

# EXECUTIVE PRIVILEGE REVIVED?: SECRECY AND CONFLICT DURING THE BUSH PRESIDENCY

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## INTRODUCTION

Although well established now as a legitimate presidential power, executive privilege remains controversial. Executive privilege is controversial in part because some presidents have overreached in exercising this authority. Presidential attempts to conceal evidence of wrongdoing during the Watergate scandal that led to President Richard Nixon's resignation and during the scandal that led to President Bill Clinton's impeachment gave executive privilege a bad name.

The phrase "executive privilege" does not appear in the Constitution. To be precise, that phrase was not a part of the common language until President Eisenhower's administration, leading some to suggest that executive privilege therefore cannot be constitutional.<sup>1</sup> These semantic, textualist challenges to executive privilege's constitutionality fail when viewed through a broader, historical lens of past

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† Professor and Chair, Department of Politics, The Catholic University of America, Washington, D.C. Ph.D., 1987, University of Virginia (American Government). This Essay is based on a paper presented at the *Duke Law Journal's* Administrative Law Conference held at the Duke University School of Law on March 29, 2002. Subsequent to the Conference but prior to publication in this issue of the *Duke Law Journal*, an earlier draft of this Essay provided a partial basis for a chapter in the second edition of my book on executive privilege. See MARK J. ROZELL, EXECUTIVE PRIVILEGE: PRESIDENTIAL POWER, SECRECY, AND ACCOUNTABILITY ch. 6 (rev. ed., Univ. Press of Kansas © 2002) I am grateful to both the other conference participants and the editors of the *Duke Law Journal* for their many helpful comments and suggestions. In addition, I appreciate the helpful comments of Lou Fisher on an earlier draft of this Essay.

1. See RAOUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 1-2 (1974) (arguing that executive privilege is unconstitutional and a "myth" because the "very words 'executive privilege' were conjoined only yesterday, in 1958"); Saikrishna Bangalore Prakash, *A Critical Comment on the Constitutionality of Executive Privilege*, 83 MINN. L. REV. 1143, 1146 (1999) (asserting that the existence of executive privilege is not supported by the Constitution, because it is neither explicitly nor implicitly mentioned in the text).

interbranch disputes. In fact, every president since George Washington has exercised some form of what is today called executive privilege, regardless of the words used to describe their actions.<sup>2</sup> As Louis Fisher has pointed out, “[o]ne could play similar word games with ‘impoundment,’ also of recent vintage, but only by ignoring the fact that, under different names, Presidents have from an early date declined to spend funds appropriated by Congress.”<sup>3</sup>

Executive privilege is an implied power derived from Article II.<sup>4</sup> It is most easily defined as the right of the president and high-level executive branch officers to withhold information from those who have compulsory power—Congress and the courts (and therefore, ultimately, the public). This right is not absolute, as executive privilege is often subject to the compulsory powers of the other branches. The modern understanding of executive privilege has evolved over a long period as the result of presidential actions, official administration policies, and court decisions. Today, executive privilege is considered most legitimate when used to protect, first, certain national security needs, and second, the confidentiality of White House deliberations when it is in the public interest to do so. Related to the second, executive privilege may be appropriate in circumstances where confidentiality is necessary to protect ongoing executive branch investigations.

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2. Mark J. Rozell, *Executive Privilege and the Modern Presidents: In Nixon's Shadow*, 83 MINN. L. REV. 1069, 1070 (1999).

3. Louis Fisher, *Raoul Berger on Public Law*, 8 POL. SCI. REV. 173, 181 (1978) (reviewing RAUL BERGER, *CONGRESS V. THE SUPREME COURT* (1969)).

4. See *United States v. Nixon*, 418 U.S. 683, 705 (1974) (“Whatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Art. II powers, the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties.”). The key members of the Committee of Style at the Constitutional Convention—Alexander Hamilton, Rufus King, and Gouverneur Morris—shaped the language of Article II to allow the executive to exercise vast powers. The Vesting Clause, U.S. CONST. art. II, § 1, the lack of any enumeration of duties in the Commander in Chief Clause, U.S. CONST. art. II, § 2, and the many silences about such powers as war, diplomacy, and control over executive departments all left the president with a vast reserve of unspecified authority. Several selections from the Federalist Papers support the exercise of executive branch secrecy. See THE FEDERALIST NO. 64, at 392–93 (John Jay) (Clinton Rossiter ed., 1961) (noting that “[i]t seldom happens in the negotiation of treaties . . . but that perfect *secrecy* and immediate *dispatch* are sometimes requisite,” and asserting that “[t]he convention [*sic*] have done well, therefore, in so disposing of the power of making treaties that although the President must, in forming them, act by the advice and consent of the Senate, yet he will be able to manage the business of intelligence in such manner as prudence may suggest”); THE FEDERALIST NO. 70, at 424 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (stating that “[d]ecision, activity, secrecy, and dispatch” are valuable characteristics for an executive to have).

