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A Response to Professor Johnsen

Mark J. Rozell†

I generally do not believe that it is either necessary or fruitful to respond to responses. I will nonetheless break precedent here to briefly object to Dawn Johnsen's essay. In trying to pick apart my research she repeatedly both misrepresents the facts and my positions. Apparently only she sees the truth whereas others are guilty of mischaracterizations. In the end, she squanders a nice opportunity to contribute something valuable to the debate over executive privilege. Sai Prakash shows the way and though I disagree with his interpretation, clearly Professor Johnsen can learn much from him about good scholarship and argumentative tone.

In light of Professor Johnsen's previous position in the Office of Legal Counsel for the Clinton administration she might feel a bit defensive about the President's actions on executive privilege. It was her job to represent the President's interests in these matters and that surely must have been a tall order. But she destroys her credibility as an academic discussant by presenting a heavy-handed and overly defensive justification for presidential actions with which no credible scholar to my knowledge would agree.

Perhaps she makes a good point here and there in the essay, as many of these more recent events are open to interpretation and all of us are struggling to work with an incomplete record of information on issues of executive privilege. I might, for example, concede that the President's stand on the Freeh memorandum had some merit and I certainly agree that the Burton committee did not always engage in good faith negotiations during that controversy. But in her zeal to attack my presentation of the events she misses the key points that I make: (1) that it weakens executive privilege for a president to assert that power as some kind of opening bid in a negotiating process and then to back down; and (2) that the congressional

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power of investigation must override executive privilege unless the president's claim meets the proper standards for asserting that power.

Neither time nor space allows a full response to Professor Johnsen's many misrepresentations of my article. I would nonetheless like to point out some egregious examples. She claims that I am "harshly critical" of presidents and that I don't convey a "pattern" of criticism. Yet elsewhere she discerns a pattern and then objects to the pattern that I developed (of modern presidents inventing other bases for executive privilege to hide embarrassments and then frequently capitulating, doing further damage to this power). She wrongly conveys the impression that I am dogmatically opposed to presidents using executive privilege and that I am somehow concerned with adding up wins and losses in presidential-congressional battles over access to information.¹ She completely misstates my view in suggesting that I do not properly respect the needs of candid advice within the White House. She claims that I misstate the applicable test of whether Congress's request for information overrides a claim of executive privilege when in fact I am merely presenting my own normative assessments and not describing the controlling case law. Just because I disagree with a judicial interpretation on the proper use of executive privilege that does not mean, as Professor Johnsen claims, that I misstate some facts or ignore some piece of evidence.²

Elsewhere Professor Johnsen discusses the issue of political accommodation as though I am completely oblivious to its role in resolving inter-branch disputes. Then she says that I criticize the executive branch "when it reaches an accommodation with Congress." Not only a contradiction, that statement is just flat-out wrong. I criticize presidents who say that they

1. This criticism is truly ironic. I wrote my book on executive privilege directly as a challenge to Raoul Berger's dogmatically anti-executive privilege tone. I recognize the legitimacy of executive privilege, when properly invoked. If there is any sense that the current article conveys an anti-presidential tone, it is only because of the particular actions of presidents in the post-Watergate period—the focus of this work.

2. Furthermore, just because the President's Attorney General sides with the President in a dispute with Congress doesn't mean that the President was right and Congress wrong. In the particular controversy to which Professor Johnsen refers, Attorney General Reno indeed cited the controlling case law but in so doing rendered an incorrect interpretation as I explain in the essay.

are taking a principled stand and then back down because it is politically expedient to do so in the short-term. Either be serious about using executive privilege or don't use it at all. That power should be rarely used and only for the most compelling reasons and is not to be exercised as something in a lawyer's arsenal of tactics to bid with against adversaries.

