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The Shadow of Executive Privilege

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Introduction

At a public hearing of the Senate Intelligence Committee this past June, Attorney General Jeff Sessions informed the Senators that he could not answer questions about his conversations with the President, nor with any "high officials within the White House."[1] He clarified that this refusal did not amount to an assertion of executive privilege, because "that's the president's prerogative,"[2] and the President himself had not invoked the privilege.[3] Rather, Sessions announced his intent to "protect[] the right of the President to assert [executive privilege] if he chooses."[4]

Several of the committee's Democratic members (as well as one Independent) pushed back against Sessions' reasoning. Senators Heinrich (D-NM) and King (I-ME) both told Sessions that he was trying to "have it both ways" by seeking the benefits of executive privilege without actually asserting it.[5] Scholars expressed similar reactions in the media. Law professor Stephen Vladeck joked on National Public Radio that "the attorney general is basically trying to invent a new doctrine called the non-privileged privilege." Vladeck elaborated that Sessions likely hoped to bypass the "bad optic[s]" of executive privilege, and to avoid triggering "legal maneuvers that could be deployed to litigate the claim of privilege."[6] I made a similar comment myself to Politifact, explaining that Sessions "is trying

1 *Russian Interference in the U.S. Election*, Hearings Before Intelligence Committee, Senate, 115th Congress (2017), Preliminary Transcript from Politico.com at 6, 14–5, 21, http://www.politico.com/story/2017/06/13/full-text-jeff-session-trump-russia-testimony-239503 (accessed 8 Aug. 2017).

2 *Id*. at 28.

3 *Id*. at 33–4.

4 *Id*. at 33–4.

5 *Id*. at 29, 33.

6 *In Refusal to Answer Questions, Sessions Denies Claiming Executive Privilege*, All Things Considered, National Public Radio, June 13, 2017, Transcript http://www.npr.org/2017/06/13/532816894/in-refusal-to-answer-questions-sessions-denies-claiming-executive-privilege (accessed 2 Sep. 2017).

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to gain the benefits of claiming executive privilege without the legal or political consequences."[7]

Yet while the Attorney General's demurrals were unusually glib and evasive, they did not emerge, whole cloth, from a historical void. Just a week prior to Sessions' testimony, several other Trump administration officials refused to answer questions before the same committee, making similarly noncommittal references to executive privilege.[8] Reaching back further, "numerous officials in the Obama, Bush, and Clinton administrations … raised 'long-standing executive branch confidentiality concerns' in response to" congressional information requests, without explicitly asserting executive privilege.[9]

More fundamentally, Sessions' testimony – and the apparent lack of committee follow-up as of this essay's drafting over 2 months later – reflects executive privilege's powerful shadow effect. By its shadow effect, I mean the impact on oversight of the implicit or explicit threat that the doctrine might be invoked at some point. This effect can take multiple forms, ranging from congresspersons' choosing not to support new oversight legislation based on actual or ostensible fears of infringing on executive privilege, to legislative committee members declining to ask for certain information in the first place rather than risking a protracted battle over executive privilege.

The shadow effect can help to shield the executive from political and legal accountability, and can provide political cover for legislators as well. For example, to the extent that a cabinet member succeeds in halting a line of questioning simply by suggesting that the President theoretically might wish to claim executive privilege, that member – and the President – bypasses both the substantive questions asked as well as any serious engagement with the merits of the executive privilege claim. By the same token, the cabinet member's response may be a relief to legislators who wish neither to appear spineless in the face of

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7 Lauren Carroll, *Jeff Sessions Cites 'Longstanding Policy' to Deflect Senators' Questions in Russia Hearing*, Politifact.com, June 14, 2017, http://www.politifact.com/truth-o-meter/statements/2017/jun/14/jeff-sessions/jeff-sessions-cites-longstanding-policy-deflect-se/ (accessed 7 Aug. 2017).

8 Quinta Jurecic, *Highlights on the Russia Investigation from Today's Senate Intelligence Committee Hearing*, Lawfare.com, June 7, 2017, https://www.lawfareblog.com/highlights-russia-investigation-todays-senate-intelligence-committee-hearing (accessed 16 Aug. 2017).

9 Andy Wright, *About That Executive Privilege "Policy": Congress Should Call the Bluff*, justsecurity.org, June 20, 2017, https://www.justsecurity.org/42364/executive-privilege-policy-and-congress-call-bluff/ (accessed 16 Aug. 2017). See also Mark J. Rozell, Executive Privilege: Presidential Power, Secrecy, and Accountability 6 (3d ed. 2010) ("because of the taint of Watergate, some modern presidents have crafted strategies to withhold information without resorting to executive privilege.").

administrative intransigence, nor – for reasons of party loyalty or otherwise – to push the cabinet member for answers.

To be sure, it is does not invariably threaten accountability for the executive to push back against congressional information requests without formally invoking executive privilege. The executive has some legitimate secrecy needs, and congressional oversight in some cases is designed less to enlighten than to harass or to score cheap political points. Intra-political-branch negotiations – particularly where those negotiations themselves are open to public view – can be a democratically healthy exercise that contains the worst impulses of each branch.[10] The potential threat of an executive privilege claim may even play some positive role in this process, prompting a series of discussions and decisions within and between the Justice Department and the relevant congressional committees.

Too often, however, the shadow cast by executive privilege stops rather than starts or enriches conversations. It can mark a dead end for information requests, deter their being made in the first place, or justify halting or ignoring legislation that might itself provide a productive framework for oversight.[11] The shadow effect is enabled by several factors. First, the courts have inferred from constitutional structure an executive privilege that can surmount statutory directives, that presumptively favors the executive, and that is weighted yet more heavily toward the executive when it is based on national security. While most disputes never lead to a courthouse, these doctrinal features nonetheless enhance the executive's negotiating position and broaden its stock of rhetorical tools. Second, the executive also draws, in refusing information requests, on political branch precedents, such as previous executive branch refusals or past compromises reached between the branches. This practice has bred many a strained analogy from contained, fact-specific precedents to categorical preclusions of entire lines of inquiry. Third, congresspersons' own political incentives sometimes militate against their pushing very hard, if at all, for executive branch disclosures. Congress also lacks an institutional legal infrastructure to match the formidable legal resources of the executive branch.

