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# Executive Privilege Since *United States v. Nixon*: Issues of Motivation and Accommodation

Dawn Johnsen<sup>†</sup>

The events that dominate our national consciousness on this twenty-fifth anniversary of *United States v. Nixon*<sup>1</sup> underscore the value of Mark Rozell's enterprise. What better time to contemplate the shadow cast by President Nixon's Watergate-era abuses on subsequent presidential assertions of executive privilege than as the House of Representatives contemplates the impeachment of another President for, among other things, asserting executive privilege in a manner that allegedly constituted an abuse of power. Independent Counsel Kenneth Starr's inclusion in his impeachment referral of President Clinton's very assertion of executive privilege both evidences and contributes to the vulnerability of the privilege—and to the vulnerability of Presidents willing to assert it.

Professor Rozell and I agree upon much, beginning with the basic legitimacy of the principle of executive privilege. Although both *United States v. Nixon* and the Clinton impeachment inquiry involved criminal investigations, Rozell appropriately focuses primarily on disputes between the executive branch and Congress, the far more typical context in which executive privilege issues arise. Such disputes require balancing the President's need for confidentiality against Congress's legitimate need for executive branch information. I agree with Rozell that “[i]n a democratic republic, the presumption gener-

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1. 418 U.S. 683 (1974).

ally should be in favor of openness, but it is also important to recognize that Presidents have legitimate secrecy needs."<sup>2</sup>

Rozell persuasively argues that President Nixon's shadow has created an imbalance against executive privilege. Presidents fearing criticism, including comparisons to President Nixon, may have been at times unduly reluctant to assert the privilege, or even to address the issue more generally.<sup>3</sup> Rozell opens his article with the promising suggestion that "there is a need to reestablish the legitimacy of executive privilege and an understanding of its proper scope and limits in our constitutional system."<sup>4</sup> Undoubtedly, the legitimacy of executive privilege depends on careful application of a clear and principled understanding of the privilege, particularly in times of a weakened presidency. Rozell devotes surprisingly little attention, however, to defining his view of the "proper scope and limits" of executive privilege or developing a framework for analyzing the legitimacy of assertions of executive privilege.

Instead, the bulk of Rozell's article seeks to describe and assess seriatim every presidential assertion and significant potential assertion of executive privilege since *United States v. Nixon*. As in his previous works, Rozell has created a valuable resource by compiling historical information that can be difficult to obtain. Yet despite our shared basic understandings

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2. Mark J. Rozell, *Executive Privilege and the Modern Presidents: In Nixon's Shadow*, 83 MINN. L. REV. 1069, 1126 (1999).

3. Rozell carries this point too far, however, in arguing that Nixon's successors routinely have concealed their use of executive privilege: "A common tactic is to devise some other phrase or use some other power to justify withholding information when an executive privilege claim would have been appropriate." *Id.* at 1071. As I will discuss, this criticism reflects a fundamental misunderstanding of the elements of the process of accommodation, a longstanding practice by which the President and Congress resolve disputes regarding access to executive branch materials.

I also disagree with Rozell's implicit suggestion that each President should adopt new guidelines on executive privilege. For example, the procedures President Reagan set forth in a 1982 memorandum remain in effect today, and there is great value in such continuity. See Memorandum from President Ronald Reagan to the Heads of Executive Departments and Agencies, Re: Procedures Governing Responses to Congressional Requests for Information (Nov. 4, 1982).

4. Rozell, *supra* note 2, at 1072. I also fully endorse his conclusion that legislation defining and limiting executive privilege is unwarranted—and would add that such legislation might encounter significant constitutional impediments—because Congress possesses ample powers to challenge presidential assertions of executive privilege, including its authorities related to oversight, appropriations, confirmations and impeachment.

about the legitimacy of executive privilege, I find myself disagreeing with his analysis of many of these specific incidents.<sup>5</sup> He often is harshly critical of the actions of Presidents and executive branch officials, though it is difficult to discern a pattern to his criticism. He accuses Presidents in some instances of unjustifiably withholding information from Congress, and elsewhere of inappropriately backing down and withdrawing claims of executive privilege, thereby weakening the privilege.

