

Just How Privileged? (Five Key Points About Executive Privilege)

Welcome to CONSTITUTIONAL CONTEXT. This is Professor Glenn Smith with another “five-minute bite of background about the Court and Constitution.”

“Executive privilege” is in the air a lot these days. Amid speculation about whether President Trump would claim executive privilege to limit the testimony of officials at congressional hearings -- and with high-profile officials declining to answer legislator questions amid hints that they wanted to give the President room to eventually claim executive privilege -- you might be wondering what the fuss is all about.

You might want to keep five key points in mind:

First, the words “executive privilege” don’t appear anywhere in the Constitution. Rather, the president’s privilege to withhold details of conversations with subordinates is an implication drawn by judges and others. The implication is based on the Constitution’s separation of national-government powers into distinctly executive and legislative functions needing to preserve their independence from each other. Executive privilege also reflects, as a unanimous Court put it in *United States v. Nixon* (the “Watergate tapes” case), “[t]he President’s need for complete candor and objectivity from advisers.”

A second point: Although some legal privileges are absolute – for example, presidents are absolutely immune from civil lawsuits seeking money damages for official actions they perform – executive privilege is only a “qualified” privilege. As the Supreme Court held in the *Nixon* case, the assertion of executive privilege can come into “confrontation with” (and need to be weighted against) “other values” such as “our historic commitment to the rule of law”.

A third key point is that the sole Supreme Court precedent about executive privilege – the *Nixon* tapes case I’ve already referenced – only defines the scope of executive privilege in a relatively specialized context. The unanimous *Nixon* Court held that the president’s “generalized” concern about confidentiality in communications (that is, one not claimed to protect specific national-security secrets) must bow to the need for participants in criminal trials to have access to “demonstrably relevant” evidence.

So, if current investigations into Russian interference in American elections and possible American collaboration lead to criminal charges and prosecutions, we might well be in a situation in which one or more defendants seek communications involving President Trump for which a claim of executive privilege might be made. This would require application, and could lead to elaboration, of the *Nixon* precedent.

But a fourth and related point is that the *Nixon* holding says little about the current context in which executive privilege is being discussed – namely, potential assertion of privilege in the face of congressional inquiries. Although a subject of great speculation

among legal scholars and pundits, the question of exactly how strong a generalized presidential executive-privilege assertion is in the face of Congress' need for information to conduct its oversight and law-reform functions remains unclear. Among many other issues, in resolving this very different balancing act defenders of Congress and the people's "right to know" would have to grapple with *Nixon* case language discounting the impact of required disclosure in the criminal context because such requests would be "infrequent." Of course, Congress-versus-president tussles over executive communications are frequent and predictable.

Finally, and most important, the reason for a lack of judicial precedent on executive privilege in the congressional-hearing context -- there are really only two lower-court rulings over the last several decades -- is that presidents and congresses usually find it in their mutual self-interest to negotiate out-of-court resolutions. To date, both presidents and congresses have decided that it is wise to avoid an uncertain judicial verdict.

Whether this pattern of ultimate compromise and keeping executive privilege out of the nation's courtrooms continues into this most unusual of political eras remains to be seen.