

Does Executive Privilege Apply to the Communications of a President-elect?

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Former White House Chief Strategist [Stephen Bannon](#) and outgoing White House Communications Director [Hope Hicks](#) both appeared recently before closed-door meetings of the House Permanent Select Committee on Intelligence as part of the Committee’s ongoing investigation into Russian involvement in the 2016 election. [According to reports](#), Mr. Bannon did not answer questions relating to the transition period between the election and inauguration. Ms. Hicks answered “[most](#),” but not all, of the Committee’s questions relating to that time period. One threshold question that appears central to these reports is whether executive privilege attaches to communications involving a President-elect prior to his inauguration.

Executive privilege (or what is sometimes referred to by [lower courts](#) as the [presidential communications privilege](#)) is a relatively nebulous, constitutional privilege that protects the confidentiality of presidential communications [on the grounds that](#) “[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.” The Supreme Court’s only significant analysis of executive privilege (privilege) comes from a pair of cases involving President Nixon’s unsuccessful attempts to maintain control over his communications and records. In [United States v. Nixon](#) (*Nixon I*), the Court rejected then-President Nixon’s attempts to quash a judicial subpoena issued at the request of a special prosecutor for recordings of conversations the President had in the oval office with close advisors regarding the Watergate break-in. In that case, the Court determined that “absent a [] need to protect military, diplomatic, or sensitive national security secrets,” the President’s “generalized interest in confidentiality” was outweighed by the “demonstrated, specific need for evidence in a pending criminal trial.”

Three years later, after President Nixon had resigned, the Court again disagreed with the former President’s broad conception of the privilege—this time in relation to the disposition of his records after he left office. In [Nixon v. GSA](#) (*Nixon II*), the Court rejected Nixon’s challenge to the Presidential

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Recordings and Materials Preservation Act, a statute that nullified an arrangement that gave the former President control over his own presidential records and instead established a process to secure and preserve Nixon's records with the General Services Administration. Although the Court concluded that a former President may assert the privilege over communications that occurred while in office, any ongoing expectation of confidentiality was "subject to erosion over time...."

Both opinions [acknowledged](#) the "legitimate governmental interest in the confidentiality of communications between high government officials," and specifically recognized the privilege as an implied constitutional principle, [derived](#) from "the supremacy of the Executive Branch within its assigned area of constitutional responsibilities" and "inextricably rooted in the separation of powers." In addition, however, the cases established two key limiting principles. First, the privilege is [not](#) "[absolute](#)" and must be assessed in a manner that "preserves the essential functions of each branch." Most claims of privilege, therefore, require a balancing of the President's need for confidentiality with either the judicial or [legislative](#) branches' need for the information sought. In *Nixon I*, the Court expressly abstained from addressing the appropriate balancing if Congress (in the context of a congressional investigation) was seeking the information rather than a prosecutor (in the context of a criminal case). The [D.C. Circuit](#), however, has held that in order to overcome the privilege, Congress would need to show that "the subpoenaed evidence is demonstrably critical to the responsible fulfillment of the [investigating] Committee's functions." [Second](#), "the privilege is limited to communications 'in performance of the President's responsibilities,' 'of his office,' and made 'in the process of shaping policies and making decisions....'" Thus, not all presidential communications are protected.

Neither of the *Nixon* opinions had any reason to reference whether the privilege applies to communications made prior to taking office. However, the opinions do suggest that the privilege attaches to the "office" of the President, originating from the President's Article II powers and protecting those communications made in connection to the exercise of the powers of the Presidency. For example, in *Nixon I*, the Court suggested that the privilege applies to communications made in the "discharge of a President's powers" or in the "performance" of the "responsibilities" of "his office." In *Nixon II*, the Court noted that although the protections of the privilege survive the end of a President's term, it is "only the incumbent [that] is charged with performance of the executive duty under the Constitution." Other lower courts have similarly viewed the privilege as "[the President's alone](#)." Similar reasoning has been applied to other Presidential privileges. For example, in *Clinton v. Jones*, the Supreme Court did not extend the protections of presidential immunity to acts taken before assuming office on the grounds that such "unofficial acts" do not relate to the "performance of particular functions of [the President's] office."

The President-elect is not the President and does not exercise statutory or constitutional powers or responsibilities of that office. This conclusion flows from the text of the Constitution itself, which [vests](#) "[t]he executive Power" only in a single "President of the United States." Moreover, the Constitution [prevents](#) the President-elect from "enter[ing] on the Execution of his Office" until he has taken the constitutionally required oath, which cannot occur until the expiration of his predecessor's term on January 20th, at which point the new President's term "[shall begin](#)." The only federal court to directly address the privilege's application to a President-elect (a Kansas district court) adopted this line of reasoning, [concluding](#) that neither *Nixon I* nor *Nixon II* can be read to "extend the privilege to presidents-elect."

It is conceivable, however, that a court could apply a more functional analysis to extend aspects of the privilege to a President-elect. This line of argument would likely stem from the fact that the Court has viewed the privilege as [protecting](#) the "effectiveness of the executive decision-making process." In *Nixon I*, the Court explained that the privilege exists to ensure that the President and his advisors are "free to explore alternatives in the process of shaping policies and making decisions" without fear of disclosure. Similarly, in *Nixon II*, the Court suggested that the privilege encourages the "the full and frank submissions of facts and opinions upon which effective discharge of his duties depends." Numerous

important decisions occur during a transition, and indeed, advice provided to a President-elect may then later serve as the basis for a decision made after assuming office. For example, a President-elect and his transition staff typically engage in discussions and deliberations regarding appointments to be made once the President-elect becomes the President. To the extent that protecting such communications is essential to [defend](#) the “the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking,” it could potentially be covered by the privilege. It should be noted, however, that no court to date has ever adopted such a view.

Even if, for purposes of argument, the privilege is viewed as extending to certain communications between a President-elect and his transition staff, it nevertheless would seem arguable that the privilege may apply with less weight given that such an extension would appear to lack the same direct grounding in the Constitution that characterizes the privilege for incumbent Presidents. Courts have previously identified a variety of situations in which covered communications receive diminished protections; for example, after significant [time has passed](#), when the incumbent president [does not support](#) the assertion of a former president, or where the President has made [public disclosures](#) about the communications. If this reasoning were adopted, it would likely influence the weight a reviewing court would accord to the President-elect’s “confidentiality interests” when balancing those interests against Congress’s need for the communications as part of a congressional investigation.

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