Criticism from both sides certainly could be warranted if a President fails to act consistently across incidents or Presidents do not act consistently with each other. Yet Rozell's specific criticisms often do not seem based on these or other principled grounds. Moreover, many of the same incidents of which Rozell is most critical seem to me good examples of how the system should work when the President and Congress disagree about the release of executive branch material, with the two branches reaching agreements that seek to accommodate the needs of both. In the end, Rozell's unduly harsh assessments, including likening President Clinton to President Nixon, may contribute to the very problem he decries: the undermining of the legitimacy of executive privilege.

Professor Rozell and I seem to hold disparate conceptions of both the appropriate scope of executive privilege and the optimal process for resolving disputes between Congress and the executive branch about the disclosure of information. And our views on scope and process seem to flow in part from different perspectives on the role that partisan, personal and institutional interests on the parts of both branches can be expected to play in executive privilege disputes. The Framers of the Constitution appreciated that the President and Members of Congress would be political actors, motivated at times by partisanship, personal self-interest, and institutional concerns, and

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5. In some instances, my disagreement stems not from differences in analysis, but from what I view as mistaken characterizations of the relevant facts, which admittedly can be difficult to ascertain in this area. For example, Rozell states that the Bush Administration created a "secret opinions policy" to deny Congress a legal opinion of the Department of Justice's Office of Legal Counsel (OLC). He asserts that "Congress traditionally has not been denied access to OLC decision memoranda." *Id.* at 1114. In fact, the policy of keeping confidential certain sensitive OLC legal opinions was not new to the Bush Administration and is entirely consistent with the principle of executive privilege. Rozell himself notes that President Reagan asserted executive privilege to prevent the release to Congress of OLC legal opinions. *See id.* at 1099.

devised a constitutional system that takes account of these anticipated motivations. So, too, must an appropriate understanding of executive privilege reflect and accommodate this basic political reality. Rozell's analysis would benefit from a fuller consideration of the appropriate contours of executive privilege, and in particular the accommodation process, which is a central feature of executive branch policy in this area and the process actually used to negotiate with Congress to seek to accommodate the legitimate needs of both branches.

A few examples may illustrate the differences in our approaches first to scope and then to process. With regard to scope, Rozell describes executive privilege as appropriately asserted for "shielding materials relating to national security or maintaining the privacy of internal deliberations over official governmental matters."<sup>6</sup> He accurately and approvingly describes the function of the privilege as enabling Presidential advisors "to deliberate and discuss policy options without fear of public disclosure of their every utterance."<sup>7</sup> In application, however, Rozell apparently would require more of Presidents than is suggested by these general descriptions, though what more is not clear.

For example, Rozell harshly criticizes President Clinton's assertions of executive privilege: "The Clinton administration has made elaborate and mostly indefensible claims of executive privilege. Prior to the so-called Lewinsky scandal, the administration made several claims of executive privilege—only one of which appeared designed to protect the constitutional preroga-

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6. *Id.* at 1071. He also describes the privilege as "an accepted doctrine when appropriately applied to two circumstances: (1) certain national security needs and (2) protecting the privacy of White House deliberations when it is in the public interest to do so." *Id.* at 1070. This latter characterization is somewhat narrower, and unduly so, in that it refers only to "White House deliberations." The privilege also is available for deliberative communications that take place elsewhere in the executive branch, as well as for nondeliberative presidential communications. See *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997) (discussed *infra* at note 13); Memorandum from John Harmon, Assistant Attorney General, Office of Legal Counsel, to the Attorney General, Re: The Constitutional Privilege for Executive Branch Deliberations: The Dispute with a House Subcommittee over Documents Concerning the Gasoline Conservation Fee (Jan. 13, 1981) (on file with author). Finally, executive privilege has long been recognized as appropriately asserted to protect information regarding open law enforcement investigations. See 40 Op. Att'y Gen. 45, 46 (1941).

