

Executive Privilege and Presidential Communications: Judicial Principles

May 12, 2022

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May 12, 2022

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Executive Privilege and Presidential Communications: Judicial Principles

The presidential communications privilege (Communications Privilege) derives implicitly from the President's powers under Article II of the U.S. Constitution and the separation of powers, and has been justified by the need to protect the confidentiality of the President's decisionmaking process. The Communications Privilege's foundation lay in the proposition that in making judgments and reaching decisions, the President and his advisers must be free to candidly discuss issues, express opinions, and explore options without fear that those deliberations will later be made public.

Today, the Communications Privilege is qualified, rather than absolute, and applies only to confidential communications made in support of official presidential decisionmaking that directly involve the President or close presidential advisers. This, however, was not always so, and for the vast majority of American history, the existence and appropriate scope of the Communications Privilege was uncertain and nearly untouched by the courts.

It was not until the years during and immediately following the Nixon Administration—what has been arguably called the defining era of the Communications Privilege's judicial development—that the courts first established the Communications Privilege's existence and began to delineate its application in criminal and civil proceedings, as well as its use in response to Congress's exercise of oversight and legislative powers. In *United States v. Nixon*, *Senate Select Committee v. Nixon*, *Nixon v. Administrator of General Services*, and *Dellums v. Powell*, the judiciary established the basic contours of the Communications Privilege, including its constitutional source and how it must generally be balanced in any given situation against the public's interest in disclosure.

Significant judicial decisions addressing presidential assertions of the Communications Privilege since the Nixon era have been relatively rare. While executive privilege disputes between Congress and the executive branch have arisen in nearly every subsequent Administration, no appellate court has directly addressed the merits of a claim of Privilege by a sitting President in the congressional investigation context since *Senate Select* in 1974. There have, however, been a handful of important appellate opinions in other contexts—such as *In re Sealed Case* and *Judicial Watch v. DOJ*—that provide added specificity to the scope and boundaries of the Communications Privilege and may inform its application in the congressional setting. These opinions by the U.S. Court of Appeals for the District of Columbia Circuit bind district courts within that circuit, but do not hold the same precedential value as decisions of the Supreme Court.

The courts also appear to have established that former Presidents retain the ability to assert executive privilege over protected communications that occurred during their term of office. The Communications Privilege protects the presidency, however, and not individual Presidents; therefore, the strength and the ultimate success of any privilege claim by a former President appears to be highly influenced by whether that claim is supported by the sitting President.

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Introduction

Presidents have claimed a right to withhold their communications from Congress since the start of the Republic.¹ Congress's resistance to such claims, however, is just as grounded in history.² The resulting, recurring, and often prominent disagreements over what has come to be known broadly as "executive privilege" tend to place in opposition two implied and often competing constitutional principles: Congress's right to obtain information necessary to carry out its legislative functions and the President's interest in protecting the confidentiality of his (and sometimes his subordinates') communications.³

Unlike more traditional legal disagreements between parties, resolution of these inter-branch executive privilege disputes has not historically come from the courts. Instead, when conflict has been avoided, it has typically been because of a process of compromise and accommodation in which absolute claims—for either access or confidentiality—are relinquished and replaced by a negotiated resolution acceptable to both Congress and the Executive.⁴

The traditional preference for political rather than judicial solutions is supported by the fact that neither Congress nor the President appears to have turned to the courts to resolve an inter-branch executive privilege dispute until the 1970s.⁵ The courts have also been wary of judicially declared outcomes and have generally sought to avoid adjudicating executive privilege disputes, instead encouraging the political branches to settle their differences while noting that judicial intervention should, as a prudential matter, "be avoided whenever possible" or at least "delayed until all possibilities for settlement have been exhausted."⁶

¹ See *In re Sealed Case*, 121 F.3d 729, 736 (D.C. Cir. 1997) ("Since the beginnings of our nation, executive officials have claimed a variety of privileges to resist disclosure of information the confidentiality of which they felt was crucial to fulfillment of the unique role and responsibilities of the executive branch of our government.").

² Disputes between Congress and the President over executive privilege can be traced back to the 1790s. See MARK J. ROZELL, *EXECUTIVE PRIVILEGE: PRESIDENTIAL POWER, SECRECY, AND ACCOUNTABILITY* 31-32 (2002) (describing the House's resistance to President Washington's refusal to disclose information relating to the Jay Treaty).

³ *United States v. Nixon*, 418 U.S. 683, 711 (1974) ("Nowhere in the Constitution . . . is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based."); *Watkins v. United States*, 354 U.S. 178, 187 (1957) ("The power of the Congress to conduct investigations is inherent in the legislative process.").

⁴ See *In re Sealed Case*, 121 F.3d at 729 ("[G]iven the restrictions on congressional standing and the courts' reluctance to interfere in political battles, few executive-congressional disputes over access to information have ended up in the courts."); See also *Breaking the Logjam: Principles and Practice of Congressional Oversight and Executive Privilege*, Hearing before the Senate Committee on the Judiciary, Subcommittee on Federal Courts, Oversight, Agency Action and Federal Rights, Aug., 3, 2021.

⁵ See *Senate Select Comm. On Presidential Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974); see also JAMES HAMILTON, *THE POWER TO PROBE: A STUDY OF CONGRESSIONAL INVESTIGATIONS* 197 (1976) (noting that the Senate Select Committee's lawsuit to enforce the subpoena issued to President Nixon was "the first civil action to enforce a congressional subpoena issued to the executive").

⁶ See *Cheney v. United States Dist. Court*, 541 U.S. 913, 389 (2004) ("These 'occasion[s] for constitutional confrontation between the two branches' should be avoided whenever possible"); *United States v. House of Representatives*, 556 F. Supp. 150, 152 (D.D.C. 1983) (observing that "[w]hen constitutional disputes arise concerning the respective powers of the Legislative and Executive Branches, judicial intervention should be delayed until all possibilities for settlement have been exhausted"). This reticence to exert judicial power as a means of solving oversight disputes between Congress and the executive branch reached its apex in the short-lived decision of *Committee on the Judiciary v. McGahn*, 951 F.3d 510 (D.C. Cir. 2020). There, the United States Court of Appeals for the D.C. Circuit held, as a constitutional matter, that courts "lack authority to resolve disputes between the Legislative and Executive Branches until their actions harm an entity" outside the federal government. *Id.* at 516 (citing *Raines v. Byrd*, 521 U.S. 811, 834 (1997) (Souter, J., concurring in the judgment)). That opinion was reversed on appeal by the

As a result, the judiciary has historically played a limited role in determining how executive privilege may be used to restrict congressional access to information.⁷ The Supreme Court has never directly considered the application of executive privilege in the context of a congressional investigation.⁸ Lower federal court decisions are similarly scarce.⁹ The only appellate-level decision to reach the merits of an executive privilege dispute between Congress and a sitting President occurred nearly 50 years ago.¹⁰ In light of this near judicial vacuum, the historical actions and interpretations of the branches necessarily play a significant role in establishing the meaning of executive privilege.

There are, however, a handful of judicial opinions that help explain the legal and constitutional parameters of executive privilege. Some of these decisions come from the Supreme Court, while others were issued by federal appellate or district courts.¹¹ These decisions establish only the privilege's basic contours, while ultimately concluding that disputes between Congress and the President over privileged materials typically require the judiciary to engage in an imprecise, fact-based, and arguably subjective balancing of the various interests at stake.¹²

Specific judicially imposed outcomes may be rare, but the impact of more general judicially established standards can reach well beyond the courtroom. Legal principles often guide negotiations between the political branches, influence the accommodations process, and ultimately inform the settlement of disputes. Moreover, judicially established principles limiting the outer confines of executive privilege can be used by Congress to combat what it may view as inappropriate uses of the privilege to impede or delay congressional access to information.

D.C. Circuit's en banc opinion holding that neither the separation of powers nor principles of standing barred the courts from hearing the House's lawsuit. 968 F.3d 755, 760-61 (D.C. Cir. 2020). *See also* CRS Legal Sidebar LSB10432, *Resolving Subpoena Disputes Between the Branches: Potential Impacts of Restricting the Judicial Role*, by Todd Garvey.

⁷ In addition to other justiciability issues, the Speech or Debate Clause, which generally prevents direct pre-enforcement challenges to congressional subpoenas, also plays a role in limiting litigation connected to Congress's investigatory powers. *See* CRS Report R45043, *Understanding the Speech or Debate Clause*, by Todd Garvey.

⁸ The Supreme Court recently issued an opinion addressing congressional subpoenas for presidential records, but that case did not involve an assertion of executive privilege. *See* *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2028 (2020) ("The President did not, however, resist the subpoenas by arguing that any of the requested records were protected by executive privilege."); *id.* at 2026 ("We have never addressed a congressional subpoena for the President's information.").

⁹ There has been a recent increase in information access disputes between the branches making their way to the courts. *See, e.g.*, CRS Testimony TE10064, *Civil Enforcement of Congressional Authorities*, by Todd Garvey. These cases have not, however, directly involved the merits of an inter-branch executive privilege disputes.

¹⁰ *See* Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974). The D.C. Circuit recently reached the merits of a dispute between the House and a former President. *See* "The Communications Privilege and Former Presidents" *infra*.

¹¹ Decisions of the Supreme Court bind the entire judiciary while federal appellate decisions serve as binding precedent within only the applicable circuit. *See* *In re Korean Air Lines Disaster*, 829 F.2d 1171, 1176 (D.C. Cir. 1987). The decision of a federal district court, though possibly holding persuasive value, does not serve as binding precedent. *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011).

¹² *See, e.g.*, *Nixon v. Sirica*, 487 F.2d 700, 717 (D.C. Cir. 1973) ("[A]pplication of Executive privilege depends on a weighing of the public interest protected by the privilege against the public interests that would be served by disclosure in a particular case"); *Senate Select*, 498 F.2d at 731 (holding that Congress overcomes the presumptive protections of executive privilege when "the subpoenaed evidence is demonstrably critical to the responsible fulfillment of the Committee's functions."). *See also*, Andrew McCanse Wright, *Constitutional Conflict and Congressional Oversight*, 98 MARQ. L. REV. 881, 946 (2014) (noting that "[i]n the absence of Supreme Court pronouncements, the political branches feel legally unconstrained to adhere to their incompatible constitutional perspectives").

This report addresses the judicial treatment of a core component of “executive privilege”: the presidential communications privilege. The report begins by identifying the various executive privileges in order to distinguish the presidential communications privilege from other executive branch confidentiality protections. It then discusses—in historical context—notable judicial opinions to help elucidate the legal standards applicable to disputes between Congress and the President over presidential communications. The report concludes by addressing the presidential communications privilege’s application to former Presidents.