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10 Indeed, an important theme in the handful of executive privilege cases involving political branch disputes is the desirability of intra-branch negotiations. See, for example, the discussion below, in Part I(B), of AT&T v. United States. U.S. v. AT&T (AT&T II), 551 F.2d 384, 392 (DC Cir. 1976). A number of scholars also have made this point. See, for example, Rozell, *supra* note 9, at 201–2; Neal Devins, *Congressional – Executive Information Access Disputes: A Modest Proposal – Do Nothing*, 48 Admin. L. Rev. 109 (1996).

11 I elaborate on this phenomenon, with examples, in Heidi Kitrosser, Reclaiming Accountability, 54–5, 92–4 (2015); Heidi Kitrosser, *National Security and the Article II Shell Game*, 26 Const. Commentary 483, 504–7, 514–20 (2010).

At the same time, all is not lost for fans of robust and responsible congressional oversight. There are some mitigating factors and counter-forces to be found in judicial precedent, political branch precedent, and in the politics of oversight. Indeed, we can see some of these forces at work in the Sessions testimony and its aftermath.

This essay elaborates on the major factors that lend themselves to a chilling shadow effect, as well as some important mitigating forces. It also draws on the Sessions testimony and its aftermath to illustrate both. In Part I, I discuss relevant aspects of the law of executive privilege in the federal courts. In Part II, I discuss the use and abuse of political branch precedents to cast a shadow suggesting a broad executive discretion to keep secrets. In Part III, I observe some of the political dynamics, as well as resource asymmetries, at play in information-sharing disputes between the political branches. In Part IV, I return to the example of Attorney General Sessions' testimony and its aftermath. A brief conclusion follows.

I. Judicial Precedent and its Shadow

First, a few points of clarification and definition. I focus in this essay solely on that subset of executive privilege involving presidential communications, as opposed to the common law "deliberative process" privilege.[12] So cabined, an executive privilege claim is an assertion by the president of a constitutional right to withhold certain kinds of information from Congress, the courts, or from persons or entities empowered by statute to receive information.[13] Communications that can trigger a claim of privilege include direct exchanges between the President and his advisors, and those engaged in by White House "advisors in the course of preparing advice for the President."[14]

A. Enabling Aspects of Judicial Precedent

Although courts have adjudicated executive privilege disputes in just a handful of cases, those cases very much influence the strength and nature of the shadow

12 The deliberative process version of executive privilege is a common law privilege against disclosing deliberative, pre-decisional communications between government personnel in order to protect the candor of such conversations. *In re Sealed Case*, 121 F.3d 729, 737, 745 (DC Cir. 1997).

13 See, e.g. Mark J. Rozell and Mitchel A. Sollenberger, *Executive Privilege and the U.S. Attorney Firings*, 38 Pres. Studies Q. 315, 316 (2008).

14 *In re Sealed Case*, 121 F.3d at 751–2. The Court stressed, however, that it was only addressing the privilege in the context of judicial proceedings, and not in the "congressional-executive context." *Id*. at 753.

effect. For one thing, participants in such disputes surely consider the possibility, however, remote, of eventual litigation. And members of the executive branch, whether making their cases for non-disclosure to Congress, to the courts or to the public, frequently cite to judicial precedent.

Several aspects of the case law lend themselves to a strong shadow effect. First, the Supreme Court frames the privilege – and has so framed it ever since it first acknowledged the privilege in the 1974 case of *United States v. Nixon* – as one that presumptively favors the executive.[15] Indeed, while the *Nixon* Court rejected Richard Nixon's executive privilege based request to quash a federal court's subpoena of oval office tapes,[16] the Court gave privilege proponents a long-term win by recognizing a presumptive privilege. More so, the *Nixon* Court relied mainly on the sweeping "candor" rationale – that is, the notion that the president may shield high level executive branch communications when he determines that disclosing the same could inhibit candor in future communications.[17] Administrations of both parties have cited the candor rationale multiple times since *Nixon* in opposing both particular information requests and proposed statutory transparency requirements.[18] The rationale's capacity to cast long shadows is illustrated by its usage early in the presidency of Barack Obama. In the wake of a controversy over security procedures for the White House state dinner, the administration explained that the White House social secretary is immune from testifying before Congress "[b]ased on the separation of powers" and the need for "the White House staff to provide advice to the [P]resident confidentially."[19]

The *Nixon* Court also suggested that where the claim rests on a different rationale – that of national security – the presumption is even stronger, requiring extreme if not absolute judicial deference.[20] The national security rationale exerts a particularly strong shadow effect. The effect is most obvious where

15 *United States v. Nixon*, 418 U.S. 683, 705–9 (1974).

16 *Id*. at 686–90, 713.

17 *Id*. at 705–9. For in-depth analysis and critique of the candor rationale, see Gia B. Lee, *The President's Secrets*, 76 GEO. WASH. L. REV. 197 (2008).

18 See, e.g. President Barack Obama, *Statement of Administration Policy: H.R. 2701 – Intelligence Authorization Act for Fiscal Year 2010* (July 8, 2009); *Assertion of Exec. Privilege Concerning the Special Counsel's Interviews of the Vice President & Senior White House Staff*, 2008 WL 5458939 (O.L.C.) 1, 2–3 (2008); *Assertion of Exec. Privilege for Documents Concerning Conduct of Foreign Affairs with Respect to Haiti*, 1996 WL 34386606, at *1–2 (Sept. 20, 1996); *Applicability of Executive Privilege to the Recommendations of Independent Agencies Regarding Presidential Approval or Veto of Legislation*, 10 Op. O.L.C. 176, 177–8 (1986).