After the Watergate scandal, several presidents exercised executive privilege either very cautiously or ineffectively. Not until the Clinton administration did a post-Watergate president make a concerted effort to exercise this presidential power.<sup>5</sup> Yet, most of President Clinton's uses of executive privilege were indefensible because he asserted this power in circumstances that were far beyond widely accepted norms. In the early stages of his administration, President George W. Bush has already made substantial use of executive privilege in circumstances where the exercise of that power is highly debatable.

This Essay focuses on the various uses of executive privilege during the early stage of President George W. Bush's administration. President Bush has exercised the privilege in an attempt to reestablish what he perceives as a more correct balance of powers between the legislative and executive branches. Still, because President Bush has departed from recognized executive privilege norms, he has ultimately weakened executive privilege.

## I. BACKGROUND

The most important modern articulation of executive privilege standards was the Reagan administration's executive privilege memorandum.<sup>6</sup> On November 4, 1982, President Ronald Reagan issued an executive privilege memorandum to heads of executive departments and agencies. The Reagan procedures were generally similar to those in a 1969 Nixon executive privilege memorandum.<sup>7</sup> For example, President Reagan's guidelines affirmed the administration policy "to comply with Congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch."<sup>8</sup> The memorandum reaffirmed the need for "confidentiality of some communications,"<sup>9</sup> and added that executive privilege would be used "only in the most compelling circumstances, and only after careful review demonstrate[d] that assertion of the

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5. Rozell, *supra* note 2, at 1071-72.

6. Memorandum from Ronald Reagan, President of the United States, to the Heads of Executive Departments and Agencies (Nov. 4, 1982) (on file with the *Duke Law Journal*).

7. For a general discussion of President Nixon's policy on executive privilege in general and on the 1969 memorandum in particular, see MARK J. ROZELL, EXECUTIVE PRIVILEGE: THE DILEMMA OF SECRECY AND DEMOCRATIC ACCOUNTABILITY 63-66 (1994).

8. Memorandum from Ronald Reagan, *supra* note 6, at 1.

9. *Id.*

privilege [was] necessary.”<sup>10</sup> Finally, the memorandum stated that “executive privilege [would] not be invoked without specific Presidential authorization.”<sup>11</sup>

The Reagan memorandum nonetheless developed clearer procedures than had existed before. All congressional requests for information would be accommodated unless “compliance raise[d] a substantial question of executive privilege.”<sup>12</sup> Such a question would arise if the information “might significantly impair the national security (including the conduct of foreign relations), the deliberative processes of the Executive Branch or other aspects of the performance of the Executive Branch’s constitutional duties.”<sup>13</sup> Under these procedures, if a department head believed that a congressional request for information might concern privileged information, he would notify and consult with both the attorney general and the counsel to the president. Those three individuals would then decide to release the information to Congress, or have the matter submitted to the president for a decision if any one of them believed that it was necessary to invoke executive privilege. At that point, the department head would ask Congress to await a presidential decision. If the president chose executive privilege, he would instruct the department head to inform Congress “that the claim of executive privilege [was] being made with the specific approval of the President.”<sup>14</sup> The Reagan memorandum allowed for the use of executive privilege even if the information originated from staff levels far removed from the Oval Office.

The George H. W. Bush administration did not adopt any new formal executive privilege procedures.

In 1994, the Clinton administration issued a memorandum that defined new procedures for handling executive privilege disputes.<sup>15</sup> The Clinton administration adopted the very broad view that all White House communications are presumptively privileged.<sup>16</sup> Fur-

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10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 1–2.

14. *Id.* at 2.

15. Memorandum from Lloyd N. Cutler, Special Counsel to the President, to All Executive Department and Agency General Counsels (Sept. 28, 1994) (on file with the *Duke Law Journal*).

16. *See id.* at 1 (“In circumstances involving communications relating to investigations of personal wrongdoing by government officials, it is our practice not to assert executive privilege, either in judicial proceedings or in congressional investigations and hearings.”).

thermore, the administration's position was that Congress has a less valid claim to executive branch information when conducting oversight than when conducting legislation.<sup>17</sup>

## II. GEORGE W. BUSH'S EXERCISE OF EXECUTIVE PRIVILEGE

In the early stages of the Bush presidency, the administration was involved in three policy disputes that either had implications for the development of executive privilege or had a direct claim of privilege by the president. It became clear early in President Bush's term that the president was committed to regaining lost ground on executive privilege. President Bush wanted to both revitalize executive privilege and expand the scope of that power substantially. President Bush's actions appear motivated by his belief in the sovereignty of the executive branch.

Nonetheless, President Bush chose some very nontraditional cases for reestablishing executive privilege. In one case, he tried to expand the scope of executive privilege for former presidents, and even to allow them to transfer this constitutional authority under Article II to designated representatives. In another case, the Bush administration tried to expand executive privilege to protect Department of Justice (DOJ) documents from investigations long ago closed. To date, the common thread in the Bush administration cases is the use of executive privilege in circumstances where there is little precedent for such action. In so doing, President Bush has contributed to the further downgrading of executive privilege rather than achieving his purpose of reaffirming this constitutional principle.