Defining the Executive Privileges

There is not a single “executive privilege.” Instead, a suite of distinct privileges exist, each of different—though sometimes overlapping—scope.¹³ The political branches, in support of their often competing interests and priorities, have adopted somewhat divergent views on these different component privileges. Whereas Congress has generally interpreted executive privilege narrowly, limiting its application to the types of presidential, national security, and diplomatic communications referenced by judicial decisions,¹⁴ the executive branch has historically viewed executive privilege more broadly, providing protections to different categories of documents and communications that implicate executive branch confidentiality interests.¹⁵ Under the executive branch’s interpretation, these privileges include

- the *state secrets privilege*, which protects certain military, diplomatic, and national security information;¹⁶
- the *presidential communications privilege*, which generally protects confidential communications between the President and his advisers that relate to presidential decisionmaking, as well as a certain subset of communications not involving the President but that are still made for purposes of advising the President;¹⁷
- the *deliberative process privilege*, which protects pre-decisional and deliberative communications within executive branch agencies;¹⁸ and

¹³ *In re Sealed Case*, 121 F.3d at 736 (noting that “executive officials have claimed a variety of privileges to resist disclosure of information”). See also John E. Bies, *Primer on Executive Privilege and the Executive Branch Approach to Congressional Oversight*, LAWFARE (June 16, 2017, 8:30AM) (“[A] review of executive branch practice identifies a number of categories of information that the executive branch, at least, believes may be protected by an invocation of the privilege.”), <https://www.lawfareblog.com/primer-executive-privilege-and-executive-branch-approach-congressional-oversight>.

¹⁴ See H. COMM. ON OVERSIGHT AND GOV’T REFORM, 110TH CONG., REP. ON PRESIDENT BUSH’S ASSERTION OF EXECUTIVE PRIVILEGE IN RESPONSE TO THE COMMITTEE SUBPOENA TO ATTORNEY GENERAL MICHAEL B. MUKASEY 8 (Comm. Print 2008) (rejecting an executive privilege claim on the grounds that “[t]he Attorney General did not cite a single judicial decision recognizing this alleged privilege”); H.R. REP. NO. 105-728, at 16 n. 43 (1998) (“As the D.C. Circuit has recently held, the doctrine of executive privilege which arises from the constitutional separation of powers applies only to decisionmaking of the President. Since the subject of the Committee’s subpoena is not one that does (or legally could) involve Presidential decisionmaking, no constitutional privilege could be invoked here.”) (citations omitted)).

¹⁵ See Dep’t of Justice, Office of Legal Counsel, *Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, 116 (“The scope of executive privilege includes several related areas in which confidentiality within the Executive Branch is necessary for the effective execution of the laws.”).

¹⁶ *Id.* at 116-17.

¹⁷ *Id.* at 116.

¹⁸ See Dep’t of Justice, Office of Legal Counsel, *Assertion of Executive Privilege Over Documents Generated in Response to Congressional Investigation into Operation Fast and Furious*, 36 Op. O.L.C. 1 (2012).

- the *law enforcement privilege*, which protects the contents of open (and sometimes closed) law enforcement files, including communications related to investigative and prosecutorial decisionmaking.¹⁹

The executive branch has tended to consolidate these various privileges into one “executive privilege,” particularly when responding to congressional investigative requests.²⁰ Congressional committees, on the other hand, have typically distinguished among the different individual privileges.²¹

The executive privileges may appropriately be treated as distinct, not only because of the different communications they protect, but also because the privileges appear to arise from different sources of law, with some more firmly established in judicial precedent than others. In short, the different privileges apply with different strengths and, in the congressional context, are balanced against Congress’s Article I powers differently. For example, courts have “traditionally shown the utmost deference” to presidential claims of a need to protect military or diplomatic secrets.²² The President’s more generalized interest in the confidentiality of his other communications, though arising implicitly from the Constitution, has not been “extended this high degree of deference.”²³ The other privileges have been given less weight, and must be assessed differently in the face of an exercise of Congress’s investigative powers. For example, when compared to the presidential communications privilege, the deliberative process privilege is more easily overcome by Congress and “disappears altogether when there is any reason to believe government misconduct occurred.”²⁴ Its legal source also appears to be different from the presidential communications privilege, as it arises “primarily” from the common law,²⁵ but may have a “constitutional dimension.”²⁶ Least potent are those executive privileges that arise purely from the common law,

¹⁹ See Dep’t of Justice, Office of Legal Counsel, *Protective Assertion of Executive Privilege Over Unredacted Mueller Report and Related Investigative Files*, 43 Op. O.L.C. 374 (2019).

²⁰ See 8 Op. O.L.C. 101, 116 (reasoning that “[t]he scope of executive privilege includes several related areas”); 13 Op. O.L.C. 153, 154 (reasoning that “the executive branch’s interest in keeping the information confidential” is “usually discussed in terms of ‘executive privilege’”).

²¹ See H. COMM. ON OVERSIGHT AND GOV’T REFORM, 110TH CONG., REP. ON PRESIDENT BUSH’S ASSERTION OF EXECUTIVE PRIVILEGE IN RESPONSE TO THE COMMITTEE SUBPOENA TO ATTORNEY GENERAL MICHAEL B. MUKASEY 8 (Comm. Print 2008) (“The Attorney General’s argument that the subpoena implicates the ‘law enforcement component’ of executive privilege is equally flawed. There is no basis to support the proposition that a law enforcement privilege, particularly one applied to closed investigations, can shield from congressional scrutiny information that is important for addressing congressional oversight concerns. The Attorney General did not cite a single judicial decision recognizing this alleged privilege.”); H.R. REP. NO. 105-728, at 16 n. 43 (1998) (“As the D.C. Circuit has recently held, the doctrine of executive privilege which arises from the constitutional separation of powers applies only to decisionmaking of the President. Since the subject of the Committee’s subpoena is not one that does (or legally could) involve Presidential decisionmaking, no constitutional privilege could be invoked here.”) (citations omitted).

²² *United States v. Nixon*, 418 U.S. 683, 710 (1974).

²³ *Id.* at 711.

²⁴ *In re Sealed Case*, 121 F.3d 729, 746 (D.C. Cir. 1997). Given its broad scope, the deliberative process privilege is “the most frequent form of executive privilege raised.” *Id.* at 737.

²⁵ In *In re Sealed Case*, the D.C. Circuit determined that “the deliberative process privilege is primarily a common law privilege,” but that “[s]ome aspects of the privilege, for example the protection accorded the mental processes of agency officials, have roots in the constitutional separation of powers.” 121 F.3d at 745, 737 n.4. See also *Protect Democ. Project v. NSA*, 10 F.4th 879, 885 (D.C. Cir. 2021) (“The deliberative process privilege is primarily a common law privilege . . .”).

²⁶ *Comm. on Oversight & Gov’t Reform v. Lynch*, 156 F. Supp. 3d 101, 104 (D.D.C. 2016). The scope and source of the law enforcement privilege is unclear, particularly when asserted in the context of congressional investigations where committees have voiced consistent objections to its use. Congress has previously viewed the executive branch’s position on the confidentiality of law enforcement information as a nondisclosure “policy” rather than a constitutionally



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Foreword by Alan S. Frumin

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which have generally been viewed, at least by Congress, as legally insufficient to justify noncompliance with a congressional subpoena.²⁷

Tracing the Judicial Evolution of the Presidential Communications Privilege

The remainder of this report will focus on the presidential communications privilege (Communications Privilege), its judicial development, and its application in congressional investigations. The Communications Privilege derives implicitly from the President's powers under Article II and the separation of powers doctrine, and has been justified by the need to protect the confidentiality of the President's decisionmaking process.²⁸ Its foundation lay in the proposition that in making judgments and reaching decisions, the President and his advisers must be free to candidly discuss issues, express opinions, and explore options without fear that those deliberations will later be made public.²⁹

Today, it is apparent that the Communications Privilege is qualified, rather than absolute, and applies only to confidential communications made in support of official presidential decisionmaking that directly involve the President or close presidential advisers.³⁰ For the vast majority of U.S. history, however, the existence and appropriate scope of the Communications Privilege was uncertain and nearly untouched by the courts.³¹ Chief Justice John Marshall referred to the confidentiality of presidential communications in *Marbury v. Madison* and during the treason trial of former Vice President Aaron Burr,³² but in “neither instance [] was Marshall forced to definitively decide whether such a presidential privilege existed and if so, in what form.”³³ In fact, the Judiciary's involvement in addressing the Communications Privilege's use in resisting disclosure in the face of either judicial or legislative subpoenas did not begin in earnest

based privilege. See H. COMM. ON OVERSIGHT AND GOV'T REFORM, 110TH CONG., REP. ON PRESIDENT BUSH'S ASSERTION OF EXECUTIVE PRIVILEGE IN RESPONSE TO THE COMMITTEE SUBPOENA TO ATTORNEY GENERAL MICHAEL B. MUKASEY 8 (Comm. Print 2008).

²⁷ The Supreme Court recently stated in dicta that the recipients of a congressional subpoena “have long been understood to retain common law . . . privileges with respect to certain materials....” *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2032 (2020). This statement is in tension with the congressional practice of treating common law privileges as discretionary and has been subject to some criticism. See CRS Report RL30240, *Congressional Oversight Manual*, coordinated by Christopher M. Davis, Todd Garvey, and Ben Wilhelm at 62-3.

²⁸ See *Nixon*, 418 U.S. at 705-06.

²⁹ *Id.* at 708. In this sense, executive privilege is partly based on the theory that transparency can inhibit decisionmaking.

³⁰ See *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425 (1977).

³¹ See, e.g., RAOUL BERGER, *EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH* (1974) 1 (describing executive privilege as a “myth” and a “product of the nineteenth century, fashioned by a succession of presidents who created ‘precedents’ to suit the occasion.”)

³² *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 169-70 (1803) (suggesting that “[t]he intimate political relation, subsisting between the president of the United States and the heads of departments, necessarily renders any legal investigation of the acts of one of those high officers peculiarly irksome, as well as delicate; and excites some hesitation with respect to the propriety of entering into such investigation”); *United States v. Burr*, 25 F. Cas. 30, 37 (noting that if a letter to President Jefferson “does contain any matter which it would be imprudent to disclose, which it is not the wish of the executive to disclose, such matter, if it be not immediately and essentially applicable to the point, will, of course, be suppressed”). The Supreme Court addressed the state secrets privilege in *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953) (articulating a “privilege which protects military and state secrets” that “belongs to the Government and must be asserted by it” but “is not to be lightly invoked.”).

³³ *In re Sealed Case*, 121 F.3d at 738.

until the 1970s and the Administration of Richard Nixon.³⁴ Prior to the Nixon era, the Communications Privilege's contours were instead left to be defined, if at all, by historical practice and the actions and interpretations of Congress and the President.

The Nixon Era

The years during and immediately following the Nixon Administration are arguably the defining era of the Communications Privilege's judicial development. It was during that time period (1972-1977) that the courts first confirmed the Communications Privilege's existence and began to delineate—but did not significantly develop—its application in criminal and civil proceedings, as well as its use in response to exercises of Congress's oversight and legislative powers.³⁵ In each of these contexts the courts were asked to resolve significant but unsettled questions of constitutional law, ranging from whether the President is immune from all compulsory process to the scope and force of presidential claims of the Communications Privilege.³⁶

The Nixon-era judicial opinions did not occur in a legal vacuum. They were informed by the events that were unfolding at the time, both in the White House and in Congress. In order to fully develop the evolution of the courts' executive privilege jurisprudence, it is therefore necessary to place the various Nixon-era legal disputes and decisions in historical context. A chronological narrative is also helpful in understanding another key principle of executive privilege: the interrelatedness of the courts' evaluation of the Communications Privilege in criminal, civil, and congressional settings.