7. Rozell, *supra* note 2, at 1122.

tives of the executive branch.”<sup>8</sup> Although he warns generally of the dangers of facile comparisons of Presidents with President Nixon, Rozell apparently believes that a direct comparison is warranted in the case of President Clinton: “Is it any longer possible to restore the proper balance to the exercise of executive privilege? Because of the Watergate taint and Clinton’s more recent abuses, that may take years to happen.”<sup>9</sup> Rozell, however, fails to substantiate his attempt to associate President Clinton’s use of executive privilege with President Nixon’s Watergate abuses.

President Clinton, for example, asserted executive privilege to prevent the release of a memorandum to the President from the Director of the FBI and the Administrator of the DEA. The memorandum conveyed confidential advice and recommendations regarding the Clinton Administration’s efforts to combat drug trafficking. This was a candid and confidential advice memorandum from two high-ranking executive branch officials to the President. Such a memorandum, typically described as a presidential communication, is widely and properly recognized as falling at the very core of executive privilege.

Of course, executive privilege is a qualified privilege, and the President’s need for confidentiality must be balanced against Congress’s need for the document. Here the Members of Congress who requested the FBI/DEA Memorandum asserted no particularized need for it, such as having a related bill under consideration. Indeed, Rozell references allegations that the request was a politically motivated attempt to embarrass the President in an election year.<sup>10</sup>

Professor Rozell’s brief analysis of this incident does not adequately explain why he views the assertion as indefensible, let alone why it does not meet his own standard of “maintaining the privacy of internal deliberations over governmental matters.” He apparently would require a greater showing of harm to the public interest than the chilling effect on advice and deliberations that the courts, including the Supreme Court, have recognized as supporting the privilege. He also misstates the applicable test for assessing whether congressional need is sufficient to override the privilege, without offering any citation or explanation for his formulation: “Lacking a real threat to na-

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8. *Id.* at 1118 (footnote omitted).

9. *Id.* at 1125.

10. *See id.* at 1121.

tional security or to the public interest posed by revealing internal deliberations, Congress's request for information must override the President's claim of privilege, unless it can be specifically demonstrated that Congress's actions were outside the scope of any legitimate investigation."<sup>11</sup> He goes so far as to suggest that congressional need is adequate "even for pursuit down 'blind alleys.'"<sup>12</sup> In fact, under the controlling case law presidential communications are "presumptively privileged," and the privilege can be overridden in the congressional setting only by a showing that the information is "demonstrably critical to the responsible fulfillment of the [congressional entity's] functions."<sup>13</sup> Citing this "controlling case law," the Attorney General advised President Clinton of her determination that the subcommittee that requested the FBI/DEA Memorandum had failed to make the requisite showing of need to overcome the clearly applicable privilege.<sup>14</sup>

Moreover, Rozell's assessment of this claim of privilege seems to be influenced by what he views as a desire on the part of President Clinton to protect himself from embarrassment that might result from releasing the document.<sup>15</sup> Elsewhere,

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11. *Id.*

12. *Id.*

13. Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 731 (D.C. Cir. 1974). The United States Court of Appeals for the District of Columbia Circuit first articulated this standard in refusing to enforce a subpoena issued by the Senate Select Committee on Presidential Campaign Activities for tape recordings of conversations in President Nixon's offices. *See id.* at 726.

The D.C. Circuit recently reviewed the law of executive privilege, including as discussed in *Senate Select Committee* and *United States v. Nixon*, and confirmed that "the *Nixon* cases establish the contours of the presidential communications privilege." *In re Sealed Case*, 121 F.3d 729, 744 (D.C. Cir. 1997). The court there considered an assertion of executive privilege in the context of an Independent Counsel investigation and held that where the President invokes presidential communications privilege, the documents become presumptively privileged and the privilege is more difficult to surmount than in the more general case of deliberative communications. Moreover, the court held that unlike the deliberative process privilege, which applies only to the deliberative or advice portions of the document sought, the presidential communications privilege encompasses documents in their entirety, including purely factual information, and extends to post-decisional communications. *See id.* at 744-46.