### A. *The Presidential Records Act of 1978 and Executive Order 13223*

In 1978, Congress passed the Presidential Records Act<sup>18</sup> to estab-

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17. See Letter from Janet Reno, Attorney General, U.S. Department of Justice, to William Jefferson Clinton, President of the United States 3 (Sept. 20, 1996) (on file with the *Duke Law Journal*) (“[I]t is clear that Congressional needs for information [in the context of oversight of the Administration’s position towards human rights abuses in Haiti] will weigh substantially less in the constitutional balancing than a specific need in connection with the consideration of legislation.”); Letter from Janet Reno, Attorney General, U.S. Department of Justice, to William Jefferson Clinton, President of the United States 2 (Sept. 30, 1996) (on file with the *Duke Law Journal*) (asserting that Congress’s “generalized interest” in the oversight of counter-narcotics policy “weighs substantially less in the constitutional balancing than a specific need in connection with the consideration of legislation”).

18. Presidential Records Act of 1978, Pub. L. No. 95-591, § 2(a), 92 Stat. 2523, 2523-27 (codified as amended at 42 U.S.C. §§ 2201-2207 (2000)).

lish procedures for the public release of the papers of presidential administrations. The Act allowed for the public release of presidential papers twelve years after a president had left office. The principle behind the law was that these presidential records ultimately belong to the public and should be made available for inspection within a reasonable period of time. Section 2206 of the Act gave responsibility for implementing this principle to the National Archives and Records Administration (NARA).<sup>19</sup> The 1978 Act retained the public disclosure exemptions of the Freedom of Information Act so that certain materials involving national security or state secrets could be withheld from public view for longer than the twelve-year period.<sup>20</sup>

On January 18, 1989, President Reagan issued Executive Order 12267,<sup>21</sup> which expanded certain implementation regulations of NARA. President Reagan's executive order identified three situations in which records could be withheld: national security, law enforcement, and the deliberative process privilege of the executive branch.<sup>22</sup> The executive order gave a sitting president primary authority to assert privilege over the records of a former president.<sup>23</sup> Furthermore, although Executive Order 12267 recognized that a former president has the right to claim executive privilege over his administration's papers, the archivist of the United States did not have to abide by his claim. The incumbent president could override the archivist with a claim of executive privilege, but only during a thirty-day review period.<sup>24</sup> After that period, absent a formal claim of executive privilege, the documents were to be automatically released.

On November 1, 2001, President George W. Bush issued Executive Order 13233<sup>25</sup> to supercede President Reagan's executive order and to vastly expand the scope of privileges available to current and former presidents. President Bush's executive order dropped the law enforcement category and added two others: the presidential communications privilege and the attorney-client or attorney work product privileges. Under the new executive order, former presidents may assert executive privilege over their own papers, even if the incum-

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19. 44 U.S.C. § 2206 (2000).

20. *Id.* § 2204(c)(1).

21. Exec. Order No. 12,667, 3 C.F.R. 208 (1989), *reprinted in* 44 U.S.C. § 2204 (2000).

22. *Id.* § 1(g), 3 C.F.R. at 208.

23. *Id.* § 3, 3 C.F.R. at 209.

24. *Id.* § 4(b), 3 C.F.R. at 210.

25. Exec. Order No. 13,233, 3 C.F.R. 815 (2001), *reprinted in* 44 U.S.C.A. § 2204 (Supp. 2002).

bent president disagrees.<sup>26</sup> Indeed, President Bush's executive order also gives a sitting president the power to assert executive privilege over a past administration's papers, even if the former president disagrees.<sup>27</sup> President Bush's standard therefore allows any claim of privilege over old documents by an incumbent or past president to stand.<sup>28</sup> Furthermore, the Bush executive order requires anyone seeking to overcome constitutionally based privileges to have a "demonstrated, specific need" for presidential records.<sup>29</sup> The Presidential Records Act of 1978 did not contain such a high obstacle for those seeking access to presidential documents to overcome. Thus, under the Bush executive order, the presumption is always in favor of secrecy, whereas previously, the general presumption was in favor of openness.

The Bush executive order set off challenges by public advocacy groups, academic professional organizations, press groups, and some members of Congress. All were concerned that the executive order vastly expanded the scope of governmental secrecy in a way that was damaging to democratic institutions. Several groups, including the American Historical Association, the Organization of American Historians, and Public Citizen, initiated a lawsuit to have the executive order overturned. Congress held hearings that were highly critical of the executive order.<sup>30</sup> Although the controversy remains unresolved in 2002, it is clear that President Bush's executive order improperly supercedes an Act of Congress and attempts to expand executive privilege far beyond the traditional standards for the exercise of that power.

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26. *Id.* § 3(d)(1)(ii), 3 C.F.R. at 817.

27. *Id.* § 3(d)(2)(ii), 3 C.F.R. at 817.