19 Michael D. Shear, Government Openness Is Tested by Salahi Case, WASH. POST, Dec. 4, 2009, at C7.

20 418 U.S. at 710–1.

administrations directly reference the rationale, as they repeatedly have done, to oppose legislative transparency requirements or particular disclosure requests.[21] More insidiously, the rationale can serve as a useful after-the-fact justification by administrations caught failing to fulfill statutory requirements of disclosure to the Senate Intelligence Committees, and by congresspersons who were aware of the failure and did not object to it.[22]

Other judicial opinions offer additional tools for administrations seeking to stave off oversight. Administrations routinely cite to a federal appeals court decision that preceded *United States v. Nixon* by 2 months and validated the Nixon administration's refusal to refuse to turn over White House tapes to the Senate Select Committee on Presidential Campaign Activities. The court in that case, Senate Select Committee v. Nixon, held that a congressional body can overcome the presumption favoring executive privilege only by showing that the information sought "is demonstrably critical to the responsible fulfillment of the Committee's functions."[23] Administrations regularly invoke that standard in refusing to disclose information in a wide range of settings.[24]

The 2004 Supreme Court case of Cheney v. United States[25] provides some additional support for a shadow effect. The *Cheney* Court held that the vice president was not required, under the facts of that case, to invoke executive privilege before obtaining court protection from disclosing information. Instead, the Court explained, it was enough for the vice president to object to an entire discovery request on separation of powers grounds, including the ground that it would unduly burden him to have to claim executive privilege with respect to particular pieces of information.[26] Hence, the very possibility that executive privilege could be infringed by aspects of a discovery order was enough to get the order struck

21 See, e.g. President Barack Obama, *Statement of Administration Policy: H.R. 2701 – Intelligence Authorization Act for Fiscal Year 2010* (July 8, 2009); *Assertion of Exec. Privilege for Documents Concerning Conduct of Foreign Affairs with Respect to Haiti*, 1996 WL 34386606, at *1–2 (Sept. 20, 1996); *The President's Compliance with the "Timely Notification" Requirement of Section 501(B) of the Nat'l Sec. Act*, 10 Op. O.L.C. 159, 165, 173–4 (1986). See also Kitrosser, *supra* note 11, at 504–5.

22 See Kitrosser, *supra* note 11, at 504–6, 514–7.

23 Senate Select Committee On Presidential Campaign Activities v. Nixon, 498 F.2d 725, 731 (DC Cir. 1974).

24 See, e.g. Letter from Attorney Gen. Holder, to President Obama 5, 8 (June 19, 2012); *Assertion of Exec. Privilege Concerning the Special Counsel's Interviews of the Vice President & Senior White House Staff*, 2008 WL 5458939 (O.L.C.) 1, 4–6 (2008); Foreign Affairs with Respect to Haiti, supra note 18, at *2–3; *Recommendations of Independent Agencies*, *supra* note 18, at 177.

25 542 U.S. 367 (2004).

26 542 U.S. at 375, 388–90.

(and ultimately, on remand, to have the case dismissed) although executive privilege was never formally invoked.[27]

B. Mitigating Features of the Case Law

Elsewhere, I have argued at length that the courts have erred in inferring an executive privilege that can surmount statutory directives, and also in deeming the privilege a presumptive one.[28] From this perspective, of course, it is particularly troubling that the shadow effect compounds these errors. Yet even if one believes that the basic doctrine of executive privilege is correct, sanguinity toward its shadow effect need not follow. Indeed, some of the reasoning in the relevant case law itself is at odds with a strong shadow effect.

In particular, aspects of *U.S. v. Nixon* and its progeny provide grist for skepticism about sweeping, preemptive anti-disclosure moves, as opposed to fact-driven, case-by-case arguments and negotiations. Indeed, the *U.S. v. Nixon* Court itself ordered the White House tapes turned over to the district court for examination.[29] And lower courts have emphasized that *U.S. v. Nixon*'s balancing test demands only a pro-privilege presumption, not abdication to executive judgments. In its 1976 opinion in United States v. AT&T, the US Court of Appeals for the DC Circuit admonished the district court for deferring too strongly to the executive's national security-based executive privilege claim. The claim had been raised in response to a subpoena by a House Subcommittee investigating warrantless surveillance practices.[30] The appeals court also took the view that the matter would best be resolved through negotiations between the political branches and directed the district court to facilitate such negotiations. Those negotiations, stressed the appeals court, should be grounded in assumptions of shared congressional and executive responsibility for foreign affairs, not executive supremacy.[31]

The US District Court for the District of Columbia struck a similarly moderate note in the 2008 case of Committee on the Judiciary v. Miers. The *Miers* court made clear that the candor rationale does not justify absolute immunity for high-level White House advisors from having to testify before Congress.

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27 See In re Cheney, 406 F.3d 723, 725, 727, 731 (DC Cir. 2005) (discussing separation of powers issues, ordering case dismissed on remand).

28 Heidi Kitrosser, Reclaiming Accountability 52–7 (2015); Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 Iowa L. Rev. 489 (2007).

29 *United States v. Nixon*, 418 U.S. at 713–4.

30 U.S. v. AT&T, 551 F.2d 384, 385–6, 392 (DC Cir. 1976).

31 *Id*. at 390–5.

Rather, such advisors must appear if subpoenaed, and at that point may raise objections to specific questions. Such objections, when raised, can be resolved through inter-branch negotiations or through judicial balancing. Absolute immunity, in contrast, would "totally insulate[]" White House advisors from congressional scrutiny, a result "[t]hat would eviscerate Congress's historical oversight function."[32] Importantly, the court distinguished its facts from those in *Cheney*. The latter case, it said, did not establish a blanket privilege for high-level advisors or officials. Rather, the vice president was allowed to forgo making specific objections only because the "civil subpoenas [at issue] were unacceptably overbroad."[33] Given reasonable discovery or oversight requests, the vice president and other advisors presumably are required to make case-by-case objections.