Watergate: Applying the Communications Privilege in the Criminal and Congressional Setting

On June 17, 1972, in the midst of President Nixon's reelection campaign, a group of men with then-undiscovered connections to the Nixon campaign were arrested while breaking into the Democratic National Committee Headquarters at the Watergate Hotel and Office Building.³⁷ The federal government responded with a traditional executive branch criminal investigation and prosecution, which eventually resulted in convictions for the burglars and two Nixon campaign aides in January 1973—just months after President Nixon won a second term in November 1972.³⁸ Shortly after those initial convictions, and partly in response to new evidence and

³⁴ *Id.* at 739-40 (“[I]t was not until the 1970s and Watergate-related lawsuits seeking access to President Nixon’s tapes as well as other materials that the existence of the presidential privilege was definitively established as a necessary derivation from the President’s constitutional status in a separation of powers regime.”); *see also id.* at 742 (“These lawsuits, referred to generically as the Nixon cases, remain a quarter century later the leading—if not the only—decisions on the scope of the presidential communications privilege.”).

³⁵ *See, e.g., Nixon*, 418 U.S. 683, 707 (1974) (assessing the Privilege in the context of a criminal trial); *Sirica*, 487 F.2d at 717 (assessing the Privilege in the context of a grand jury investigation); *Senate Select*, 498 F.2d at 731 (assessing the Privilege in the context of a congressional investigation); *Dellums v Powell*, 561 F.2d 242, 249 (D.C. Cir. 1977) (assessing the Privilege in the context of civil case).

³⁶ President Nixon also asserted the Privilege in the impeachment context in response to subpoenas issued by the House Judiciary Committee. The House did not, however, enlist the aid of the courts in order to enforce its demands for information in that context, and instead chose to respond to the President’s refusals by adopting a specific article of impeachment rebuking the President for his failure to comply with the committee’s subpoenas. *See* H. REP. NO. 93-1305, 93rd Cong. (1974) at 206-13.

³⁷ S. REP. NO. 93-981, 93rd Cong. (1974) at 1.

³⁸ *See* JOHN J. SIRICA, TO SET THE RECORD STRAIGHT: THE BREAK-IN, THE TAPES, THE CONSPIRATORS, THE PARDON 83-88 (1979).

allegations that further implicated both the Nixon reelection campaign and the Nixon Administration, the Senate established the Senate Select Committee on Presidential Campaign Activities (Senate Watergate Committee) to investigate all “illegal, improper or unethical activities” connected to the 1972 election.³⁹

In the spring of 1973, with evidence of a possible cover-up by the Nixon Administration mounting, a variety of high-level officials resigned, including Attorney General Richard Kleindienst.⁴⁰ The Senate Judiciary Committee made clear that the confirmation of President Nixon’s nominee to replace Kleindienst, Elliot Richardson, would depend on his willingness to appoint an *independent* prosecutor to oversee the expanding Watergate criminal investigation.⁴¹ Richardson promised to make the appointment, and after being confirmed, named Archibald Cox as Special Prosecutor.⁴² Thus, continued investigation of the Watergate burglary and the Nixon Administration’s potential involvement and response proceeded concurrently along two separate tracks: an executive branch criminal investigation conducted by an independent Special Prosecutor, and a congressional investigation launched by the Senate. Both investigations eventually culminated in conflicts with President Nixon over executive privilege that were eventually presented to the Judiciary for resolution.

At first, President Nixon stated that he would not use executive privilege to impede either the criminal or congressional investigation, at least not with respect to testimony by Administration officials.⁴³ This position conformed to the executive branch’s long-standing view that executive privilege should not be used to conceal wrongdoing. Consistent with this pledge, the President did not invoke the Communications Privilege to block his current or former advisers from providing requested testimony to either the Special Prosecutor or the Senate Watergate Committee. The President’s approach changed, however, in the summer of 1973 after Alexander Butterfield, an aide to the President, testified to the Watergate Committee that the Oval Office was outfitted with a device that recorded the President’s conversations.⁴⁴

Following the tapes revelation, both the Watergate Committee and the Special Prosecutor determined that it was necessary for their own distinct investigative purposes to obtain tapes of specific conversations between the President and his aides. The Watergate Committee sought certain tapes through a legislative subpoena and under its broad legislative mandate, while Cox sought them through a grand jury subpoena as part of his ongoing criminal investigation into various Nixon officials implicated in the Watergate cover-up. On July 25, 1973, President Nixon refused both the committee subpoena and the grand jury subpoena, concluding that “it would be inconsistent with the public interest and with the Constitutional position of the Presidency” to comply.⁴⁵ Both the Watergate Committee and the Special Prosecutor reacted by filing suit in the

³⁹ S. Res. 60, 93rd Cong. (1973).

⁴⁰ SIRICA, *supra* note 38 at 114-115.

⁴¹ See Anthony Ripley, *Archibald Cox Appointed Prosecutor for Watergate*, N.Y. TIMES (May 19, 1973).

⁴² *Id.*

⁴³ 9 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 697 (1973) (“Considering the number of persons involved in this case whose testimony might be subject to a claim of executive privilege, I recognize that a clear definition of that claim has become central to the effort to arrive at the truth. Accordingly, executive privilege will not be invoked as to any testimony concerning possible criminal conduct or discussions of possible criminal conduct, in the matters presently under investigation, including the Watergate affair and the alleged cover-up.”).

⁴⁴ James M. Naughton, *Surprise Witness: Butterfield, Ex-Aide at White House, Tells of Listening Devices*, N.Y. TIMES (July 17, 1973), <https://www.nytimes.com/1973/07/17/archives/surprise-witness-butterfield-exaide-at-white-house-tells-of.html>.

⁴⁵ *Nixon v. Sirica*, 487 F.2d 700, 705 (D.C. Cir. 1973).

U.S. District Court for the District of Columbia (D.C. District Court) to obtain judicial enforcement of their respective subpoenas. Both cases were in their own way unprecedented. Grand jury subpoena enforcement cases had been filed before,⁴⁶ but never to compel compliance by a sitting President. And neither the House nor the Senate had ever filed a civil lawsuit to enforce a subpoena, let alone one against the President.⁴⁷

The President shortly thereafter explicitly stated that his July 25 letter constituted a “formal claim of executive privilege.”⁴⁸

In re Subpoena to Nixon (D.C. District Court)

The D.C. District Court, hearing the case on a nearly blank judicial slate without controlling precedent, first addressed the President’s refusal to comply with the grand jury subpoena. In that litigation, President Nixon’s attorneys adopted an absolutist position, arguing both that the President was “not subject to compulsory process from the courts” and that it was the President, and not the judiciary, who must determine whether the Communications Privilege is appropriately invoked.⁴⁹ In what is arguably the first judicial opinion directly addressing the Communications Privilege, the court rejected both arguments and ordered the President to submit the tapes for *in camera* review to determine whether the Communications Privilege was properly asserted.⁵⁰ The opinion, written by Chief Judge John Sirica, ultimately said little about the source or scope of the President’s Privilege other than to state that despite a “need to disfavor privileges and narrow their application as far as possible,” the court was “willing” to “recognize and give effect to an evidentiary privilege based on the need to protect Presidential privacy” in “presidential deliberations.”⁵¹ But, he held, it was the judiciary and not the President “that finally determines whether [the] privilege is properly invoked.”⁵²

Notably, Judge Sirica also distinguished between the legitimate interests underlying the Communications Privilege and undifferentiated claims of presidential privacy. The primary policy justification for the Communications Privilege, he reasoned, was that forced disclosure of conversations between the President and his advisers would inhibit free and frank discussion and impair presidential decisionmaking.⁵³ This need to protect the President’s deliberative process exists “for the benefit of the public, not of executives who may happen to then hold office.”⁵⁴ By contrast, the notion of personal “[p]residential privacy” on its own and disconnected from the public interest in informed decisionmaking, he reasoned, had “no merit.”⁵⁵

⁴⁶ See *Cobbledick v. United States*, 309 U.S. 323, 327 (1940).

⁴⁷ In 1928, members of a Senate special investigative committee brought suit to obtain documents associated with a disputed Senate election, but the Court dismissed that claim on jurisdictional grounds due to a lack of Senate authorization for the suit. *Reed v. Delaware Cty. Comm.*, 277 U.S. 376, 389 (1928).

⁴⁸ *Sirica*, 487 F.2d at 705.

⁴⁹ *In re Subpoena to Nixon*, 360 F. Supp. 1, 3 (D.D.C. 1973). President Nixon went further, suggesting that “[t]he issue in this case is nothing less than the continued existence of the Presidency as a functioning institution.” See RAOUL BERGER, *EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH* 348 (1974).

⁵⁰ *In re Subpoena to Nixon*, 360 F. Supp. at 3-4.

⁵¹ *Id.* at 5, 11.

⁵² *Id.* at 6.

⁵³ *Id.* at 5 n.8. This statement reflects the primary policy justification that would later form the basis for the Supreme Court’s recognition of a privilege in *United States v. Nixon*. 418 U.S. 683, 708 (1974).

⁵⁴ *In re Subpoena to Nixon*, 360 F. Supp. at 5.

⁵⁵ *Id.*

***Nixon v. Sirica* (D.C. Circuit)**

President Nixon challenged Judge Sirica's order in the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) where he again asserted his unqualified position that disclosure of presidential communications was "at the sole discretion of the President."⁵⁶ In *Nixon v. Sirica*, the D.C. Circuit affirmed Judge Sirica's opinion and ordered the subpoenaed materials turned over to the district court.⁵⁷ The D.C. Circuit noted its sensitivity to the argument that "the candor of Executive aides and functionaries would be impaired if they were persistently worried that their advice and deliberations were later to be made public,"⁵⁸ but held that the President's assertion of the Communications Privilege, though creating "presumptive" protections, could not "be deemed absolute."⁵⁹ Instead, the court reasoned that whether the Communications Privilege could ultimately be used to refuse disclosure would depend "on a weighing of the public interest protected by the privilege against the public interests that would be served by disclosure in a particular case."⁶⁰

To give effect to both the presumptive protections arising from a President's assertion of the Communications Privilege and the notion that the Communications Privilege is not absolute, the court articulated a two-stage decisionmaking framework that would later be adopted by the Supreme Court in subsequent cases. At stage one, the court reasoned that an adequate showing of need was necessary to overcome the presumptive protections of the President's assertion and allow for a limited disclosure to the D.C. District Court for an *in camera* review described below. In concluding that the grand jury had made that showing, the court acknowledged the "great public interest in maintaining the confidentiality of conversations that take place in the President's performance of his official duties."⁶¹ It held, however, that this interest "must fail in the face of the uniquely powerful showing made by the Special Prosecutor" that "the subpoenaed tapes contain evidence peculiarly necessary to the carrying out of this vital function—evidence for which no effective substitute is available."⁶²

The court's balancing was influenced by its conclusion that prior executive branch conduct can undermine the President's interest in confidentiality and, as a result, support the case for compelled disclosure. For example, the court reasoned that Nixon's prior statement that executive privilege would not be asserted "presumably reflect[ed] a judgment by him that the interest in the confidentiality of White House discussions in general is outweighed by such matters as the public interest."⁶³ The court similarly viewed the public testimony given by several White House advisers and employees as "substantially diminish[ing] the interest in maintaining the confidentiality of conversations pertinent to Watergate."⁶⁴

Having determined that the grand jury had overcome the Communications Privilege's presumptive protections, stage two of the framework required *in camera* review by the D.C.

