and their staffs. Both sides claim victory – the president for protecting the prerogatives of the executive branch, members of Congress for getting access to exactly the documents they most needed. The accommodation process, when

it works as it is supposed to, enables both branches to protect their respective institutional interests, while allowing the business of governing to move forward.

The process is not perfect because it is the consequence of a constitutional system of separated powers that operates within spheres of authority that are not defined with legalistic precision. Resolving executive privilege disputes through the ebb and flow of separation of powers, however imperfect a resolution, is far preferable to constraining that power through a statutory definition, as some have suggested.[26] It is preferable to giving up on the accommodation process because in some past occasions the process has broke down and no resolution could be achieved. There is a long history of the system working effectively. It is incumbent upon political leaders to restore the comity and cooperation that are the hallmarks of the accommodation process.

[26] Emily Berman, "Executive Privilege: A Legislative Solution", Brennan Center for Justice, at https://www.brennancenter.org/sites/default/files/2019-08/Report_Executive-Privilege-A-Legislative-Remedy.pdf (accessed July 30, 2021).