The *Miers* Court also highlighted the public interests and constitutional values served by congressional investigations, observing that Congress's power of inquiry is as broad as its power to legislate and lies at the very heart of Congress's constitutional role. Indeed, the ability to compel testimony is "necessary to the effective functioning of courts and legislatures."[34] The same district court echoed this reasoning in 2013 in Committee on Oversight and Government Reform v. Holder.[35] There, the court denied the Obama administration's request that it decline jurisdiction over an executive privilege dispute stemming from a House committee investigation of the botched "Fast and Furious" program. The court concluded that "[t]o give the Attorney General the final word would elevate and fortify the executive branch at the expense of the other institutions that are supposed to be its equal, and do … damage to the balance envisioned by the Framers."[36]

II. Oversight Disputes in the Political Branches

In challenging oversight requests, administrations reference not just judicial precedents but also those stemming from information-sharing disputes between Congress and the executive. Such political branch precedents include the making or withdrawing of requests by members of Congress, the refusing of or acceding to them by the executive, and compromises made by either or both branches. Whether in the courtroom or in the realm of public or political debate, it is neither

32 Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53, 103 (D.D.C. 2008).
33 *Id*. at 106 n.38.
34 *Id*. at 102–3.
35 Committee on Oversight and Government Reform v. Holder, 979 F.Supp.2d 1 (D.D.C. 2013).
36 *Id*. at 2–5, 12.

uncommon nor necessarily unreasonable to rely on "the gloss of history" to inform the application of constitutional principles and standards.[37] Yet it does not suffice simply to assume, without further analysis specific to the constitutional provision and conduct at issue, that might makes right – that is, that the mere fact that a government branch or office has engaged in an activity in the past resolves its constitutionality. Among other things, it is essential to consider whether the past conduct cited is materially equivalent to the present-day activity at issue.

Administrations often fail to heed these limits, tending instead to draw sweeping principles of executive discretion from relatively narrow historical examples. The latter practice characterizes what perhaps is the most well-known and influential use of history's gloss to support a broad executive secret-keeping discretion. That is, the memorandum submitted by Deputy Attorney General Rogers ("the Rogers memorandum") to a Senate subcommittee in 1958[38] in response to its request "for an explanation of the President's authority 'to withhold requested information from Congress.'"[39] The Rogers memorandum was offered in support of the Eisenhower administration's earlier-announced view that "the President and the heads of departments have an uncontrolled discretion to withhold … information and papers in the public interest."[40] Yet there is a considerable distance between that bold position and the historical episodes mustered by Rogers. For example, J.R. Wiggins, speaking to the Massachusetts Historical Society in 1963, observed of the two episodes that Rogers cited from the Washington administration: "The first … turns out to be a case wherein the President, without any objection, furnished all the papers which the Congress requested," while the second "did not involve at all the President's broad powers to withhold, but related to the treaty powers of the House."[41] Other scholars similarly have demonstrated that the Rogers' precedents cannot bear the weight that the Eisenhower

37 Justice Frankfurter famously described a long history of presidential actions as, under certain conditions, constituting a "gloss on 'executive Power' vested in the President by § 1 of Art. II." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 611 (1952) (Frankfurter, J., concurring). For detailed discussions of the concept of historical gloss, see Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012); Heidi Kitrosser, *It Came From Beneath the Twilight Zone: Wiretapping and Article II Imperialism*, 88 Tex. L. Rev. 1401, (2010).

38 William P. Rogers, *Constitutional Law: The Papers of the Executive Branch*, 44 A.B.A. J. 941 (1958).

39 Raoul Berger, Executive Privilege: A Constitutional Myth 163 (1974).

40 *Texts of Eisenhower Letter and Brownell Memorandum on Testimony in Senate Inquiry*, N.Y. TIMES, May 17, 1954, at 24. See also Rogers, *supra* note 38, at 941–3.

41 J. R. Wiggins, *Lawyers as Judges of History*, 75 Proceedings of the Massachusetts Historical Society 84, 103 (1963).

administration placed on them.[42] Nonetheless, the Rogers memorandum was treated as a "bible for the executive branch" for years,[43] and modern administrations continue to trace the notion of a sweeping executive privilege back to the Washington administration.[44]

Since at least the mid-twentieth century, in short, modern presidents have sought to conjure the specter of a broad executive secret-keeping discretion from relatively narrow or otherwise inapposite historical examples.[45] And despite the cautionary notes sounded by critics over the years, the approach has borne fruit as one administration after another repeats the same precedents, and creates new ones through their own actions.

III. Some Key Political and Practical Factors

Appeals to constitutional principle, doctrine, and history do not, of course, take place in a vacuum, detached from political or practical considerations. To the contrary, there are some important political and practical forces that strengthen executive privilege and its shadow effect, as well as some mitigating factors.

A. Political and Practical Factors that Strengthen Executive Privilege and its Shadow

First, despite James Madison's prediction that the interests of the people who populate each branch would "be connected with [that branch's] constitutional rights,"[46] American political incentives do not always line up so neatly. For one

42 Daniel N. Hoffman, Governmental Secrecy and the Founding Fathers 193–4, 235–8 (1981); Berger, *supra* note 39, at 163–208; Saikrishna Bangalore Prakash, *A Critical Comment on Executive Privilege*, 83 Minn. L. Rev. 1143, 1177–85 (1999); Abraham D. Sofaer, Executive Privilege: An Historical Note, 75 COLUM. L. REV. 1318 (1975).

43 Berger, *supra* note 39, at 164.

44 See, e.g. White House Office of Communications, *Press Briefing by Tony Snow*, July 25, 2007; 2007 WL 2123960, *1; *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 U.S. Opp. Off. Legal Counsel 101, 140 (1984).

45 Indeed, the term "executive privilege" itself did not exist until 1958, when the Eisenhower administration coined it. Rozell, *supra* note 9, at 40. That administration also "was the first to claim explicitly an executive privilege based simply on an undifferentiated interest in preserving the confidentiality of deliberations and advice throughout the Executive Branch" – in other words, the candor rationale. Archibald Cox, *Executive Privilege*, 122 U. Pa. L. Rev. 1383, 1433 (1974).