⁵⁶ *Nixon v. Sirica*, 487 F.2d 700, 708 (1973).

⁵⁷ *Id.* at 721.

⁵⁸ *Id.* at 713.

⁵⁹ *Id.* at 716.

⁶⁰ *Id.* at 715-16 ("The Constitution mentions no Executive privileges, much less any absolute Executive privileges. Nor is an absolute privilege required for workable government.").

⁶¹ *Id.* at 717.

⁶² *Id.*

⁶³ *Sirica*, 487 F.2d at 717.

⁶⁴ *Id.* at 718.

District Court which would then provide the requesting party (in this case, the grand jury) with access to all materials “relevant” to matters within its jurisdiction, “unless the Court judges that the public interest served by nondisclosure of particular statements or information outweighs the need for that information demonstrated by the grand jury.”⁶⁵ That assessment would be left to the district court on remand.⁶⁶

President Nixon did not appeal the D.C. Circuit’s decision in *Sirica*. Instead, the President first sought a compromise with the Special Prosecutor by offering to summarize the subpoenaed conversations in writing and allow a Democratic Senator to listen to the tapes to confirm the summaries’ accuracy.⁶⁷ Cox rejected the President’s offer. The President then sought to implement his position outside the courts on October 20, 1973, by having Cox removed in what is known as the Saturday Night Massacre.⁶⁸ Public and congressional response to the firing of Cox was so severe that Nixon was ultimately forced to comply with the court order *and* direct the appointment of a new Special Prosecutor, Leon Jaworski.

Impeachment Investigation

The start of 1974 brought with it an additional investigative layer to the Watergate affair. Although an informal investigation had been ongoing since late 1973, in February 1974 the House formally authorized the House Judiciary Committee to conduct an impeachment investigation of President Nixon.⁶⁹ The Senate Watergate Committee would continue its focus on the break-in, the cover-up, and whether legislative responses were necessary, while the House Judiciary Committee would focus on whether the President’s conduct warranted impeachment and potential removal from office.

Senate Select Committee v. Nixon (D.C. District Court)

That same month, February 1974, the D.C. District Court issued its decision on the Senate Watergate Committee’s subpoena for the Nixon tapes.⁷⁰ Relying on *Sirica*, the court noted its “duty” to balance “the public interests” in confidentiality “against the public interests that would be served by disclosure to the Committee in this particular instance.”⁷¹ Ultimately, the court would not enforce the Committee subpoena, not because of the President’s assertion of privilege, but out of concern that disclosure to the Committee could threaten the Special Prosecutor’s

⁶⁵ *Id.* at 718. At this stage, the President would have an opportunity to “present more particular claims of privilege,” through the provision of a privilege log that contains “descriptions specific enough to identify the basis of the particular claim or claims.” *Id.* at 721.

⁶⁶ *Id.*

⁶⁷ See David E. Rosenbaum, *Stennis Says Tapes Audit Depended on Ervin Consent*, N.Y. TIMES (Oct. 21, 1973), <https://www.nytimes.com/1973/10/21/archives/stennis-says-tapes-audit-dependent-on-ervin-consent-technical.html>.

⁶⁸ The D.C. District Court later ruled that Cox’s firing violated Department of Justice regulations. *Nader v. Bork*, 366 F. Supp. 104, 108 (D.D.C. 1973) (“The firing of Archibald Cox in the absence of a finding of extraordinary impropriety was in clear violation of an existing Justice Department regulation having the force of law and was therefore illegal.”).

⁶⁹ H. Res. 803, 93rd Cong. (1974).

⁷⁰ Senate Select Comm. on Presidential Campaign Activities v. Nixon, 370 F. Supp. 521 (D.D.C. 1974). Shortly before Cox’s removal, the District Court dismissed the Watergate Committee’s lawsuit to enforce its legislative subpoena, holding that there was no existing statute that granted the judiciary jurisdiction over such a claim. The opinion noted, however, that conferring jurisdiction upon the court by statute was “the prerogative of the Congress.” Congress shortly thereafter responded by enacting a statute that explicitly conferred jurisdiction over the claim to the federal courts. See Senate Select Comm. on Presidential Campaign Activities v. Nixon, 366 F. Supp. 51, 55 (D.D.C. 1973).

⁷¹ *Senate Select*, 370 F. Supp. at 522.

“pending criminal prosecutions.”⁷² Disagreeing with the notion that criminal proceedings should take precedence over a congressional investigation, the Committee appealed that decision.

While the Watergate Committee’s case was on appeal to the D.C. Circuit, the grand jury returned an indictment for various Nixon campaign and Administration officials that named the President as an unindicted co-conspirator.⁷³ The grand jury also requested, and the court approved, the transmission of certain evidence to the House Judiciary Committee—evidence the grand jury felt had a “material bearing on matters within the primary jurisdiction of the Committee in its current [impeachment] inquiry.”⁷⁴ During the subsequent criminal trial of the indicted Nixon Administration officials, which included former Attorney General John Mitchell, Special Prosecutor Jaworski issued a trial subpoena to the President for other tapes of conversations between the President and his advisers that were needed for evidence. It was the dispute over this trial subpoena that would ultimately lead to the Supreme Court’s seminal decision in *United States v. Nixon*.

***United States v. Mitchell* (D.C. District Court)**

On April 30, 1974, the President publicly released redacted transcripts of some of his taped conversations, including several conversations covered by the trial subpoena. The next day, he asserted executive privilege and moved to quash the Special Prosecutor’s trial subpoena.⁷⁵ The D.C. District Court was again faced with a claim of Privilege, but this time in the context of a subpoena for evidence in an ongoing criminal trial, rather than a subpoena issued as part of a grand jury investigation. In an opinion following the principles established in *Sirica*, the D.C. District Court held in *United States v. Mitchell* that the Special Prosecutor had made a “demonstration of need sufficiently compelling to warrant judicial examination” of the tapes.⁷⁶ The court ordered the remaining privileged tapes turned over to the court for *in camera* review, but not directly to the Special Prosecutor. Both the President and the Special Prosecutor appealed the decision directly to the Supreme Court.⁷⁷

Concurrent with these developments in the criminal setting, the House Judiciary Committee issued additional subpoenas to President Nixon throughout April and May 1974 for tapes of specific conversations involving the President that related to the Committee’s impeachment investigation.⁷⁸ Although the President initially agreed to cooperate, on May 22, 1974, the President concluded that “to continue providing these conversations in response to the constantly escalating requests would constitute such a massive invasion into the confidentiality of presidential conversations that the institution of the Presidency itself would be fatally compromised.”⁷⁹ The House Judiciary Committee’s decision on how to respond to the President’s

⁷² *Id.* at 523. The court specifically noted that the Committee had not demonstrated “a pressing need” for the tapes and, as a result, the court was “assigning priority to the integrity of criminal justice” over the committee investigation. *Id.* at 524.

⁷³ See Anthony Ripley, *Jury Names Nixon a Co-conspirator But Didn’t Indict*, N.Y. TIMES (June 7, 1974), <https://www.nytimes.com/1974/06/07/archives/jury-named-nixon-a-coconspirator-but-didnt-indict-st-clair-confirms.html>.

⁷⁴ In re Report & Recommendation of June 5, 1972 Grand Jury etc., 370 F. Supp. 1219, 1221 (D.D.C. 1974).

⁷⁵ *United States v. Mitchell*, 377 F. Supp. 1326, 1328 (D.D.C. 1974).

⁷⁶ *Id.* at 1330. The court also noted that the President had “relinquish[ed] his privilege with respect to “the portions of subpoenaed recordings with the president has caused to be reduced to transcript form and published.” *Id.*

⁷⁷ *United States v. Nixon*, 418 U.S. 683, 689-90 (1974).

⁷⁸ H.R. REP. NO. 93-1305, at 187-206 (1974).

⁷⁹ *Id.*

noncompliance would likely be influenced by a judicial opinion in the then-pending appeal in the Senate Watergate Committee's attempt to enforce its own subpoenas in the courts. That decision came one day later, on May 23, 1974.

Senate Select Committee v. Nixon (D.C. Circuit)

In *Senate Select Committee v. Nixon*, the D.C. Circuit arguably hampered Congress's investigative interests by affirming the district court's refusal to enforce the Watergate Committee's subpoena.⁸⁰ To this day, *Senate Select* remains the only substantive appellate court decision directly addressing the assertion of the Communications Privilege by a sitting President in a congressional investigation.

The D.C. Circuit's opinion affirmed the Communications Privilege's qualified nature by making clear that a President's assertion could be overcome by a "strong showing of need by another institution of government."⁸¹ But, following the "staged decisional structure" adopted in *Sirica*, the court found that unlike the grand jury in *Sirica* and the Special Prosecutor in *Mitchell*, the Senate Watergate Committee had failed to make the requisite showing of need.⁸² The Committee's need was, in the court's reasoning, "too attenuated and too tangential to its functions to permit a judicial judgment that the President is required to comply with the Committee's subpoenas."⁸³ The court elaborated that Congress, in the exercise of its investigative powers, may overcome the President's presumptive privilege only when it can show that "the subpoenaed evidence is demonstrably critical to the responsible fulfillment of the Committee's function."⁸⁴ Notably, the court clarified that the "nature of the presidential conduct that the subpoenaed material might reveal," including President Nixon's alleged criminal misconduct, was not a significant factor in assessing whether the Communications Privilege was overcome. Instead, that analysis depended "solely" on the "nature and appropriateness" of the *Committee's* function.⁸⁵

The Watergate Committee had sought to make the required showing by arguing it had a "critical" need for the tapes to carry out two separate functions. First, under its *oversight* function, the Committee argued that the tapes were necessary to "oversee the operations of the executive branch, to investigate instances of possible corruption and malfeasance in office, and to expose the results of its investigations to public view."⁸⁶ Second, under its *legislative* function, the Committee argued that "resolution, on the basis of the subpoenaed tapes, of the conflicts in the testimony before it 'would aid in a determination whether legislative involvement in political campaigns is necessary' and 'could help engender the public support needed for basic reforms in our electoral system.'"⁸⁷

⁸⁰ *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 726 (D.C. Cir. 1974). Although affirming the district court decision, the D.C. Circuit opinion expressly rejected the lower court's reasoning (both in how the court applied executive privilege and the priority it gave the criminal justice process over congressional investigations) as not accurately reflecting the controlling principles of *Sirica*. *Id.* at 729 ("Neither the Committee's position nor, if we read it correctly, that of the District Court accurately reflects the doctrines of *Nixon v. Sirica*, doctrines that, at least by analogy, we think controlling here.").

⁸¹ *Id.* at 730.

⁸² *Id.*

⁸³ *Id.* at 733.

⁸⁴ *Id.* at 731.