28. See Letter from Alberto R. Gonzales, Counsel to the President, to Steve Horn, United States House of Representatives 1 (Nov. 2, 2001) (on file with the *Duke Law Journal*) (explaining that former presidents "are to have the primary responsibility for asserting privileges over the records of a former President" but that the sitting president may assert such privileges in "compelling circumstances" even against the wishes of a former president); Exec. Order No. 13,233 § 3(d), 3 C.F.R. at 817.

29. Exec. Order No. 13,233 § 2(c), 3 C.F.R. at 816 (quoting *United States v. Nixon*, 418 U.S. 683, 713 (1977)).

30. See, e.g., *Hearings Regarding Executive Order 13,233 and the Presidential Records Act Before the House Subcomm. on Gov't Efficiency, Fin. Mgmt. & Intergovernmental Relations and the House Comm. on Gov't Reform*, 107th Cong. 30 (2001) [hereinafter *Hearings Regarding Executive Order 13,233*] (statement of Professor Anna K. Nelson, American University) ("[T]he Bush Administration, unwittingly perhaps, has thwarted the intention of Congress to open these government records to the public.").

Thus, the groups opposed to the president's action were correct for the following reasons. First, the handling of presidential papers is a matter that should be handled by statute and not by executive order. Presidential papers are ultimately public documents—a part of our national records—and are paid for with public funds. They should not be treated merely as private papers.

Second, although there is legal precedent for allowing an ex-president to assert executive privilege,<sup>31</sup> the standard for allowing such a claim is very high, and executive privilege cannot stand merely because an ex-president has some personal or political interest in preserving secrecy.<sup>32</sup> An ex-president's interest in maintaining confidentiality erodes substantially once he leaves office, and it continues to erode even further over time.<sup>33</sup> The Bush executive order does not acknowledge any such limitation on a former president's interest in confidentiality.

Third, the executive order makes it easy for such claims by former presidents to stand, and almost impossible for those challenging the claims to get information in a timely way. The legal constraints will effectively delay requests for information for years as these matters are fought out in the courts. These obstacles alone will settle the issue in favor of former presidents, because many with an interest in access to information will conclude that they do not have the ability or the resources to stake a viable challenge. The burden will shift from those who must justify withholding information to fall instead on those who have made a claim for access to information.

Fourth, executive privilege may actually be frivolous in this case because there are already other secrecy protections in place for national security purposes. In a nutshell, the Bush administration is trying to expand executive privilege substantially to cover what existing statutes and regulations already cover. Furthermore, a general interest in confidentiality is not enough to sustain a claim of executive

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31. *See* *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 449 (1976) (adopting the solicitor general's view that some constitutionally based privileges "survive[] the individual President's tenure").

32. *See id.* at 439 ("We reject the argument that only an incumbent President may assert [the presidential privilege of confidentiality] and hold that appellant, as a former President, may also be heard to assert [it].").

33. *Id.* at 451.



privilege over old documents that may go back as far as twenty years.<sup>34</sup>

### *B. Cheney Energy Task Force*

President Bush appointed Vice President Richard Cheney to direct an energy policy task force for the purpose of developing the administration's energy policy. In April 2001, two Democratic members of Congress, Henry Waxman and John Dingell, requested information from Vice President Cheney about the composition and activities of the task force. Their request was in response to press reports that the task force had been meeting in secrecy with representatives of various groups that had a direct interest in the development of a national energy policy. The lawmakers asked the General Accounting Office (GAO) to investigate the activities of the task force. The GAO initially responded with a broad-based request for information about the task force meetings. The GAO also requested information regarding the identities of individuals present at task force meetings, the identities of persons consulted by the task force about the development of energy policy, and the costs of the meetings. The vice president's counsel mostly refused this request and provided only a limited number of documents that the GAO considered unhelpful. After several months of wrangling over access to the information, on August 2, 2001, the vice president wrote to Congress that the GAO lacked authority to seek access to the task force information. According to Vice President Cheney, the GAO only has the authority to review the results of programs, and not to seek information from a task force involved in program development.

Comptroller General of the United States David Walker strongly objected to the assertion that the GAO's scope of authority is limited to reviewing program results. Nonetheless, the GAO narrowed the scope of its information request and decided to seek only the names of advisers to the task force, the dates, locations and the subjects of meetings. The GAO and the members of Congress had thus dropped

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34. *E.g.*, *Hearings Regarding Executive Order 13,233*, *supra* note 30, at 52 (statement of Professor Mark J. Rozell, The Catholic University of America); *see also Hearings on "H.R. 4187, the Presidential Records Act Amendments of 2002" Before the House Subcomm. on Gov't Efficiency, Fin. Mgmt. & Intergovernmental Relations*, 107th Cong. 1 (2002) (statement of Mark J. Rozell) (concluding that "it is well within congressional authority . . . to define the process for claiming and resolving executive privilege claims that arise from requests for the papers of past administrations").

their insistence that Vice President Cheney disclose substantive details about discussions that took place in those meetings.