46 The Federalist No. 51 (James Madison).

thing, partisan interests often take precedence over institutional ones, leading to what law professors Daryl Levinson and Richard Pildes have termed a "separation of parties, not powers."[47] Congresspersons who share a party affiliation with the president frequently act to defend the interests of "their" president and party rather than the constitutional prerogatives of their institutions.[48]

Even apart from party politics, it simply is not always in the political interests of individual congresspersons to be fully informed as to what is going on in the executive branch. Where the choice is between knowing enough to be held responsible should things go awry versus retaining ignorance and preserving the flexibility to align with or distance one's self from presidential actions as events develop, ignorance can be bliss. This is particularly, though not exclusively, true in the realm of national security. From this perspective, executive branch arguments for secrecy – or even the mere hint that those arguments might be raised and cause delays or other difficulties – are a godsend, enabling congresspersons to claim that they would like to know more but that their hands are simply tied, whether by the Constitution or the clock.[49]

Furthermore, resource asymmetries between Congress and the President negatively impact Congress' capacity to challenge actual or anticipated executive privilege claims. The executive branch has a formidable legal infrastructure at its disposal, particularly in the Department of Justice and its Office of Legal Counsel (OLC). The OLC's legal opinions are enormously influential, in part because they fill the void caused by the relative rarity of judicial interference in executive power disputes.[50] In addition to citing judicial precedents, OLC often draws, in its opinions, upon the historical gloss of political branch precedents to support present-day executive actions. The supported actions themselves can become precedent

47 Daryl J. Levinson and Richard H. Pildes, *Separation of Parties, Not Powers*, 119 Harv. L. Rev. 2311 (2006).

48 See Levinson and Pildes, *supra* note 47, at 2313–4, 2323, 2344; William P. Marshall, Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters, 88 B.U. L. REV. 505, 518–9 (2008); Neil Devins, Presidential Unilateralism and Political Polarization: Why Today's Congress Lacks the Will and the Way to Stop Presidential Initiatives, 45 WILLAMETTE L. REV. 395, 409 (2009); Jack M. Balkin and Sanford Levinson, The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State, 75 FORDHAM L. REV. 489, 520 (2006); Mark Tushnet, *Controlling Executive Power in the War on Terrorism*, 118 Harv. L. Rev. 2673, 2678–9 (2005).

49 See Kitrosser, *supra* note 11, at 484, 499–500, 506–7; id. at 500 n.59 (citing John Hart Ely, The American War in Indochina, Part I: The (Troubled) Constitutionality of the War They Told Us About, 42 STAN. L. REV. 877, 878, 907 (1990)).

50 See Jack Goldsmith, The Terror Presidency 32, 96–7 (2007); Trevor Morrison, Stare Decisis in the Office of Legal Counsel, 110 COLUM. L. REV. 1448, 1451 (2010).

for future administrations to cite, contributing to a one-way ratchet effect toward enhanced presidential power and secrecy.[51]

Congress's institutional legal support has never rivaled that of the executive branch, and the mismatch has been exacerbated over the past couple of decades. In this time-frame, Congress has – for reasons themselves attributed by observers to a party-over-institution ethic – taken a hatchet to its own internal sources of expertise. Among other things, committee budgets have been slashed and committee staffs shrunk, while apolitical sources of expertise and research – including the Government Accountability Office and the Congressional Research service – also have weathered substantial cuts.[52] This diminution in resources situates Congress all the less well to challenge the executive when it uses executive privilege, whether formally or by alluding to it while denying information requests.

B. Some Mitigating Forces

Not all of the political and logistical cards are stacked in favor of executive privilege and its shadow effect. To the contrary, there are some important counterforces in both the political and logistical realms.

Politically, the concepts of transparency, of checks and balances, and of an executive bound by law are not devoid of currency. This is demonstrated by survey data,[53] as well as by anecdotal evidence of criticism that presidents have faced within their own parties when they are perceived as excessively secretive

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51 See Reclaiming Accountability at 8–9; William P. Marshall, Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters, 88 B.U. L. REV. 505, 510–4 (2008).

52 See, e.g. Michelle Cottle, *Newt Gingrich Broke Politics: Now He Wants Back In*, The Atlantic, July 14, 2016, https://www.theatlantic.com/politics/archive/2016/07/newt-broke-politicsnow-he-wants-back-in/491390/; Paul Glastris and Haley Sweetland Edwards, *The Big Lobotomy: How Republicans Made Congress Stupid*, Washington Monthly, June/July/August 2014 (http://washingtonmonthly.com/magazine/junejulyaug-2014/the-big-lobotomy/); Bruce Bartlett, "Gingrich and the Destruction of Congressional Expertise," *New York Times*, 29 Nov. 2011, https://economix.blogs.nytimes.com/2011/11/29/gingrich-and-the-destruction-of-congressional-expertise/.

53 See, e.g. Jeffrey M. Jones, *Americans Still Say Liberties Should Trump Anti-Terrorism*, Gallup.com, June 10, 2015, http://www.gallup.com/poll/183548/americans-say-liberties-trump-anti-terrorism.aspx?g_source=position2&g_medium=related&g_campaign=tiles (accessed 2 Sep. 2017); Lydia Saad, *Public Favors Inquiry into Attorney Firings but Divided on Gonzales' Fate*, Gallup.com, March 27, 2007 http://www.gallup.com/poll/27004/Public-Favors-Inquiry-Into-Attorney-Firings-Divided-Gonzales-Fate.aspx?g_source=executive+privilege&g_medium=search&g_campaign=tiles (accessed 2 Sep. 2017).

or lawless.[54] For example, both the George W. Bush and Obama administrations received some pushback from within their respective parties at points in response to such concerns.[55] At the extreme, perceptions of a rule of law crisis in the executive branch can make a difference at the ballot box and in subsequent congressional behavior. This phenomenon was perhaps at its most forceful in the early 1970s with the rise of the "Watergate babies" – a large group of freshman Democrats swept into congressional office amid national perceptions of out of control presidential power in the wake of Watergate and Vietnam. A New York Times reporter observed at the time that "[t]he Congress is determined to try to regain some of the power it lost or abandoned to the President in the postwar generation." Among its goals was "limit[ing] the scope of executive privilege."[56]