⁸⁵ *Id.*

⁸⁶ *Senate Select*, 498 F.2d at 731.

⁸⁷ *Id.*

As to the oversight function, the Court held that the Select Committee failed to show the requisite need—mainly because the House Judiciary Committee had already obtained a selection of tapes from the Jaworski grand jury. The court reasoned that any further investigative need by the Select Committee was therefore “merely cumulative,” as the tapes were currently in the possession of one committee of Congress.⁸⁸ With regard to the Committee’s legislative functions, the court held that the particular content of the conversations was not essential to future legislation, as “legislative judgments normally depend more on the predicted consequences of proposed legislative actions . . . than on precise reconstruction of past events.”⁸⁹ Any “specific legislative decisions” faced by the Select Committee, the court found, could “responsibly be made” based on the released transcripts.⁹⁰ As such, the court’s determination that the Select Committee failed to make the requisite showing of need appears to have been based on a pair of unique facts unlikely to be present in more traditional investigative disputes over the Communications Privilege: first, that copies of the tapes had been provided to the House Judiciary Committee under that committee’s impeachment investigation; and second, that the President had publicly released partial transcripts of the tapes.⁹¹

***United States v. Nixon* (Supreme Court)**

One month later, on expedited appeal from *Mitchell*, the judiciary’s role in resolving questions of executive privilege came to a climax in the Supreme Court’s seminal decision of *United States v. Nixon*.⁹² The *Nixon* opinion, which reflected the reasoning of the judicial decisions that had come before, similarly rejected the President’s absolutist interpretation of the Communications Privilege.⁹³

Nixon confirmed several of the fundamental principles that had been recognized in *Sirica* and *Senate Select*. First, the *Nixon* opinion clearly recognized the existence of an implied constitutional privilege protecting presidential communications,⁹⁴ holding that the “privilege of confidentiality of presidential communications” is “fundamental to the operation of Government and inextricably rooted in the separation of powers” and “the supremacy of each branch within its own assigned area of constitutional duties.”⁹⁵ The Court further held that the Communications

⁸⁸ *Id.* at 732. The court appears to have concluded that the subsequently initiated and nearly completed work of the House Judiciary Committee had in effect preempted the Senate Committee’s efforts. *Id.* at 733 (“More importantly, . . . there is no indication that the findings of the House Committee on the Judiciary and, eventually the House of Representatives itself, are so likely to be inconclusive or long in coming that the Select Committee needs immediate access of its own.”)

⁸⁹ *Id.*

⁹⁰ *Id.* at 733.

⁹¹ S. REP. NO.93-981, at 1083 (1974) (“It is clear, therefore, that the court’s decision rested, as the court observed, on ‘the peculiar circumstances of this case,’ and should not necessarily prevent legislative committees in the future from obtaining materials relating to Presidential communications.”).

⁹² *United States v. Nixon*, 418 U.S. 683 (1974). The *Nixon* opinion, which was before the Court on expedited direct appeal from the district court decision in *Mitchell*, was issued with some urgency. Noting the “public importance of the issues presented and the need for their prompt resolution,” the Court issued its opinion only 16 days after oral argument.

⁹³ *Id.* at 706 (“[N]either the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances.”).

⁹⁴ *Id.* at 711 (“Nowhere in the Constitution . . . is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President’s powers, it is constitutionally based.”)

⁹⁵ *Id.* at 708, 705.

Privilege, however, must not be “expansively construed” as it, like other privileges, is “in derogation of the search for truth.”⁹⁶

Second, the Court explicitly reaffirmed its role as the “ultimate interpreter of the Constitution” and the privileges emanating from it, concluding that it was the Court, and not the President, that must have the final say on the Communications Privilege.⁹⁷

Third, as first articulated by Judge *Sirica*, the Court held that the underlying justification for the Communications Privilege related to the “public interest” in the integrity of presidential decisionmaking.⁹⁸ “Human experience,” the Court reasoned, “teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process.”⁹⁹ The Court added that there is a

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.¹⁰⁰

As such, the Court held that “[t]he President’s need for complete candor and objectivity from advisers calls for great deference from the courts” and, using language from *Sirica*, justified a “presumptive privilege for Presidential communications” made in “the exercise of Art. II powers.”¹⁰¹

Fourth, the Court emphasized that the implied constitutional Privilege was not “absolute” or “unqualified,” at least not when founded upon a “generalized” need for confidentiality in “nonmilitary and nondiplomatic discussions.”¹⁰² Instead, when the Communications Privilege is invoked in response to a judicial subpoena, a “confrontation with other values arise[s]” requiring the courts to “resolve those competing interests in a manner that preserves the essential functions of each branch.”¹⁰³ The President’s interest, therefore, would need to be balanced against the “fundamental and comprehensive” need to “develop all relevant facts” and evidence in a criminal case.¹⁰⁴ In weighing these interests, the Court held the following:

We 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. On the other hand, the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic functions of the courts.

⁹⁶ *Id.* at 709-10 (“These and other interests are recognized in law by privileges against forced disclosure, established in the Constitution, by statute, or at common law. Whatever their origins, these exceptions to the demand for every man’s evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.”).

⁹⁷ *Id.* at 704.

⁹⁸ *Nixon*, 418 U.S. at 705.

⁹⁹ *Id.* at 705.

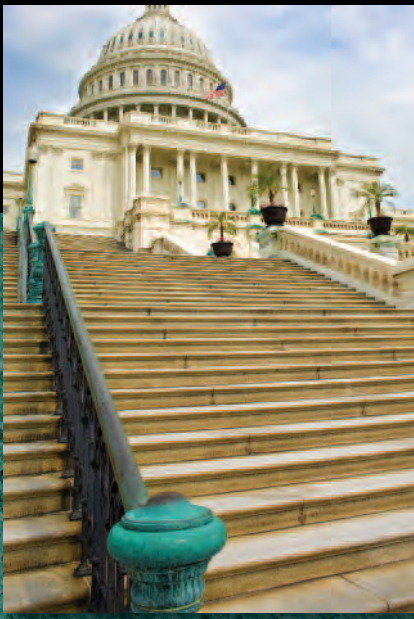
¹⁰⁰ *Id.* at 708.

¹⁰¹ *Id.* at 706.

¹⁰² *Id.* at 707.

¹⁰³ *Id.*

¹⁰⁴ *Nixon*, 418 U.S. at 711-12 (“In this case we must weigh the importance of the general privilege of confidentiality of Presidential communications in performance of the President’s responsibilities against the inroads of such a privilege on the fair administration of criminal justice.”).



A Practical Guide to Preparing and Delivering
Testimony Before Congress and Congressional
Hearings for Agencies, Associations, Corporations,
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As a result, the Communications Privilege, when based “only on a generalized interest in confidentiality,” “cannot prevail over the fundamental demands of ... the fair administration of justice” and therefore “must yield to the demonstrated, specific need for evidence in a pending criminal trial.”¹⁰⁵

Finally, *Nixon* approved the same “staged decisional structure” applied by the D.C. Circuit in *Sirica* and *Senate Select*. If a President determines that “compliance with a subpoena would be injurious to the public interest he may properly...invoke a claim of privilege.”¹⁰⁶ Such an invocation creates “presumptive” protections for the subpoenaed material. As a result of these initial protections, a court may only order *in camera* review when the party has “made a sufficient showing to rebut the presumption.”¹⁰⁷ Once the presumptively privileged material is reviewed *in camera*, a court may then direct the further disclosure of all “relevant” and “admissible” information.¹⁰⁸

The *Nixon* opinion made two additional points worth noting. First, the Court repeatedly suggested that its analysis may have been different if instead of a generalized interest in the confidentiality of his communications, the President had asserted a claim of “military or diplomatic secrets.”¹⁰⁹ “As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities.”¹¹⁰ Second, the Court explicitly disclaimed any attempt to assess the application of the Communications Privilege in a congressional investigation: “we are not here concerned with the balance between the President’s generalized interest in confidentiality ... and congressional demands for information.”¹¹¹

Shortly after the Supreme Court’s opinion in *Nixon*, the House Judiciary Committee voted to recommend articles of impeachment against President Nixon for obstruction of justice, abuse of power, and contempt of Congress for his refusal to comply with congressional subpoenas.¹¹² On August 9, 1974, before the full House considered the articles of impeachment but after determining that he had lost support in Congress and would not survive impeachment, President Nixon resigned.

After Nixon’s Resignation: Applying the Communications Privilege in the Civil and Legislative Setting

Nixon’s resignation did not end his use of executive privilege in the courts.

¹⁰⁵ *Id.* at 713.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 714.

¹⁰⁸ During that review (at least when the Privilege is asserted in response to a criminal trial subpoena) a court must distinguish between material that is both “probably admissible in evidence and relevant” and that which is not. *Id.* at 714. The latter material must be “restored to its privileged status” and “accorded that high degree of respect due the President of the United States,” while the former would be provided to the requesting party. *Id.* at 714-16.

¹⁰⁹ *Id.* at 710.

¹¹⁰ *Id.* at 710.

¹¹¹ *Id.* at 712 n.19.

¹¹² The contempt of Congress allegation was based on the President’s failure to comply with subpoenas issued by the House Judiciary committee as part of its impeachment investigation. H.R. REP. NO 93-1305 at 4 (1974).

Dellums v. Powell (D.C. Circuit)

In January 1977, the D.C. Circuit considered the application of the now former-President's claim of executive privilege to prevent disclosure of his communications in a civil case.¹¹³ *Dellums v. Powell* involved a class action suit alleging that Nixon Administration officials had violated plaintiffs' constitutional rights during arrests made at the 1971 "May Day" demonstrations protesting American involvement in Vietnam.¹¹⁴ As part of discovery in that case, a subpoena was issued to the White House Counsel's office for tapes and transcripts of Oval Office conversations between Nixon and the defendants. Nixon intervened to have the subpoena quashed, arguing that the materials sought were protected by the Communications Privilege which, he argued, was "absolute in the context of civil litigation."¹¹⁵

As in *Sirica*, *Senate Select*, and the Supreme Court's opinion in *Nixon*, the *Dellums* opinion again rejected the former President's absolutist position and held that the Communications Privilege, even when invoked in the civil context, would be subject to a "balancing approach."¹¹⁶ Like the need for disclosure in the criminal context, the *Dellums* opinion determined that "there is also a strong constitutional value in the need for disclosure in order to provide the kind of enforcement of constitutional rights that is presented by a civil action for damages."¹¹⁷ Thus, when a party in a civil case can show a "substantial" and "specific" need for the information sought that is "beyond the routine desire of every party to discover relevant information to assist in the preparation of a case," the party can "overcome the rebuttable presumption of privilege of a former President..."¹¹⁸

Despite finding that the plaintiff had shown a need sufficient to overcome Nixon's presumptive privilege in this particular case, the *Dellums* opinion suggested that a civil litigant would not typically overcome the Communications Privilege. Referencing the underlying justification for the Communications Privilege, the court twice noted that any "fear that the candor of Presidential advisers will be imperiled" was misplaced because of the "infrequent occasions" in which a party in a civil case could make the requisite showing of need.¹¹⁹ Moreover, to further protect the former President's confidentiality interests, the court clarified that disclosure based on "the potential needs of litigation" does not mean that a court must also permit disclosure to the public.¹²⁰ As a result, the court determined that Nixon was entitled to a temporary protective order preventing further disclosure of his materials.¹²¹

¹¹³ *Dellums v. Powell*, 561 F.2d 242 (D.C. Cir. 1977). See also, *Sun Oil Co. v. United States*, 514 F.2d 1020, 1021 (Ct. Cl. 1975) (addressing the Privilege in the civil context).