The conflict between the GAO and the vice president's office appeared headed to a court showdown until the terrorist attacks on the United States on September 11, 2001. Walker issued a statement in late September that the dispute remained unresolved, but that "given our current national focus on combating terrorism and enhancing homeland security, this matter is not a current priority."<sup>35</sup> On January 27, 2002, Vice President Cheney declared that the administration was steadfast in its refusal to provide even the most basic information about the meetings because of an important principle involved: that to do so would contribute to a further withering away of traditional presidential prerogatives. The conservative group Judicial Watch filed a lawsuit against the Cheney task force to try to compel public disclosure of information about the names of persons who had met with the task force.<sup>36</sup> The liberal National Resources Defense Council also initiated a lawsuit to get access to administration information on the development of energy policy.<sup>37</sup> On January 30, 2002, the GAO announced its intention to initiate a lawsuit to force Vice President Cheney to reveal the names of the participants in the task force meetings and to give other details about the meetings.<sup>38</sup>

At this writing, this controversy has not resulted in a direct presidential claim of privilege. Nonetheless, in his August 2 letter to the Congress, Vice President Cheney asserted that to provide the information requested by GAO would interfere with the constitutional duties of the executive branch by undermining the confidentiality of internal deliberations. Walker correctly pointed out that Vice President Cheney had thereby introduced "the same language and reasoning as assertions of Executive Privilege."<sup>39</sup> Walker also noted that the GAO had merely requested factual information, such as the names of per-

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35. Press Release, David M. Walker, Comptroller General of the United States, U.S. General Accounting Office, Statement on the National Energy Policy Development Group (Sept. 28, 2001) (on file with the *Duke Law Journal*).

36. *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group*, 219 F. Supp. 2d 20 (D.D.C. 2002).

37. *Nat'l Res. Def. Council v. Dep't of Energy*, 191 F. Supp. 2d 41 (D.D.C. 2002).

38. The GAO later did file a suit. See *Walker v. Cheney*, No. 02-0340 (D.D.C. filed Feb. 22, 2002).

39. Letter from David M. Walker, Comptroller General of the United States, U.S. General Accounting Office, to J. Dennis Hastert, Speaker of the House of Representatives 4 (Aug. 17, 2001) (on file with the *Duke Law Journal*).

sons who attended meetings and the costs of meetings, and not deliberative information.<sup>40</sup>

Because of this narrow scope of inquiry, any claim of executive privilege in this controversy, whether made explicitly by the president or implicitly by the vice president, lacked credibility. The vice president was on stronger ground in his refusal to cooperate with the initial request for information about the task force in the summer of 2001 because that inquiry was overly broad. The definition of “records” sought initially by GAO went on for half a page, reaching to e-mails, voicemails, drawings, plans, checks and canceled checks, bank statements, ledgers, books, diaries, logs, video recordings, telexes, notes, invoices, and drafts. Because of that initially broad information request, it is plausible that Vice President Cheney perceived the later narrowed request as merely a first effort by the GAO to ultimately drag him into a multistep process of getting more and more detailed information over time. Vice President Cheney may also have been concerned that releasing the names of those who met with the administration task force would result in those individuals being called in the future to testify to Congress. Nonetheless, these concerns are not sufficient to sustain a claim of executive privilege, because the narrow scope of the GAO request for information does not involve either direct presidential decisionmaking or even deliberative matters. Thus, the administration has pursued a two-pronged strategy of: (1) making the traditional arguments for executive privilege without making a formal claim of that principle, and (2) claiming that the GAO lacks statutory authority to access executive branch information about task force matters.

Whether the administration succeeds in a legal battle with the GAO depends on a number of factors unknown at this writing. For example, it is conceivable that a court would rule that Congress has not exhausted all of its mechanisms for getting the information, including holding hearings, issuing subpoenas, and that there is no legal resolution available unless Congress does so. It is also possible that Congress indeed will hold direct hearings and issue subpoenas, at which point the administration may respond differently.

### *C. Department of Justice Documents and Congressional Oversight*

President Bush made his first formal claim of executive privilege

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40. *Id.* at 2.

on December 12, 2001. This claim was in response to a congressional subpoena for prosecutorial records from the DOJ. The House Government Reform Committee, chaired by Representative Dan Burton, was investigating two separate matters that concerned DOJ decisionmaking. First, the committee was examining the decision by former Attorney General Janet Reno to refuse to appoint an independent counsel to investigate allegations of campaign finance abuses in the 1996 Clinton-Gore campaign. Second, the committee was examining allegations of FBI corruption in its Boston office's handling of organized crime in the 1960s and 1970s. The committee made it clear that it was not requesting DOJ documents or other materials pertaining to any ongoing criminal investigations.