Nor is Congress without tools that it can use to fight back against presidential intransigence should it see fit to do so. For one thing, it can always call the bluff of an administration that plays coy with respect to information gathering, forcing the issue by serving subpoenas and voting to hold witnesses in contempt.[57] Both steps were taken, of course, in the episodes that led to the *Miers* and *Holder* decisions. Congress also can also exert leverage over secretive administrations indirectly. It can refuse, for example, to approve new spending for programs about which an administration is not forthcoming, or to move forward with nominations for the same reason.[58]

Furthermore, while Congress has decimated its own professional staff and research resources in the recent past, it has it within its power to mend those self-inflicted wounds. Indeed, the cuts and related changes of the past two decades were a reversal of congressional capacities that "had been painstakingly built up …" beginning in the late 1960s. That build–up reflected a perceived need to "counter the power of the White House" and to professionalize the congressional

54 More broadly speaking, "the willingness of members of Congress to accede to the wishes of a same-party president is at least partly a function of that president's standing in the public sphere." Josh Chafetz, Congress' Constitution: Legislative Authority and the Separation of Powers 29 (2017).

55 See, e.g. examples cited in Reclaiming Accountability at pp. 199–200; Kate Phillips, *Feingold Plans Hearing on Czars*, The Caucus: The Politics and Government Blog of the New York Times, September 29, 2009, https://thecaucus.blogs.nytimes.com/2009/09/29/feingold-plans-hearing-on-czars/?_r=0 (accessed 3 Sep. 2017).

56 James Reston, The Class of 1974, N.Y. Times, Dec. 18, 1974, at 45.

57 For a recent, in-depth discussion of Congress' contempt power, see Chafetz, *supra* note 54, at 152–94 (2017).

58 For discussions of such congressional tools, see, e.g. Rozell, *supra* note 9, at 180; Louis Fisher, *Invoking Executive Privilege: Navigating Ticklish Political Waters*, 8 William & Mary Bill of Rights J. 583, 599–602 (2000); Devins, *supra* note 10, at 134–5.

committee system[59] – the same perceptions that helped to sweep the Watergate babies to power.

IV. The Sessions Testimony and its Aftermath

Attorney General Sessions' recent testimony and its aftermath offer a microcosmic view of executive privilege's long shadow, its supporting forces, and some countervailing factors. The first two features are demonstrated in several ways, the most obvious being the simple fact that the Attorney General avoided answering questions by raising the possibility that the President might wish at some point to claim executive privilege. The presence of mitigating political and legal forces are illustrated, on the other hand, by the limited pushback that Sessions received during and after the hearing, by the committee's decision to hold a public hearing in the first place, and by President Trump's not objecting to the very fact of Sessions' testifying.

A. Attorney General Sessions and the Shadow of Executive Privilege

1. Taking Cover in the Shadow

Attorney General Sessions took cover in executive privilege's shadow, most elementally, by avoiding answering a category of questions – those regarding his conversations with the President or with any "high officials within the White House[60] – on the basis that the President might wish to invoke the privilege in the future. Sessions made clear that he was not himself invoking the privilege, as "that's the president's power."[61] He also acknowledged that the President had not, in fact, invoked the privilege.[62] Instead, Sessions maintained, he was "protecting the president's constitutional right by not giving it away before [the President] has a chance to review it."[63] The Attorney General further elaborated that "[i]f it comes to a point where the issue is clear and there's a dispute about it, at some point the president will either assert the privilege or not or some other privilege would be asserted, but at this point I believe it's premature."[64]

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59 Glastris & Edwards, *supra* note 52.
60 *Russian Interference in the U.S. Election*, *supra* note 1, at 6, 14–5, 21.
61 *Id.* at 15.
62 *Id.* at 33–4.
63 *Id.* at 29.
64 *Id.* at 34.

Toward the end of the hearing, Richard Burr, the chair of the committee and a Republican, asked Session to do a bit of post-hearing homework, stating:

> There were several questions that you chose not to answer because of confidentiality with the President. I would only ask you now to go back and work with the White House to see if there are any areas of questions that they feel comfortable with you answering and if they do, that you provide those answers in writing to the committee.[65]

As of late August, however, I have been unable to find any evidence that the Attorney General followed up in this manner, or that the Committee pressed the issue.[66]

It appears, then, that Sessions thus far has managed to use the mere shadow of executive privilege not simply to bypass a set of questions, but to avoid engaging the propriety of invoking executive privilege under these circumstances. Of course, the Committee could itself have forced the issue, voting to subpoena Sessions' testimony and eventually voting to hold him in contempt had President Trump claimed executive privilege or had Sessions otherwise remained nonresponsive.[67] It appears, however, that the Committee thus far is "content to let the issue lie."[68] This is unsurprising, if for no reason other than the partisan dynamics at issue, given the unity of party between the President and a majority of the Committee.

2. History's Gloss

The Attorney General and his supporters also made use of historical gloss arguments to bolster executive privilege's shadow effect. Throughout his testimony, the Attorney General cited "the historic"[69] and "longstanding policy [of] the

65 *Id*. at 56.

66 I searched Google as well as the Lexis/Nexis news database, and left a phone message for the Senate Intelligence Committee on August 16, 2017, to which I received no response. Additionally, I e-mailed journalist Gregory Korte of USA Today, who had written a detailed article on the Sessions hearing in mid-June for which I served as a source. I asked Korte if he was aware of any post-hearing follow-up by either the Department of Justice or the Committee. Korte responded that he had "followed up with both DOJ and the committee for a week after [the hearing] trying to figure out if anything came of it. Both seemed content to let the issue lie." He also mentioned that he had submitted a FOIA request and would let me know if he received a substantive response. Our e-mail exchange took place on August 2nd. I sent another e-mail on August 15th to see if Korte had received any new information, and he wrote back that same day to indicate that he was aware of nothing new. (Korte gave me permission to report on our e-mail exchange).