¹¹⁴ *Id.* at 244 (alleging violations of the First and Fifth Amendments).

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 246 (noting the need for a "particularized analysis rather than mechanistic formalism") (quoting *Nixon v. Adm'r of Gen. Servs.*, 408 F. Supp. 321, 342 (D.D.C. 1976)).

¹¹⁷ *Id.* at 247.

¹¹⁸ *Id.* at 249. The plaintiff's need, which the court found to be sufficient to overcome an assertion of Privilege by a former President, was shown through a combination of factors, including the "substantial violations of constitutional rights sought to be vindicated," the existence of no "alternative means" to obtain "comparable" discovery, and "sufficient evidentiary substantiation [of high-level meetings held in preparation of the May Day demonstrations] to avoid the inference that the demand reflects mere harassment." *Id.* at 247.

¹¹⁹ *Dellums*, 561 F.2d at 246, 47. See also *Cheney*, 542 U.S. at 384 ("The need for information for use in civil cases, while far from negligible does not share the urgency or significance of the criminal subpoena requests in *Nixon*.")

¹²⁰ *Id.* at 249.

¹²¹ The *Dellums* litigation continued into the 1980s. See *Dellums v. Powell*, 642 F.2d 1351 (D.C. Cir. 1980).

The court also made clear that its analysis applied to assertions by a *former* President, noting that “[i]t is of cardinal significance, in the controversy now before this court, that the claim of privilege is being urged solely by a former president, and there has been no assertion of privilege by an incumbent president, whose appearance had a distinctly different stance.”¹²² The *Dellums* opinion reasoned—and, as discussed below, the Supreme Court would later confirm—Privilege assertions by a former President should be given less weight than those made by the incumbent.¹²³

Nixon v. Administrator of General Services (Supreme Court)

In June 1977, the Supreme Court again considered the nature of executive privilege in *Nixon v. Administrator of General Services (Nixon II)*.¹²⁴ In that case, former President Nixon challenged the Presidential Recordings and Materials Preservation Act, a statute that nullified a contract that gave Nixon control over his own presidential records. The Act instead established a process to secure and preserve his records with a government agency.¹²⁵ Along with other claims, Nixon argued that provisions of the law permitting the screening and cataloguing of presidential materials by executive branch archivists impermissibly infringed on his Privilege. *Nixon II* was therefore distinct from cases like *Nixon I*, *Sirica*, *Senate Select*, and *Dellums* because the Communications Privilege was being invoked to prevent a limited disclosure within the executive branch pursuant to a statutory provision, rather than disclosure outside the executive branch pursuant to a subpoena.

The Court rejected former President Nixon’s position, holding that the statutory arrangement for preservation of the President’s records worked only a “very limited intrusion” into the President’s confidentiality interests, especially given that the law built in safeguards to prevent the public disclosure of protected materials.¹²⁶ Like the previous cases, the Court engaged in a balancing test, evaluating whether the public interest justified such an intrusion, ultimately holding that it did. Congress had acted, the Court determined, based on a variety of “important objectives,” including to “preserve the materials for legitimate historical and governmental purposes”; “restore public confidence in our political processes by preserving the materials as a source for facilitating a full airing of the events leading to appellant’s resignation”; and based on its “need to understand how those political processes had in fact operated in order to gauge the necessity for remedial legislation.”¹²⁷

The Court’s view of the severity of the intrusion appears to have been colored by the fact that the claim was being made by a former President.¹²⁸ Although recognizing that the Communications Privilege “survives the individual President’s tenure” and thus can be invoked by former Presidents to protect covered communications occurring while in office, the Court nonetheless

¹²² *Dellums*, 561 F. 2d at 247.

¹²³ *Id.* at 245. (“Assuming arguendo a former President may present a claim of presidential privilege, we agree with the District Court both that it is entitled to lesser weight than that assigned the privilege asserted by an incumbent President, and that it has been overcome in the present case by plaintiffs’ showing.”).

¹²⁴ *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425 (1977) [hereinafter *Nixon II*].

¹²⁵ *Id.* at 430-33.

¹²⁶ *Id.* 451 (noting a “consistent historical practice” in which archivists “have performed the identical task in each of the Presidential libraries without any suggestion that such activity has in any way interfered with executive confidentiality”).

¹²⁷ *Id.* at 452-54.

¹²⁸ See “The Communications Privilege and Former Presidents” *infra*.

noted that the President's interest in confidentiality is "subject to erosion over time after an administration leaves office."¹²⁹

Nixon II also provided the Court's clearest explanation of the types of communications covered by the Communications Privilege. Interpreting *Nixon*, the Court held that the "the privilege is limited to communications 'in performance of [a President's] responsibilities,' 'of his office,' and made 'in the process of shaping policies and making decisions.'"¹³⁰ This passage reflects the fundamental principle that the Communications Privilege does not act as a generalized safeguard for "Presidential privacy," but instead protects the public interest in effective and deliberative presidential decisionmaking. As such, the Communications Privilege applies not to all presidential communications, but only those that bear a relationship to a presidential decision.

Nixon II marked the end of President Nixon's lengthy and largely unsuccessful legal battles over the release of his communications. But the importance of the Nixon-era cases transcends those materials. The cases established the fundamental characteristics of the Communications Privilege: (1) there is a qualified constitutional privilege that provides presumptive protections to confidential communications made to assist presidential decisionmaking; (2) the Communications Privilege can be invoked to resist disclosure of covered communications in various contexts; and (3) the Communications Privilege is not absolute, and can be overcome when the party seeking the information can articulate a sufficient showing of need.

Post-Nixon: Lower Courts Filling in the Gaps

Judicial decisions addressing presidential assertions of the Communications Privilege since the Nixon era have been relatively rare.¹³¹ Indeed, while executive privilege disputes between Congress and the executive branch have arisen in nearly every subsequent Administration, no federal appellate court has directly addressed the merits of a claim of Privilege by a sitting President in the congressional investigation context since *Senate Select*.¹³² There have, however, been a handful of judicial opinions in other contexts (including under the Freedom of Information Act [FOIA] and in grand jury investigations) that provide additional specificity to the scope and boundaries of the Communications Privilege and may inform its application in the congressional setting.

¹²⁹ *Nixon II*, 433 U.S. at 451.

¹³⁰ *Id.* at 449 (citations omitted). As such, it was only a "small fraction" of Nixon's complete collection of presidential records that would be covered by the Privilege. *Id.* at 454.

¹³¹ There have been a number of cases involving the Privilege that have arisen from FOIA. *See e.g.*, *Protect Democracy Project, Inc. v. NSA*, 10 F.4th 879 (D.C. Cir. 2021); *Judicial Watch, Inc. v. DOD*, 913 F.3d 1106 (D.C. Cir. 2019). One reason these cases may be more prevalent than in other contexts is the fact that under FOIA, the Privilege need not be asserted by the President, and can be asserted by his subordinates. *See Leopold v. United States DOJ*, 487 F. Supp. 3d 1, 16 (D.D.C. 2020) ("Courts in this district have routinely concluded that it is not required that the President personally invoke the presidential communications privilege for the privilege to apply under Exemption 5 in FOIA cases.").

¹³² There have, however, been federal judicial decisions addressing related conflicts such as access to national security information, *see United States v. AT&T Co.*, 567 F.2d 121 (D.C. Cir. 1977), absolute testimonial immunity for presidential advisers, *see Comm. on the Judiciary v. McGahn*, 968 F.3d 755 (D.C. Cir. 2020), the deliberative process privilege, *see Comm. on Oversight & Gov't Reform v. Lynch*, 156 F. Supp. 3d 101, 104, 107 (D.D.C. 2016), and executive privilege claims by former Presidents, *see Trump v. Thompson*, 20 F. 4th 10 (D.C. Cir. 2021) cert. denied 142 S. Ct. 1350. (2022). *See generally*, CRS Report R45653, *Congressional Subpoenas: Enforcing Executive Branch Compliance*, by Todd Garvey; CRS Testimony TE10064, *Civil Enforcement of Congressional Authorities*, by Todd Garvey.

Elaborating on the Communications Privilege's Scope: Communications Not Involving the President

Because the Nixon-era cases focused on recordings of conversations between the President and his advisers, those opinions provided little insight into whether the Communications Privilege applies to executive branch communications that do not directly involve the President. This question has been addressed by the D.C. Circuit. In a series of cases, that court has built on the Nixon-era cases to hold that the Communications Privilege protects not only the direct communications of the President, but also certain communications made for purposes of advising the President.

Association of American Physicians & Surgeons v. Clinton (D.C. Circuit)

The D.C. Circuit considered communications by presidential advisers somewhat indirectly in a 1993 case, *Association of American Physicians & Surgeons v. Clinton* (AAPS).¹³³ That case arose in the context of the Federal Advisory Committee Act (FACA), and, in particular, whether that law's disclosure requirements applied to the President's Task Force on National Health Care Reform—a committee tasked with advising the President on possible health care reform legislation.¹³⁴

The AAPS opinion did not refer to the Communications Privilege by name but relied on *Nixon* and *Nixon II* to conclude that because President Clinton had a “great need to receive advice confidentially,” FACA and its transparency requirements should not be interpreted to apply to the Task Force.¹³⁵ To hold otherwise, the court held, would “interfere[] with a President’s ability to seek advice” and raise “Article II concerns.”¹³⁶ The fact that the President did not participate in the Task Force’s deliberations did not limit the application of the Communications Privilege. According to the D.C. Circuit, the President’s “Article II right to confidential communications attaches not only to direct communications with the President, *but also to discussions between his senior advisers*,” at least when those discussions involve “advice they secretly will render to the President.”¹³⁷ As a result, the D.C. Circuit decided that those with “operational proximity” to the President that are “directly reporting and advising the President must have confidentiality at each stage in the formulation of advice to him.”¹³⁸

In re Sealed Case (Espy) (D.C. Circuit)

Four years after AAPS, and nearly 20 years to the day after *Nixon II*, the D.C. Circuit issued what is the most thorough opinion addressing the Communications Privilege since the Nixon era. In *In re Sealed Case (Espy)* the circuit court began to fill in some of the gaps left by *Nixon I* and *Nixon II*, especially as to communications that do not directly involve the President. *Espy* arose from a grand jury subpoena issued as part of an Independent Counsel investigation into allegations that a former Secretary of Agriculture in the Clinton Administration, Mike Espy, accepted improper

¹³³ Ass’n of Am. Physicians & Surgeons v. Clinton, 997 F.2d 898 (D.C. Cir. 1993).

¹³⁴ *Id.* at 901-02. The Task Force consisted of various government officials and was chaired by the First Lady.

¹³⁵ *Id.* at 909.

¹³⁶ *Id.* at 910.