President Bush instructed Attorney General John Ashcroft not to comply with the congressional request for any deliberative documents from the DOJ. Ashcroft clashed with Burton over the administration's refusal to cooperate with the legislative investigations. At the core of this battle was a dispute over whether an administration can withhold any and all documents that involve prosecutorial matters, even if those matters are officially closed. Burton and members of the committee were upset that the Bush administration was trying to expand the scope of its authority to withhold information from Congress by refusing documents from terminated DOJ investigations. They were also upset that the Bush DOJ had declared that the unfinished investigation of the 1996 campaign finance controversy was closed. Burton and his colleagues clearly believed that Reno had hampered legitimate investigations, and that President Bush's desire to have certain Clinton-era controversies ended had the effect of denying full public disclosure of governmental misconduct. Burton penned a strongly worded letter to Ashcroft protesting the administration's "inflexible adherence to the position" that all deliberative materials from the DOJ be routinely withheld from Congress.<sup>41</sup> Burton pointed out that the administration had not made a valid claim of executive privilege and therefore had no right to withhold the documents requested by his committee.<sup>42</sup>

White House Counsel Alberto Gonzales recommended that the president assert executive privilege in response to any congressional

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41. Letter from Dan Burton, Chairman, House of Representatives Committee on Government Reform, to John Ashcroft, Attorney General, U.S. Department of Justice 1 (Aug. 29, 2001) (on file with the *Duke Law Journal*).

42. *Id.* at 2.

subpoena for the documents or if Ashcroft appeared before the committee. The committee subpoenaed the documents and called Ashcroft to appear at a hearing on September 13, 2001. Because of the terrorist attacks two days before the scheduled hearing, Ashcroft's appearance was delayed. A new hearing was then scheduled for December 13, 2001. President Bush wrote a memorandum to Ashcroft asserting executive privilege.<sup>43</sup> At the hearing (Ashcroft was not present), Burton fumed "This is not a monarchy . . . [t]he legislative branch has oversight responsibility to make sure there is no corruption in the executive branch."<sup>44</sup> In place of Ashcroft, the chief of staff of the DOJ Criminal Division issued the administration's statement before the committee. The statement claimed that revealing information about DOJ investigations would have a "chilling effect" on future DOJ deliberations. Nonetheless, during the hearing, the witness, Michael Horowitz, admitted that although the administration had adopted the policy that Congress should never receive access to deliberative documents, in the future, the DOJ could conduct a case-by-case analysis of the validity of congressional requests for such documents.<sup>45</sup> This statement indicated for the first time that there was some flexibility on the administration's part with regard to the principle of withholding deliberative materials.

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43. Memorandum from George W. Bush, President of the United States, to the Attorney General 1 (Dec. 12, 2001) (on file with the *Duke Law Journal*).

44. See Ellen Nakashima, *Bush Invokes Privilege on Hill*, WASH. POST, Dec. 14, 2001, at A43 (quoting Burton).

45. See 1 *Investigation into Allegations of Justice Department Misconduct in New England: Hearings Before the Comm. on Gov't Reform*, 107th Cong. 382 (2001) [hereinafter *Investigation into Allegations*] (statement of Michael E. Horowitz, Chief of Staff, Criminal Division, U.S. Department of Justice) ("[W]e remain willing to work informally with the committee to provide the information to the committee about the decisions related to these subpoenaed documents that you had not previously requested . . ."). This prepared statement is a truly unimpressive brief on behalf of the administration's claim of privilege. It contains a string of unconnected quotations taken out of context to try to prove the obvious point that administrations have secrecy needs. The statement never gets beyond broad generalities to make a case why secrecy was needed in this particular dispute. Some of the evidence presented is simply wrong (e.g., the claim that George Washington withheld all information from Congress in the St. Clair incident), leaves out important facts (e.g., that four days after a former Bush administration stand on executive privilege, the president relented and gave everything to Congress), and claims as authoritative a widely discredited assertion by former attorney general Benjamin Civiletti that allowing members of Congress to investigate the process of federal prosecutions would destroy the civil liberties of persons under investigation. BENJAMIN R. CIVILETTI, *JUSTICE UNBALANCED: CONGRESS AND PROSECUTORIAL DISCRETION* 5-6 (The Heritage Foundation, Lecture No. 472, 1993).

President Bush's executive privilege memorandum to Ashcroft emphasized the deliberative nature of some of the prosecutorial materials requested by the committee. The president also expressed concern that releasing materials regarding confidential recommendations to an attorney general "would inhibit the candor necessary to the effectiveness of the deliberative processes by which the Department [of Justice] makes prosecutorial decisions."<sup>46</sup> More vaguely, the president asserted the separation of powers doctrine and the need "to protect individual liberty," and he stated that "congressional access to these documents would be contrary to the national interest."<sup>47</sup>

The DOJ followed with a letter to Burton emphasizing the president's assertion of executive privilege over the subpoenaed documents and expressing a desire to reach some accommodation. Assistant Attorney General Daniel Bryant expressed the unwillingness of the DOJ to release certain memoranda pertaining to Reno's decision not to appoint a special counsel to investigate allegations of campaign improprieties in the 1996 Clinton-Gore campaign.<sup>48</sup> Regarding the investigation of allegations of FBI corruption, he expressed at some length the DOJ's willingness to "work together" with the committee to provide "additional information without compromising the principles maintained by the executive branch."<sup>49</sup> Burton responded that the offer of accommodation was meaningless because, ultimately, the administration remained unwilling to allow the committee to review the most crucial documents for the purposes of an investigation.<sup>50</sup> Gonzales followed with the assurance that the administration did not have a "bright-line policy" of withholding all deliberative documents from Congress.<sup>51</sup> Yet Gonzales continued that, with regard to such

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46. Bush, *supra* note 43, at 1.