14. Letter from Attorney General Janet Reno to the President (Sept. 30, 1996) (on file with author).

15. Rozell states, "Clinton never made a case that releasing the memorandum would cause any undue harm. It appeared that he only stood to harm his own political standing by releasing a document that contained embar-

too, where he is critical of presidential action, Rozell seems to suggest that an assertion of executive privilege is illegitimate where a President is motivated by a concern that disclosure of information would prove embarrassing. He at times seems to equate an effort to avoid embarrassment with an effort to hide evidence of executive branch wrongdoing.<sup>16</sup> Rozell's analysis thus implicitly raises interesting questions about the role motive should play in executive privilege.

Clearly motive matters. Where a President asserts executive privilege in order to hide evidence of illegal acts or other wrongdoing by high level executive officials, the assertion is illegitimate. In fact, motive matters for both the President and Congress, because both have a constitutional obligation to respect and accommodate the legitimate needs of the other.<sup>17</sup> Both branches also have an obligation to consider the long-term interests of their institutions and the public interest more generally. In some instances, for example, the institutional interests of the presidency may require an assertion of executive privilege that conflicts with other of the President's short-term personal interests, such as where public release of an advice memorandum would reflect well on the President, but would severely chill the willingness of advisers to be candid in the future. Finally, although relevant, motive is extremely difficult to assess. Rarely will there be direct evidence of congressional or presidential motive. Reliance on motive to assess the legitimacy of particular requests for information or assertions of privilege thus must be exercised with caution.

Unlike situations where requested information would reveal executive branch wrongdoing, the fact that release of a deliberative communication to the President likely would embarrass the President typically should not defeat an otherwise

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raising information." Rozell, *supra* note 2, at 1121.

16. For example, Rozell characterizes President George Washington's views on executive privilege as follows: "At no point did [President Washington] believe that a President could withhold information to protect himself from politically embarrassing information or to cover-up conversations about potential wrongdoing in the White House." *Id.* at 1070.

17. The United States Court of Appeals for the District of Columbia Circuit recognized this duty of each branch to accommodate the legitimate needs of the other in considering a House subcommittee's request for executive branch information: "The Constitution contemplates such accommodation. Negotiation between the two branches should thus be viewed as a dynamic process affirmatively furthering the constitutional scheme." *United States v. AT&T*, 567 F.2d 121, 130 (D.C. Cir. 1977).



legitimate claim of privilege. Indeed, it is not merely coincidental, but inherent in the nature of presidential communications that they often could prove embarrassing if publicly released: that is a fundamental reason for the very existence of the privilege. The Supreme Court in *United States v. Nixon* recognized

the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately.<sup>18</sup>

The Department of Justice Office of Legal Counsel also implicitly addressed the inherent connection between the need for confidentiality and potential embarrassment to the President in a 1981 memorandum where it noted that executive branch advisers "may hesitate—out of loyalty or perhaps, as the Supreme Court suggested, out of self-interest—to make remarks that might later be used against their colleagues or superiors."<sup>19</sup> A President's political adversaries can be expected to seek presidential communications and executive branch deliberative information for the very reason that public disclosure might prove embarrassing to the President, which Rozell notes may have been the motivation behind the request for the FBI/DEA Memorandum to President Clinton. The presidential communications privilege rests on a recognition that the public interest is served by allowing Presidents to receive candid advice from their top officials, and confidentiality is critical to the willingness of advisers to be forthcoming, particularly where

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18. 418 U.S. 683, 708 (1974). The Court in *Nixon* held that the need for confidentiality in presidential communications was outweighed by prosecutorial need in the particular context of a criminal trial of President Nixon's close advisers, where President Nixon was named as an unindicted co-conspirator. The Court noted the likely limited effect of its holding: "[W]e cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution." *Id.* at 712.

19. Harmon, *supra* note 6, at 10. The memorandum explained further, "[T]he President must maintain a climate in which executive branch advisers do not feel compelled to write and speak for a larger audience. That is, he must be able to assure his advisers that their deliberations will be made public, if at all, only in exceptional circumstances. Anything that undermines this assurance impairs, to a degree, the ability of the executive branch to perform its constitutional functions. This is the basis of the constitutional privilege for executive branch deliberations.