67 At least one commentator suggested that Congress should do just that, thus "call[ing the administration's] bluff." Wright, *supra* note 9.

68 E-mail exchange between Greg Korte and myself, August 2, 2017.

69 *Russian Interference in the U.S. Election*, *supra* note 1, at 25.

Department of Justice not to comment on conversations that the Attorney General had with the president of the United States."[70] During the hearing, Senator Lankford, Republican of Oklahoma, backed up this reference by recounting information disputes in the Obama administration. Addressing Sessions, Lankford stated:

> It seems to be a short memory about some of the statements Eric Holder would and would not make to any committee in the House or the Senate and would or would not turn over documents even requested. They had to go all the way through the court systems for the courts to say no, the president can't hold back documents and the attorney general can't do that. So somehow the accusation that you're not saying every conversation about everything, there's a long history of attorney generals standing beside the president saying there are some conversations that are confidential, and then it can be determined from there.[71]

Later that same day, the Republican National Committee (RNC) wrote and posted a story on its website entitled "Keeping conversations with the president private is nothing new." It offered several examples of the candor rationale's being invoked by the Obama administration to justify withholding information from Congress. Among other things, the RNC cited a 2012 exchange between White House Chief of Staff Jack Lew and CNN reporter Candy Crowley, in which Lew stated that "[e]very president since George Washington has taken executive privilege seriously. Every Republican president has." The RNC also observed that the Obama administration "prefer[red] to avoid" using the term executive privilege "whenever possible," unless the issue was forced by legal developments, "such as a subpoena being issued."[72]

Following the hearing, the Department of Justice circulated two documents, both from 1982, to represent the "historic" and "longstanding" policies to which the Attorney General had referred during the hearing.[73] One is an OLC opinion to the Attorney General from the Assistant Attorney General, entitled "Confidentiality of the Attorney General's Communications in Counseling the President."[74] It discusses the nature and scope of executive privilege for such communications, and other potentially applicable privileges. The second document is a memorandum from President Ronald Reagan to the heads of executive departments and

70 *Id*. at 14.

71 *Id*. at 36.

72 RNC Communications, *Keeping conversations with the president private is nothing new*, Gop.com, June 13, 2017.

73 Charlie Savage, *On Executive Privilege and Sessions's Refusal to Answer Questions*, New York Times, June 16, 2017 at p. A18.

74 Memorandum from Assistant Attorney General Theodore B. Olson to the Attorney General, *Confidentiality of the Attorney General's Communications in Counseling the President*, 6 U.S. Op. Off. Legal Counsel 481 (August 2, 1982).

agencies, entitled "Procedures Governing Responses to Congressional Requests for Information."[75]

It is clear upon review of the memoranda, however, that Sessions' actions were inconsistent with the letter and spirit of both items. To be sure, both documents affirmed the executive branch's commitment to protecting executive privilege, and in particular to guarding the President's ability to speak candidly with his cabinet members and advisors, including the Attorney General. Yet the Reagan memorandum also stressed that "executive privilege will be asserted only in the most compelling circumstances," and only as a last resort where disclosure disputes cannot be resolved through "good faith negotiations" with Congress.[76] The OLC memorandum, while more a description of the governing law than a prescription of policy, cited *AT&T* for the proposition that the branches should strive for a "'spirit of dynamic compromise'" when faced with a dispute.[77] Relatedly, the OLC memorandum acknowledged that the privilege is a qualified one that demands a balancing of interests between the branches.[78] Both documents – particularly the Reagan memorandum – suggest that some give and take on the part of each branch should occur before matters escalate to the point where the President considers invoking executive privilege. Sessions' position turns this formula on its head, implying that the administration will not yield whatsoever, unless and until the President considers executive privilege and decides not to invoke it.

The Reagan memorandum also directed that, in the rare cases in which "it is determined that compliance [with a congressional request] raises a substantial question of executive privilege," Congress should be asked to hold its request in abeyance while the administration determines whether to comply or to invoke executive privilege.[79] Of course, this protocol is considerably more feasible in the context of documentary requests than in the real-time setting of a hearing.[80] Nonetheless, the approach outlined in the memorandum – the same memorandum that the Department produced to support Sessions' statements – is a world

75 Memorandum from President Ronald Reagan to the Heads of Executive Departments and Agencies, *Procedures Governing Responses to Congressional Requests for Information*, November 4, 1982.

76 Reagan Memorandum, *supra* note 75, at 1.

77 Olson Memorandum, *supra* note 74, at 487.

78 *Id*. at 486–8.

79 Reagan Memorandum, *supra* note 75, at 2.

80 John Bies makes this point as well. John E. Bies, *Primer on Executive Privilege and the Executive Branch Approach to Congressional Oversight*, Lawfare.com, June 16, 2017, https://lawfareblog.com/primer-executive-privilege-and-executive-branch-approach-congressional-oversight (accessed 2 Sep. 2017).

apart from the approach taken by Attorney General Sessions.[81] Under the Sessions approach, the mere theoretical possibility that President Trump might wish to claim executive privilege sufficed to shut down an entire category of questions, with no apparent follow-up arranged.

B. Hints of Mitigating Forces

There also is some evidence, in the Sessions testimony and its aftermath, of the political and legal forces that can dull executive privilege's shadow.

Perhaps the most straightforward such evidence is the pushback that Sessions received during the hearing, with a number of Democratic Senators and an Independent Senator accusing Sessions of "stonewalling,"[82] of selectively picking and choosing which presidential discussions to reveal,[83] and of responding nonsensically by refusing either to answer or to invoke a privilege.[84] Sessions also was pressed during the hearing for more information about the longstanding privilege policy of which he spoke, which led to his acknowledging that he was not certain whether the policy was a written one.[85] Within the few days following the hearing, Sessions' indirect reliance on executive privilege also received a fair bit of media attention.[86]

The hearing's very existence also may reflect mitigating political and legal forces. The hearing was, after all, held and held publicly, despite the committee's majority Republican composition. This suggests that Republicans may feel some political pressure to avoid the appearance of enabling a cover-up. The fact that President Trump apparently did not attempt to prevent the testimony from taking place also may reflect some political pressure on the White House, as well as the legal reality – best illustrated by the *Miers* case – that an administration is unlikely to prevail if challenged for refusing to allow an official to so much as show up to testify.