47. *Id.*

48. See Letter from Daniel J. Bryant, Assistant Attorney General, Office of Legislative Affairs, U.S. Department of Justice, to Dan Burton, Chairman, House of Representatives Committee on Government Reform 1 (Dec. 19, 2001) (on file with the *Duke Law Journal*) ("The Department has a strong confidentiality interest in the extremely sensitive prosecutorial decisionmaking documents called for by the subpoenas.").

49. *Id.* at 2.

50. See Letter from Dan Burton, Chairman, House of Representatives Committee on Government Reform, to John Ashcroft, Attorney General, U.S. Department of Justice 1-2 (Jan. 3, 2002) (on file with the *Duke Law Journal*) ("[I]f you were prepared to advise the President to invoke executive privilege over the . . . documents, there is little likelihood that you would ever permit Congress to receive deliberative memoranda.").

51. Letter from Alberto R. Gonzales, Counsel to the President, to Dan Burton, Chairman, House of Representatives Committee on Government Reform 1 (Jan. 10, 2002) (on file with the *Duke Law Journal*).

memoranda, “the Executive Branch has traditionally protected those highly sensitive deliberative documents against public or congressional disclosure,”<sup>52</sup> a characterization that Burton strongly rejected.<sup>53</sup>

It is truly puzzling that President Bush took his first official executive privilege stand over materials concerning closed DOJ investigations. The Bush administration had made it clear that it was necessary to regain the lost ground of executive privilege after the years of Clinton scandals and misuses of that power. Yet it chose to regain some of that lost ground in a circumstances in which there appeared little justification for the exercise of that power. There were no national security implications to the legislative investigation. There was no clear public interest at stake in protecting old investigative documents and other materials. This claim of privilege did not even fall into the category of protecting the integrity of ongoing criminal investigations.

The dispute over certain DOJ documents became especially heated when news stories reported that the FBI had abused its authority when it investigated organized crime in the 1960s and 1970s. There was credible evidence that the FBI had caused the wrongful imprisonment of at least one person while it protected a government witness who committed multiple murders even while he was in protection. Burton demanded access to ten key DOJ documents in order to investigate the allegations of wrongful conduct by the FBI.<sup>54</sup> The documents that Burton requested were, on average, twenty-two years old.<sup>55</sup> The administration refused to turn over DOJ documents, and Burton threatened to take this controversy to the courts.

Burton had the complete support of the committee, as evidenced by a February 6, 2002, hearing at which all the members, Republican and Democrat alike, joined in lambasting the administration’s actions, and declared their intention to carry the fight for the documents as far

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52. *Id.*

53. *Id.*; Letter from Dan Burton, Chairman, House of Representatives Committee on Government Reform, to Alberto R. Gonzales, Counsel to the President 2 (Jan. 11, 2002) (on file with the *Duke Law Journal*).

54. Letter from Dan Burton, Chairman, House of Representatives Committee on Government Reform, to John Ashcroft, Attorney General, U.S. Department of Justice 2 (Feb. 4, 2002) (on file with the *Duke Law Journal*).

55. *Id.*

as necessary.<sup>56</sup> The complete unanimity of the committee was remarkable, especially given that the administration—during a period of war and with extraordinary high levels of public approval—had made direct appeals for support to GOP members of the committee on the eve of the hearing. At the opening of the hearing, several GOP members openly declared their disdain for this tactic, and said that, regardless of party affiliation or of a president's popularity, they were ready to defend Congress's prerogatives.

The administration witness at the hearing, Daniel Bryant, an assistant attorney general in the DOJ Office of Legislative Affairs, asserted the position that all prosecutorial documents are "presumptively privileged" and never available for congressional inspection.<sup>57</sup> This claim ran counter to a long history of congressional access to DOJ prosecutorial documents, especially in cases of closed investigations where the need for secrecy has disappeared.<sup>58</sup> It also appeared to run counter to earlier administration policy clarifications that there was no blanket policy of withholding such materials from Congress. Bryant stated that the administration was willing to give an oral presentation about the general contents of the disputed documents to members of the committee, but not to allow the members to actually see the documents.<sup>59</sup> This offer only brought more comments of disdain from committee members.

On March 1, 2002, the two sides reached an accommodation in which the committee would be permitted to openly view six of the ten disputed documents. The agreement allowed both sides to declare victory. The committee claimed that it had won the right to access to the most important documents that were necessary for its investigation of the Boston FBI office scandal. The administration took the

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56. *See* 1 *Investigation into Allegations*, *supra* note 45, at 471 (statement of Henry A. Waxman, Representative in Congress from the State of California) ("This administration's effort to operate in secret goes far beyond national security or any other important national interest."); *Id.* at 481–82 (statement of Charles E. Grassley, U.S. Senator from the State of Iowa) ("I fear that there is a widespread, deliberate policy by agencies to deny or delay giving information to Congress . . . . Getting to the bottom of the . . . scandal and fixing the cause of this injustice far outweighs any need to preserve the deliberate process.").