*Id.* at 10-11.

the advice is potentially embarrassing to the President. Thus, the President's confidentiality needs appropriately may prevail, whether or not the information is personally embarrassing, where Congress has not demonstrated an adequate overriding need.

Difficult cases may arise where the information sought not only would prove embarrassing to the President but arguably would reveal presidential wrongdoing, or where the assertion of the privilege itself otherwise may be viewed as an abuse of power. Although Rozell makes no such claim regarding the FBI/DEA Memorandum, these more difficult questions arise in the context of President Clinton's assertion of executive privilege in Independent Counsel Starr's investigation involving the President and Monica Lewinsky. Again, Rozell attacks President Clinton's motive: "there is little evidence . . . the Clinton White House undertook this drawn-out battle merely to make a principled stand on executive privilege. All evidence to date suggests that Clinton used executive privilege to frustrate and delay the investigation . . ." <sup>20</sup> Although Rozell does not address the issue of impeachment, his criticism is similar to that of Independent Counsel Starr, who in his impeachment referral and testimony before the House Judiciary Committee charged President Clinton with abuse of power for these and other assertions of privilege in the course of Starr's investigation.

A thorough analysis of the Lewinsky assertion, including how the analysis changes as executive privilege moves from the congressional to the independent counsel and impeachment settings, is not possible here. Again, though, Rozell oversimplifies in condemning the assertion, which in my view clearly does not constitute an impeachable offense.

Independent Counsel Starr had contended that executive privilege was wholly inapplicable because what was at issue was the President's personal, not official, conduct. Starr therefore claimed the right to compel presidential advisers to testify before the grand jury without any showing of particularized need to overcome the privilege. The district court rejected this argument, agreeing instead with the President that the communications at issue involved official matters, such as impeachment, domestic and foreign policy matters, and assertions of official privileges, arising out of the independent counsel investigation involving the President's personal relationship with

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20. Rozell, *supra* note 2, at 1124.

Lewinsky.<sup>21</sup> The district court therefore required Starr to make an *ex parte* showing of need to the court, and then, not surprisingly, ruled that under the applicable test, Starr's need for evidence in a criminal investigation outweighed the President's need for confidentiality.<sup>22</sup> After prevailing on the legal principle in dispute, but losing in its application to his own situation, the President declined to appeal. Although this assertion of executive privilege fairly may be criticized, particularly with the benefit of hindsight, an issue of principle was involved and on this issue the court ruled for the President.

Rozell also describes as indefensible President Clinton's assertion of executive privilege in the context of a House committee investigation of the termination of employees of the White House Travel Office. This assertion was appropriate in my view. The factual background and issues raised are quite complex and not fully considered by Rozell. The Attorney General explained the basis for the assertion in a publicly released letter to the President advising him that the assertion would be appropriate.<sup>23</sup> Briefly, of particular importance was that the congressional request was highly unusual and intrusive in that it sought confidential documents prepared by the Office of White House Counsel in order to assist the President and his staff in responding to the very House committee that made the request. The request thereby threatened the ability of the President to have the effective assistance of his White House Counsel in considering privilege and other issues of importance

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21. Clearly, as the court noted, "[p]urely private conversations that did not touch on any aspect of the President's official duties or relate in some manner to presidential decision-making would not properly fall within the executive privilege." *In re Grand Jury Proceedings*, 5 F. Supp. 2d 21, 26 (D.D.C.), *aff'd in part, rev'd in part sub nom. In re Lindsey*, 158 F.3d 1263 (D.C. Cir.), *and cert denied*, 119 S. Ct. 466 (1998) (footnote omitted). The court appropriately recognized, however, that "the President does need to address personal matters in the context of his official decisions." *Id.*

22. The court required Independent Counsel Starr to demonstrate "first, that each discrete group of the subpoenaed materials likely contains important evidence; and second that this evidence is not available with due diligence elsewhere." *Id.* at 28 (quoting *In re Sealed Case*, 121 F.3d 729, 754 (D.C. Cir. 1997)).