¹³⁷ *Id.* at 909-10 (emphasis added) (“Certainly Department Secretaries and White House aides must be able to hold confidential meetings to discuss advice they secretly will render to the President.”).

¹³⁸ *Id.* at 910.

gifts.¹³⁹ The grand jury was seeking documents in the possession of the White House Counsel's office related to that office's earlier investigation into Espy, including various internal documents used by the office in drafting its final report.¹⁴⁰ Notably, the President had not actually viewed any of the contested documents.

The court was squarely faced with whether the Communications Privilege protects only communications directly involving the President or also extends further to cover communications by other executive branch officials that were made for purposes of advising the President, but never made to the President. The court acknowledged that there are "strong arguments" in favor of restricting the Communications Privilege to only those communications directly involving the President.¹⁴¹ Ultimately, however, the court held that because of "the President's dependence on presidential advisers" a "limited extension" of the Communications Privilege to "communications made by presidential advisers [and their staffs] in the course of preparing advice for the President" was necessary to ensure that the President retained "access to candid and informed advice."¹⁴² To hold otherwise, the court reasoned, would "impede the effective functioning of the presidency" in violation of the separation of powers.¹⁴³

The court defined the Communications Privilege's scope as follows:

We believe therefore that the public interest is best served by holding that communications made by presidential advisers in the course of preparing advice for the President come under the presidential communications privilege, even when these communications are not made directly to the President. Given the need to provide sufficient elbow room for advisers to obtain information from all knowledgeable sources, the privilege must apply both to communications which these advisers solicited and received from others as well as those they authored themselves. The privilege must also extend to communications authored or received in response to a solicitation by members of a presidential adviser's staff, since in many instances advisers must rely on their staff to investigate an issue and formulate the advice to be given to the President.¹⁴⁴

The court did not explicitly define who would qualify as a "presidential adviser," other than to say that the White House counsel was one such official. It added, however, that "not every person who plays a role in the development of presidential advice . . . can qualify for the privilege. In particular, the privilege should not extend to staff outside the White House in executive branch agencies."¹⁴⁵

While extending the Communications Privilege beyond conversations directly involving the President, the court also reaffirmed existing restrictions on the Communications Privilege's scope.¹⁴⁶ First, the court held that the Communications Privilege "only applies to communications that these advisers and their staff author or solicit and receive in the course of performing their

¹³⁹ *In re Sealed Case*, 121 F.3d 729, 734-36 (D.C. Cir. 1997).

¹⁴⁰ *Id.* at 735.

¹⁴¹ *Id.* at 748.

¹⁴² *Id.* at 749-50.

¹⁴³ *Id.* at 751.

¹⁴⁴ *Id.* at 751-52. With regard to member of an "adviser's staff" the Privilege covers only those "who have broad and significant responsibility for investigating and formulating the advice to be given the President on the particular matter to which the communications relate." *Id.* at 752.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* (noting that the Privilege should be interpreted "as narrowly as is consistent with ensuring that the confidentiality of the President's decision-making process is adequately protected").

function of advising the President on official government matters.”¹⁴⁷ Thus, the Communications Privilege applies only in relation to advice rendered for purposes of presidential decisions, and “should never serve as a means of shielding information regarding governmental operations that do not call ultimately for direct decision-making by the President.”¹⁴⁸ Second, the court reiterated that the Communications Privilege is “at all times, a qualified one,” meaning that even protected communications do not “become permanently shielded,” but “remain available upon a sufficient showing of need.”¹⁴⁹

The *Espy* opinion also explored what constitutes a “sufficient showing of need,” at least in the realm of criminal cases. For either a criminal trial subpoena or a grand jury subpoena, the court reasoned that the “balancing methodology” governing whether an assertion of the Communications Privilege is overcome contains two key “components.”¹⁵⁰ First, a party must demonstrate that the subpoenaed material “likely contains important evidence.”¹⁵¹ Second, the party must show that the evidence is not “practically available” through “due diligence” from another source.¹⁵²

Finally, as the Supreme Court did in *Nixon*, the court again disclaimed that its holding had any application to disputes between Congress and the executive branch, a context the court believed “implicate[d] different constitutional considerations.”¹⁵³ As stated by the court:

[W]e underscore our opinion should not be read as in any way affecting the scope of the privilege in the congressional-executive context, the arena where conflict over the privilege of confidentiality arises most frequently. The President’s ability to withhold information from Congress implicates different constitutional considerations than the President’s ability to withhold evidence in judicial proceedings. Our determination of how far down into the executive branch the presidential communications privilege goes is limited to the context before us, namely where information generated by close presidential advisers is sought for use in a judicial proceeding, and we take no position on how the institutional needs of Congress and the President should be balanced.¹⁵⁴

Espy therefore explicitly left open the question of whether its extension of the Communications Privilege to communications by presidential advisers that do not directly involve the President applies when the Communications Privilege is asserted in the face of a congressional subpoena.

***Judicial Watch Inc. v. DOJ* (D.C. Circuit)**

Espy extended the protections of the Communications Privilege to a class of communications made by subordinate executive officials—what *Espy* referred to as “immediate White House advisers” or “close presidential advisers”—even when those communications do not involve, or

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 751.

¹⁵⁰ *Id.* at 753-54.

¹⁵¹ *Id.* at 754 (“The first component, likelihood of containing important evidence, means that the evidence sought must be directly relevant to issues that are expected to be central to the trial.”).

¹⁵² *Id.* at 755 (“The second component, unavailability, reflects Nixon’s insistence that privileged presidential communications should not be treated as just another source of information.”).

¹⁵³ *Id.* at 753.

¹⁵⁴ *Id.*

are not received by, the President.¹⁵⁵ That expansion, however, was soon clarified in the 2004 decision of *Judicial Watch Inc. v. DOJ*.¹⁵⁶

Judicial Watch involved the application of the Communications Privilege to a FOIA request for pardon documents created by the Department of Justice (DOJ) Pardon Attorney, but never provided to the President or any official in the White House.¹⁵⁷ The government's position was that the Communications Privilege applied to all documents authored by *any* executive branch official made in the course of preparing advice to the President. The court rejected that argument, holding that because "the demands of the privilege become more attenuated the further away the advisers are from the President operationally," agency officials, including the Pardon Attorney, are not in the class of presidential advisers whose communications could be covered under *Espy* if never "solicited or received" by the White House.¹⁵⁸

In distinguishing between those executive officials who qualify as "immediate White House advisers" for purposes of *Espy* and those who do not, the court adopted a relatively formalist approach. The line drawn appears to be dependent on where the official falls on the executive branch organizational chart.¹⁵⁹ The court stressed the role played by the "organizational structure of presidential decisionmaking" in delineating the outer confines of the Communications Privilege and suggested that *Espy*'s extension of the Communications Privilege applied only to those within the Office of the President.¹⁶⁰ "Communications never received by the President or his Office," the court stated, "are unlikely to 'be revelatory of his deliberations.'"¹⁶¹ Applying this standard, the court held that the Pardon Attorney, the Attorney General, and the Deputy Attorney General were not presidential advisers for purposes of *Espy*, and thus their communications (even those that relate to presidential decisionmaking) could only be covered by the Communications Privilege if actually solicited and received by the President or an adviser within the Office of the President.¹⁶²

Espy and *Judicial Watch* remain the leading post-Nixon appellate cases on the Communications Privilege. Under their holdings, it would appear that in the D.C. Circuit the Communications Privilege applies to two general categories of communications relating to official¹⁶³ presidential decisionmaking:

1. communications directly involving the President; and

¹⁵⁵ *Id.* at 752.

¹⁵⁶ *Judicial Watch Inc. v. DOJ*, 365 F.3d 1108 (D.C. Cir. 2004).

¹⁵⁷ *Id.* at 1117.

¹⁵⁸ *Id.* at 1115.

¹⁵⁹ *Id.* at 1122-23.

¹⁶⁰ *Id.* at 1116-17 1123 ("Further extension of the privilege to internal Justice Department documents that never make their way to the Office of the President ... is unprecedented and unwarranted."); *id.* at 1120 (noting that the Pardon Attorney's "role contrasts with that of the key White House advisers in the Office of the President who directly advise the President....The White House Counsel, in the Office of the President, who enjoys close proximity to the President, is one such key adviser; the Pardon Attorney, in the Justice Department, who is at least twice removed from the President, is not").

¹⁶¹ *Id.* at 1117.

¹⁶² *Id.* at 1124.

¹⁶³ See H.R. REP. NO. 117-200 (2021) at 17 ("The law is clear that executive privilege does not extend to discussions relating to non-governmental business....").

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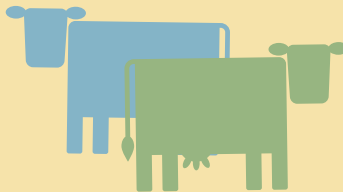
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2. communications authored by or solicited and received by the President's closest advisers or their staff for purposes of preparing advice to the President.¹⁶⁴

The Communications Privilege does not protect other executive branch communications—for example, internal agency communications—that are not submitted to the White House, even if made for the purpose of eventually advising the President.¹⁶⁵

Cheney v. United States District Court: The Communications Privilege and the Separation of Powers

One month after *Judicial Watch*, the Supreme Court issued *Cheney v. United States District Court*—the only other Supreme Court opinion to directly address the Communications Privilege outside of *Nixon I* and *Nixon II*.¹⁶⁶ *Cheney* is notable not only because it provides the Court's most recent (though minimal) discussion of the Communications Privilege, but also for reaffirming distinctions first articulated in the Nixon-era cases between civil and criminal proceedings and for expounding on the relationship between the Communications Privilege and the separation of powers.

The *Cheney* decision interacted with the Communications Privilege in a complicated procedural posture, and for this reason the implications of the decision to more traditional scenarios, especially to the congressional context, are difficult to discern. In *Cheney*, a federal district court had entered orders in a FACA lawsuit allowing discovery of documents relating to the structure and operation of the National Energy Policy Development Group (NEPDG), a task force chaired by the Vice President and established to give policy recommendations on energy issues to the President.¹⁶⁷ The George W. Bush Administration, though not asserting executive privilege, challenged that discovery order on the ground that it represented a “substantial intrusion[] on the process by which those in closest operational proximity to the President advise the President” in violation of the separation of powers.¹⁶⁸ The district court and the D.C. Circuit rejected the Administration's arguments, mainly because the Administration had another means to protect its interests; it could assert executive privilege in response to the civil discovery subpoena.¹⁶⁹

The Supreme Court reversed, holding that when a lower court has allowed “unnecessarily broad” discovery, reviewing courts have authority to “explore other avenues, short of forcing the

¹⁶⁴ Citing *Espy*, *Judicial Watch* described these qualifying officials as having “broad and significant responsibility for investigating and formulating the advice to be given the President.” *Id.* at 1114. There was also a suggestion in *Judicial Watch* that in order to be covered by the Privilege, a communication must relate to a “quintessential” and “non-delegable duty of the President under Article II....” *Id.* at 1123, 1115. While this may remain a possible interpretation of *Judicial Watch*, various district court decisions have explicitly rejected that view. See *Cause of Action Inst. v. Dep't of Commerce*, 513 F. Supp. 3d 116, 126 (D.D.C. 2021) (“Courts in this district have therefore consistently refused to narrow the scope of the privilege to only communications relating to the President's exercise of core Article II powers.”).