Professor Johnsen says in a footnote that I am wrong to suggest that the practice of keeping OLC legal opinions secret originated with the Bush presidency. I never said that. She implies that I am in error to say that the Bush administration created a secret opinions policy to deny Congress access to a Justice Department memorandum. But that is exactly what happened in one case.³

Professor Johnsen blasts me for speculating about presidential motives in asserting executive privilege, although she discusses motives herself. She tries to score some rhetorical points by comparing my criticisms of President Clinton's actions to those of the Independent Counsel Kenneth Starr. I can understand how in the current overheated political environment this comparison is supposed to be the kiss of death, but let's not forget that we're contributing works of scholarship here and not scoring political points. Besides, Starr prevailed on most of the various privilege issues before the courts, so perhaps I should wear the comparison as a badge of honor. Yet Professor Johnsen suggests that the White House, not the OIC, prevailed in the court on the issue of executive privilege. That Judge Norma Holloway Johnson reaffirmed the legitimacy of executive privilege was not exactly some kind of stirring victory for the White House. Does anyone other than Professor Johnsen actually believe that the President undertook these battles merely for the purpose of protecting the constitutionality of executive privilege rather than as a delaying tactic? Cannot she acknowledge that the Clinton White House made at least some mistakes in refusing to release documents or in the efforts to prevent certain individuals from testifying before

3. See *Department of Justice Authorization for Appropriations, Fiscal Year 1992, Before the Committee on the Judiciary, U.S. House of Representatives*, 102d Cong., at 76-85 (1991) (statement of Steven R. Ross, General Counsel to the Clerk of the House of Representatives). If I follow her point in footnote 5, Professor Johnsen is suggesting that I argue that the secret opinions policy set the precedent for the denying to Congress of secret OLC legal opinions. That is an erroneous reading of my essay and I cannot understand how she came to that conclusion.

the grand jury? By defending Clinton's every action Professor Johnsen surely raises doubts about her own objectivity.

In criticizing my approach to executive privilege Professor Johnsen writes: "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." We can all agree to that. I devoted the better part of a book arguing the very point that the messy give and take of the separation of powers system is the only mechanism for resolving executive privilege disputes.⁴ That is why I don't believe that Congress should adopt statutory guidelines on executive privilege. But again Professor Johnsen contradicts herself. She also claims that there is a need to devote much attention to defining the proper scope and limits of executive privilege and to base decisions in this area on principles.⁵ Ultimately it is unclear in her essay whether disputes over executive privilege are in the neat theoretical world in which principles are the guide or in the land of give and take. She asserts some of her own guidelines but they are so vague it is unclear how they might help to resolve executive privilege disputes. How do the guidelines of greater "flexibility," "balance," and "compromise" get us any closer to understanding how to resolve these disputes?

Professor Johnsen's overriding argument is that my approach to executive privilege is "fundamentally misguided." Ultimately she undercuts her own argument. She says that she agrees with me on the basic legitimacy of executive privilege; that it is proper to focus such research on legislative-executive disputes rather than judicial-executive ones; that in a democratic system the presumption must be in favor of openness but that presidents have secrecy needs; that Nixon created an imbalance against executive privilege; and that Congress should not pass statutory guidelines on executive privilege. How can she agree with almost all of my major arguments and then say that my approach is "fundamentally misguided?"⁶

4. MARK J. ROZELL, *EXECUTIVE PRIVILEGE: THE DILEMMA OF SECRECY AND DEMOCRATIC ACCOUNTABILITY* (1994).

5. Professor Johnsen is disturbed that I do not spend what she considers enough space in this essay to fully explain the proper scope and limits of executive privilege. I have written another essay on that topic alone, *Executive Privilege: Definition and Standards of Application*, *PRESIDENTIAL STUDIES QUARTERLY* (forthcoming December 1999).

6. Although Professor Johnsen says that she agrees with me on the issue of openness, I see absolutely nothing in her article to lend credibility to that

statement. She is in favor of resisting legislative and independent counsel claims for information, giving ground over time only through what she calls a process of "accommodation." The process of accommodation that she favors is entirely one-sided.