23. See Letter from Attorney General Janet Reno to the President (May 23, 1996) (on file with author); see also Letters from Jack Quinn, Counsel to the President, to William F. Clinger, Jr., Chairman, Committee on Government Reform and Oversight, U.S. House of Representatives (May 3, May 9, May 30, June 25, and Aug. 15, 1996) (on file with author) (describing factual background and legal basis for assertion of privilege).

to the presidency that often arise in congressional oversight investigations.

Perhaps more fundamental than my differences with Rozell over the scope of executive privilege are our disparate views about the appropriate process to be followed to resolve information disputes between Congress and the executive branch. To summarize some recurring themes in Rozell's analysis with which I disagree: Rozell criticizes Presidents since President Nixon for seeking to avoid personally asserting executive privilege and for asserting the privilege only as a last resort. He accuses Presidents of improperly "inventing" other rationales for noncompliance with congressional requests for information, often to promote personal or partisan interests. He applauds Congress when it forces the President to invoke executive privilege and criticizes the executive branch when it reaches an accommodation with Congress, implying that ultimate resolution of disputes demonstrates the illegitimacy of earlier executive branch objections. He evaluates disputes in terms of which branch was the victor and which the loser.

In my view, Rozell's assessments rest on a fundamentally misguided approach to executive privilege. For reasons I will discuss, I believe that direct presidential involvement in responding to congressional requests for information should be avoided whenever possible. I agree that only Presidents may assert executive privilege in disputes with Congress, but they should do so only when absolutely necessary, only as a last resort, typically late in the process. Other executive branch officials first should seek to accommodate Congress's legitimate needs and exhaust alternatives, which requires them to express to Congress their concerns about confidentiality in terms other than assertions of executive privilege. Congress should be respectful of these confidentiality concerns and not demand that the President personally assert executive privilege where legislative needs do not outweigh confidentiality concerns. And, finally, reaching an accommodation with Congress, even late in the game, does not inherently constitute a loss for the executive branch, threatening to the legitimacy of executive privilege. Nor does it demonstrate that the executive branch was unjustified in raising confidentiality concerns.

My views are consistent with the accommodation process actually used to resolve disputes between the executive branch and Congress. There certainly is room to differ about the optimal process to be followed. But Rozell does not critique or find

fault with the accommodation process; he fails even to acknowledge that Presidents and executive branch officials are following a process. Rozell instead impugns Presidents' motives, accusing President Bush, for example, of being "crafty" and "hidden-hand[ed]" and intentionally concealing his use of executive privilege by devising inappropriate grounds for withholding information.<sup>24</sup> In fact, many of the executive branch actions of which Rozell is harshly critical were entirely consistent with long-standing and principled executive branch practice.

When viewed through the lens of the accommodation process, greater consistency emerges across the incidents Rozell attributes to individual Presidents' personal motivations and distinct approaches to the issue of executive privilege. For example, Rozell characterizes "Bush's strategy" as seeking to "further the cause of withholding information by *not* invoking executive privilege," but instead by "cloak[ing] the use of executive privilege under different names."<sup>25</sup> There may well be ascertainable differences in Presidents' willingness to accommodate congressional requests for information, as well as in the relative value Presidents place on openness in government. To the extent that differences exist, I would tend to favor greater openness, as apparently Rozell would. Rozell's analysis, however, does not establish such differences, nor does it explain why he condemns Bush for being "crafty, even hidden-hand[ed]," while he praises Ford's "cautious, non-confrontational approach" of "avoid[ing] the phrase 'executive privilege' and us[ing] other legal bases for withholding information."<sup>26</sup>

The practice of seeking to avoid a formal assertion of executive privilege and first discussing confidentiality concerns in other terms is, in my view, a central and valuable component of the accommodation process, not the "strategy" of a single President. Moreover, differences among incidents and Presidents often seem attributable to Congress, including to the role politics plays in motivating the congressional requests. For example, the number and nature of congressional requests vary to a

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24. See Rozell, *supra* note 2, at 1103 ("[A] number of controversies during his presidency bring to light how his administration exercised that power in a crafty, even hidden-hand, fashion.").

25. *Id.* at 1102.