57. *Id.* at 505 (statement of Daniel J. Bryant, Assistant Attorney General, Office of Legislative Affairs, U.S. Department of Justice).

58. *See id.* at 516 (statement of Professor Mark J. Rozell, The Catholic University of America) (providing three examples in which Congress received access to DOJ deliberative documents).

59. *Id.* at 504 (statement of Daniel J. Bryant, Assistant Attorney General, Office of Legislative Affairs, U.S. Department of Justice).



view that it had allowed access only to a narrow category of documents—in this case, those that concerned an indicted FBI agent were considered necessary to Congress's oversight function. The administration continued to insist that it did not have to give Congress access to deliberative documents. Ultimately, the committee accepted this agreement because of a lack of a consensus that members should instead continue to push for all ten documents. The administration prevailed in withholding three key documents pertaining to Reno's decision not to appoint a special counsel to investigate campaign finance abuses by the 1996 Clinton-Gore campaign. The inability of the committee to achieve a total victory indeed reflected the unwillingness of certain Democratic members to push for these three documents.

The resolution of this controversy was somewhat reminiscent of many former executive privilege battles, especially the ones during the Reagan years. In each of those battles the administration staked out a strong stand on executive privilege and signaled a refusal to compromise; Congress persisted and used its authority to pressure the administration to turn over the disputed materials; the administration ultimately relented on either all the documents, or at least the key ones; both sides walked away and declared victory. In this case though, the committee achieved only a partial victory. Furthermore, that the administration held the line on certain categories of documents signaled the likelihood of additional such information disputes between the branches during the Bush presidency.

### III. EXECUTIVE PRIVILEGE IN THE EARLY GEORGE W. BUSH PRESIDENCY SUMMARIZED

Although President Bush wanted to quickly reestablish executive privilege, he attempted to do so in his first year in office by means of some very nontraditional cases. One case concerned executive privilege for former presidents and with regard to the papers of past administrations. The common standard is that a former president's interest in maintaining secrecy over his administration's documents wanes substantially over time. President Bush's executive order attempts to override an act of Congress and to vastly expand presidential privileges for ex-presidents. A second controversy concerned the exercise of a form of executive privilege by a sitting vice president. The common standard for years has been that presidents alone have the authority to either assert executive privilege or to direct an ad-

ministration official to do so. Even though Vice President Cheney did not use the words “executive privilege” in refusing access to information, he used legal language and justifications identical to an actual claim of executive privilege. Furthermore, Vice President Cheney did not assert the right to withhold deliberative materials or presidential advice but rather very benign seeming factual information such as names of people present at certain meetings of the task force and the costs and the subjects of those meetings. The third controversy again involved protecting materials from closed, not ongoing, criminal investigations.

None of these cases concerned national security. The administration never made a convincing case that there was some strong public interest involved in protecting the release of these materials to Congress. With the nation at war abroad and fighting terrorism domestically, it is not hard to imagine a stronger circumstance in which the administration might stake a claim to executive privilege to protect national security and the public interest. In its first months in office, the Bush administration instead made some flimsy attempts at restoring executive privilege.

President Bush’s efforts on executive privilege nonetheless were consistent with an overall administration strategy of attempting to tip the balance of federal governmental powers increasingly in favor of the executive branch. If the administration sustains strong public support for the war on terror, then it stands to reason that the president will continue to try to enhance his ability to exercise greater powers with fewer congressional restraints. Such a scenario creates the likelihood of future battles with Congress over executive privilege.

#### CONCLUSION

What is the current standing of executive privilege? The debate on executive privilege over the past generation has shifted significantly. Few any longer call it a “myth.” The principle of executive privilege is widely accepted today, although there is considerable debate about the parameters of this presidential power. It certainly has not helped that the George W. Bush administration has overreached in its exercise of this power.

To clarify the parameters of this power, some advocate the adoption of a statutory definition of executive privilege, and others express the hope that future court decisions will provide more guidance and specificity over executive privilege. Yet neither proposed solution is

necessary or desirable. The resolution to conflicts over executive privilege resides in the theory of separation of powers as envisioned by the framers of the Constitution. Congress and the courts possess the institutional powers needed to challenge presidential exercises of executive privilege. So long as the other branches vigorously protect their prerogatives, presidential misuses of executive privilege will be curtailed. There is no need for a legislatively or judicially imposed solution to prevent such possible future misuses of executive privilege when these branches already possess the constitutional powers needed to successfully challenge presidents.

The early stage of the Bush administration demonstrates that even during periods of high popularity, presidents are often constrained in their efforts to expand or overreach their constitutional authority. President Bush has revived the national debate over executive privilege. He shows little interest in backing away from battles with Congress over this presidential power. It is thus likely that the debate over executive privilege will continue, as long as Congress still vigorously challenges presidential assertions of that power.