Of course, these hints of countervailing forces are just hints, and they are complicated by contrary indicia. With respect to the hearing's existence, it is important to know that Sessions himself wrote to the committee offering to testify, and used the hearing as a basis to cancel another appearance, previously

81 Andy Wright also points out that the Trump administration did not follow the Reagan memorandum that it circulated. See Wright, *supra* note 9.

82 *Russian Interference in the U.S. Election*, *supra* note 1, at 24 (Sen. Wyden).

83 *Id.* at 34 (Sen. King).

84 *Id.* at 29 (Sen. Heinrich), 33 (Sen. King).

85 *Id.* at 29 (exchange with Senator Heinrich), 47 (exchange with Senator Harris).

86 See sources cited *supra* nn. 6, 7, 9, 73, 80.

scheduled for that same morning, before the Senate Appropriations Committee.[87] With respect to the blowback from Democrats and the media regarding executive privilege, it appears thus far to have had little if any long or even medium-term impact. A cynical interpretation, then, is that the Attorney General and the White House gamed things well, revealing just enough to appear transparent, while indirectly using executive privilege to avoid certain revelations and to lay the groundwork to deter subsequent hearings. A more optimistic take, however, is that political and legal factors make it difficult if not impossible for an administration to avoid providing any information about a matter that has captured the public's attention, or for Congress to ignore that matter entirely. While both institutions have tools at their disposal to manage and contain the flow of information that does emerge, there is always the chance that revelations will breed more revelations and more questions, creating political and legal pressures that exceed the reach of executive privilege and its shadow.

Conclusion

If one were to look only at the number of judicial opinions involving executive privilege disputes between the political branches, one might consider the privilege's impact vanishingly small. That impression would not change much were one's review broadened to encompass occasions on which the President formally invoked the privilege but judicial intervention did not follow. Such impressions, however, would be misleading. Executive privilege's very existence, and political branch actors' awareness of the same, can cast strong shadows on those oversight disputes in which the privilege is not formally invoked, nor even mentioned explicitly.

Whatever one may think of the formal doctrine of executive privilege, the shadow effect extends its actual and potential reach considerably. For example, much of the case law embraces the value of inter-branch negotiations and emphasizes the need to weigh secrecy and oversight interests case by case. At its strongest, however, the shadow effect can take the form of categorical arguments against

87 *Russian Interference in the U.S. Election*, *supra* note 1, at 3–4 (comments by Senator Warner); Pete Williams, Garrett Haake and Ken Dilanian, *Sessions Agrees to Testify About Russia in Public Hearing*, nbcnews.com, June 12, 2017, https://www.nbcnews.com/politics/congress/sessions-agrees-testify-about-russia-public-hearing-n771031 (accessed 2 Sep. 2017); Manu Raju, *Source: Sessions' Plans to Testify Surprised Senate Intelligence Panel Members*, cnn.com, June 11, 2017, http://www.cnn.com/2017/06/11/politics/sessions-intelligence-testimony/index.html (accessed 31 Aug. 2017).

inquiries into broad swaths of information, and a relieved embrace of, or defeated acquiescence in the same by would-be congressional interrogators. More so, the earlier that the shadow effect enables the executive or avoidant congresspersons to nip potential inquiries in the bud – say, by providing an excuse for an oversight law to die in committee, or by leading a committee to avoid calling a witness in the first place to avoid a time-consuming fight – the less exposure that the public has to executive privilege, to its impact, or to debates about its scope.

The Sessions testimony and its aftermath offer a window into the shadow effect, as well as those countervailing forces that keep that effect somewhat in check. Beyond providing a microcosmic view of these phenomena, the testimony and surrounding events may well be a precursor of much more to come. The press continues to report almost daily on alleged interactions between the Trump campaign and Russia, and on alleged efforts by the Trump administration to stymie investigations into the same. Polling suggests that Americans are concerned about these allegations,[88] and also reveal sagging presidential approval ratings.[89] These developments place pressure on congressional Republicans to show that they are not mere presidential lackeys, and thus may invite pushback against future efforts to conjure executive privilege's shadow. Much also depends, of course, on the administration's own actions and statements on this front, on the extent to which congressional Democrats try to force the issue, and on developments in the separate investigation conducted by special counsel Robert Mueller. However these events play out, they will surely shed additional light on the reach of executive privilege's shadow, and on its dynamic interactions with political and legal variables.

Article note: I am grateful to Laura Donohue for assuring me that she does not object to the close parallel between my title and that of her masterful article, *The Shadow of State Secrets*, 159 U. Pa. L. Rev. 77 (2010). Elsewhere, I have discussed the shadow effect of executive privilege together with the shadow effect of state secrets doctrine, and benefitted enormously from Donohue's article in so doing. *See, e.g.*, Heidi Kitrosser, Reclaiming Accountability 99 (2015) (citing Donohue's work to the effect that "[t]he state secrets privilege casts a very long shadow.").

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88 See, e.g. Jennifer Agiesta, *Poll: Trump Finances Fair Game in Russia Investigation*, cnn.com, August 10, 2017, http://www.cnn.com/2017/08/10/politics/cnn-poll-russia-investigation-trump-finances/index.html (accessed 5 Sep. 2017); Dana Blanton, *Fox News Poll: Voters Want Congressional Investigations into Russia*, http://www.foxnews.com/politics/2017/03/16/fox-news-poll-voters-want-congressional-investigations-into-russia.html (accessed 5 Sep. 2017).

89 See e.g. Ronald Brownstein, *Trump Will Have a Very Hard Time Overcoming His Approval Ratings*, cnn.com, September 5, 2017, http://www.cnn.com/2017/09/05/politics/donald-trump-approval-ratings/index.html (accessed 5 Sep. 2017).