26. *Id.* at 1082.

significant degree with whether the same political party that commands majorities in Congress also occupies the presidency.

The accommodation process effectively takes account of the institutional, partisan and personal interests that may arise in disputes between Congress and the President over executive branch information. This long-standing practice is premised on a respect for Congress as a coordinate branch of government with legitimate needs for information that sometimes conflict with the executive branch's needs for confidentiality. Both branches have a constitutional obligation to work together in good faith to resolve such conflicts. Often the initial congressional request for executive branch information seeks more than is legitimately needed, particularly in times of divided government where partisanship is more likely a factor. In response, executive branch officials, typically—and appropriately—acting at this stage without presidential involvement, convey to Congress their confidentiality concerns in terms other than executive privilege. Executive branch policy prohibits an assertion of privilege until the President and the Attorney General are satisfied that the executive branch has discharged its constitutional duty to accommodate Congress's legitimate needs.<sup>27</sup> Typical accommodations include Congress substantially narrowing its initial request, or the executive branch briefing members of Congress on the subject matter of the requested documents, or the executive branch showing—but not relinquishing control of—the documents to particular members of Congress. It misses the point to attempt to categorize such resolutions in terms of wins and losses.

The reality of congressional oversight of the executive branch is not a neat theoretical world but one that requires the messy give and take of negotiations. The institutional conflicts and political motivations sometimes inherent in this aspect of the relationship between the President and Congress are best resolved through a process that allows for flexibility, a balancing of competing interests, and compromise. As part of this process of achieving appropriate accommodations, executive branch officials must convey to Congress their confidentiality concerns in terms other than executive privilege. Far from being a “hidden-hand[ed]” or “crafty” attempt to avoid presidential involvement, this process maximizes the likelihood of reaching an appropriate accommodation of Congress's needs.

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27. See Harmon, *supra* note 6, at 16.

Only when this process fails is presidential invocation of executive privilege appropriate. The alternative of routine early involvement by the President seems impractical, insufficiently respectful of Congress, and likely to encourage the solidification of positions on both sides.

Executive privilege is unlikely ever to be a popular constitutional principle, or even one well understood by the general public. In times of constitutional crisis and a weakened presidency, assertions of executive privilege become particularly easy targets. It is precisely during such times of difficulty, however, that respect for the principle of executive privilege, and maintaining a principled approach to the application of the privilege, is most critical.

Returning to the months following Watergate proves instructive. In reaction to President Nixon's failed attempt to use executive privilege to withhold certain tape recordings containing evidence of wrongdoing, Congress considered legislation to limit the ability of Presidents to assert executive privilege. Now-Supreme Court Justice Antonin Scalia, who was then serving as the Assistant Attorney General for the Office of Legal Counsel, had the unenviable task of defending executive privilege before a Senate subcommittee considering the legislation. He informed the subcommittee that its bill would unconstitutionally infringe on the President's authority to assert executive privilege.

Now, as then, the President's authority to assert executive privilege in appropriate circumstances constitutes a vital component of our constitutional system of government. To quote from Assistant Attorney General Scalia's Senate testimony in 1975:

I realize that anyone saying a few kind words about Executive privilege after the events of the last few years is in a position somewhat akin to the man preaching the virtues of water after the Johnstown flood, or the utility of fire after the burning of Chicago. But fire and water are, for all that, essential elements of human existence. And Executive privilege is indispensable to the functioning of our system of checks and balances and separation of powers.<sup>28</sup>

I would add that the President personally bears a special burden to safeguard the principle of executive privilege. Each

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28. *Executive Privilege—Secrecy in Government: Hearings Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Gov't Operations*, 94th Cong. 125 (1975) (statement of Antonin Scalia, Assistant Attorney General, Office of Legal Counsel).

President has a responsibility to preserve the constitutional authorities of the office. President Nixon's assertion of executive privilege for the purpose of hiding wrongdoing clearly weakened executive privilege. So, too, may less egregious, yet unwise presidential assertions. In other instances, though, the good of the presidency may require Presidents to assert executive privilege, even at high personal costs where unfair comparisons to President Nixon are sure to follow.