¹⁶⁵ *Judicial Watch*, 365 F.3d at 1112 (noting that “internal agency documents that are not ‘solicited and received’ by the President or his Office are instead protected against disclosure, if at all, by the deliberative process privilege”).

¹⁶⁶ *Cheney v. United States Dist. Court*, 542 U.S. 367, 383-91 (2004).

¹⁶⁷ *Id.* at 376.

¹⁶⁸ *Id.* at 381. That action was in the form of mandamus, which among other things requires a party to show that there is “no other adequate means to attain the relief” desired. *Id.* at 403.

¹⁶⁹ *Id.* at 376-77.

Executive to invoke privilege.”¹⁷⁰ The Court reasoned that to *require* the executive branch to assert the Communications Privilege in such a scenario would ignore the “weighty separation-of-powers objections raised in the case,” because “[o]nce executive privilege is asserted, coequal branches of the Government are set on a collision course.”¹⁷¹ The Court determined that the lower courts had “labored under the mistaken assumption that the assertion of executive privilege is a necessary precondition to the Government’s separation-of-powers objections.”¹⁷² *Cheney*, therefore, appears to suggest that there are separation of powers concerns associated with executive confidentiality issues that attach *even before* executive privilege is asserted.¹⁷³

Cheney also reaffirmed the principle that the confidentiality interests associated with the Communications Privilege are weighed differently in different types of proceedings. In fact, the nature of the proceeding, whether civil or criminal, appears to affect both sides of the judicially developed balancing test. As for the requesting party, the Court held that “[t]he need for information for use in civil cases, while far from negligible, does not share the urgency or significance of [a] criminal subpoena,” where the need for the information “is much weightier.”¹⁷⁴ As for the President’s interest, the court viewed the potential for a civil subpoena to disrupt the functioning of the executive branch as far greater than a criminal subpoena. In the criminal context, “there are various constraints ... to filter out insubstantial legal claims,” but “there are no analogous checks in the civil discovery process.”¹⁷⁵ Like past cases, however, *Cheney* did not mention how a congressional proceeding relates to either civil or criminal proceedings.¹⁷⁶

The Communications Privilege and Former Presidents

In *Nixon II*, the Supreme Court determined that the Communications Privilege continues to protect presidential communications after the conclusion of the Administration within which the communication occurred and may be asserted by the former President.¹⁷⁷ As described above, the Court found that a former President may “legitimately” assert the Communications Privilege to prevent disclosure of his official records after he has left office.¹⁷⁸ The Court reasoned that the

¹⁷⁰ *Id.* at 390.

¹⁷¹ *Id.* at 391, 389.

¹⁷² *Cheney*, 542 U.S. at 391.

¹⁷³ *Id.* at 385 (noting that “special considerations control when the Executive Branch’s interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated.”). *See also*, *Karnoski v. Trump*, 926 F.3d 1180, 1205-06 (9th Cir. 2019).

¹⁷⁴ *Cheney*, 542 U.S. at 384.

¹⁷⁵ *Id.* at 386 (noting that in the criminal system decisions are made by a “publicly accountable prosecutor subject to budgetary considerations” and subject to the “responsible exercise of prosecutorial discretion”).

¹⁷⁶ The Supreme Court did appear to draw a distinction between the criminal process and the legislative process in *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2036 (2020) (“Unlike in criminal proceedings, where ‘[t]he very integrity of the judicial system’ would be undermined without ‘full disclosure of all the facts,’ efforts to craft legislation involve predictive policy judgments that are ‘not hamper[ed] . . . in quite the same way’ when every scrap of potentially relevant evidence is not available. While we certainly recognize Congress’s important interests in obtaining information through appropriate inquiries, those interests are not sufficiently powerful to justify access to the President’s personal papers when other sources could provide Congress the information it needs.”) (citations omitted).

¹⁷⁷ *Nixon II*, 433 U.S. at 446-49.

¹⁷⁸ *Id.* at 449.

confidentiality necessary to ensure the free exchange of ideas between the President and his advisers while the President is in office

cannot be measured by the few months or years between the submission of the information and the end of the President's tenure; the privilege is not for the benefit of the President as an individual, but for the benefit of the Republic. Therefore the privilege survives the individual President's tenure.¹⁷⁹

The Court's determination appears to have rested on the reasoning that the general purpose of the Communications Privilege—ensuring the provision of frank advice to the President—could be threatened or undermined no matter when the disclosure of the covered communications occurs. *Nixon II* distinguished former Presidents from incumbents in three important ways. First, the Court explicitly stated that “to the extent that the privilege serves as a shield for executive officials against burdensome requests for information which might interfere with the proper performance of their duties, a former President is in less need of it than an incumbent.”¹⁸⁰ Second, the Court concluded that the “expectation of the confidentiality of executive communications” is “subject to erosion over time after an administration leaves office.”¹⁸¹ Thus, the strength of a former President's Communications Privilege claim appears to dwindle as time passes.

Third and perhaps most importantly, the Court determined that because only the sitting President is “charged with performance of executive duty under the Constitution,” he is “in the best position to assess the present and future needs of the executive branch, and to support invocation of the privilege accordingly.”¹⁸² In *Nixon II*, the fact that President Carter—the sitting President at the time—did not support former President Nixon's privilege claim “detract[ed] from the weight of” Nixon's assertion.¹⁸³ In the Court's view, it is the incumbent President who is better situated to make determinations about the need for executive confidentiality, because it is the incumbent President who may suffer the harm that the Communications Privilege purports to protect against if privileged documents were disclosed (namely that current advisers would be dissuaded from giving the incumbent President candid advice).¹⁸⁴ As a result, when the incumbent President does not support a former President's privilege claim, the strength of the claim declines.

This principle was also seen in *Dellums*—decided just before *Nixon II*. There, the court directly addressed a privilege claim by a former President that was not supported by the incumbent President. The court concluded that “the significance of the assertion by a former President is diminished when the succeeding president does not assert that the document is of the kind whose nondisclosure is necessary to the protection of the presidential office and its ongoing operation.”¹⁸⁵ Lack of support from the incumbent does not necessarily defeat the former President's claim, the D.C. Circuit reasoned, but was of “cardinal significance” in considering “whether the claim is overcome by a showing of other need....”¹⁸⁶ *Dellums* and *Nixon II*, therefore, made apparent that while a former President can invoke the presidential communications privilege, the strength of that claim—and the likelihood that the asserted interest

¹⁷⁹ *Id.* (citations omitted).

¹⁸⁰ *Id.* at 448.

¹⁸¹ *Id.* at 451.

¹⁸² *Id.* at 449.

¹⁸³ *Nixon II*, 433 U.S. at 449.

¹⁸⁴ *Id.*

¹⁸⁵ *Dellums v. Powell*, 561 F.2d 242, 248 (D.C. Cir. 1977).

¹⁸⁶ *Id.* at 247.

in confidentiality will succumb to the need shown by the party seeking the documents—is heavily influenced by the position of the current President.

The importance of the incumbent’s concurrence to a privilege claim by a former President was recently reaffirmed in *Trump v. Thompson*.¹⁸⁷ *Thompson* arose from the inquiry conducted by the House Select Committee to Investigate the January 6th Attack on the U.S. Capitol (Select Committee). As part of its investigation, the Select Committee requested that the National Archives and Records Administration (NARA) produce relevant presidential records from the former Trump Administration pursuant to the Presidential Records Act (PRA).¹⁸⁸ The request sought various categories of White House communications and documents created on or around January 6, 2021. Under the PRA, if any congressional committee requests a presidential record on a “matter within its jurisdiction” that is “needed for the conduct of its business and that is not otherwise available,” the National Archives “shall” make the record available.¹⁸⁹ However, consistent with principles established in *Nixon* and *Nixon II*, the PRA also preserves the right of both current and former Presidents to assert privilege claims by providing that disclosure by NARA is “subject to any rights, defenses, or privileges which the United States or any agency or person may invoke.”¹⁹⁰

Shortly thereafter, President Biden determined that under the “unique and extraordinary circumstances” and because of Congress’s “compelling need” to understand the “horrific events” of January 6, asserting executive privilege over the requested documents would not be “in the best interests of the United States.”¹⁹¹ Former President Trump disagreed, and notified the Archivist that he was asserting the Communications Privilege. After President Biden clarified that he would “not uphold the former President’s assertion of Privilege,” former President Trump filed suit in federal district court to block NARA from disclosing privileged documents to the Select Committee.¹⁹²

The D.C. District Court in *Thompson* viewed the case as “a dispute between a former and incumbent President.”¹⁹³ Citing to *Nixon II*, the court stated that because the incumbent President is “best suited” to identify and determine the best interests of the executive branch, former President Trump’s Privilege claim was “outweighed by President Biden’s decision not to uphold the privilege.”¹⁹⁴ Moreover, the court reasoned that to side with the former President would not only second guess the sitting President’s judgment, but also the legislative branch’s judgment—for both President Biden and the House agreed that the requested documents should be disclosed.¹⁹⁵

The D.C. Circuit affirmed the district court decision on appeal. The court acknowledged, with reference to *Nixon II*, that there was “no question” that former President Trump could assert the Communications Privilege and that the Communications Privilege was “of constitutional

¹⁸⁷ *Trump v. Thompson*, 20 F.4th 10 (D.C. Cir. 2021), *cert. denied*, 142 S. Ct. 1350 (2022).

¹⁸⁸ *Id.* at 16.

¹⁸⁹ 44 U.S.C. § 2205(2)(C).

¹⁹⁰ *Id.* at § 2205(2).

¹⁹¹ *Thompson*, 20 F.4th at 20-21.

¹⁹² *Id.* at 21-22.

¹⁹³ *Trump v. Thompson*, Civil Action No. 21-cv-2769 (TSC), 2021 U.S. Dist. LEXIS 216812, at *26 (D.D.C. Nov. 9, 2021).

¹⁹⁴ *Id.* at *29.

¹⁹⁵ *Id.* at *27-29.

stature.”¹⁹⁶ Nevertheless, the court held that a “rare and formidable alignment of [three] factors” supported disclosure of the documents to the Committee and outweighed the former President’s interest in confidentiality.¹⁹⁷

First, the court stated that President Biden’s determination that it was neither in the executive branch’s nor the public’s interest to assert Privilege over the requested documents “carries immense weight in overcoming the former President’s” claim.¹⁹⁸ Consistent with previous case law, the court viewed President Biden as “the principal holder and keeper of executive privilege” and the judiciary as “illequipped to ... second guess the expert judgment of the sitting President.”¹⁹⁹

Second, the House had a “uniquely weighty interest in investigating the causes and circumstances” of the January 6 attack on the U.S. Capitol.²⁰⁰ Indeed, the court noted that having presented a “sound factual predicate” for the requested documents, “there would seem to be few, if any, more imperative interests squarely within Congress’s wheelhouse than ensuring the safe and uninterrupted conduct of its constitutionally assigned business.”²⁰¹

Third, and “weighing still more heavily” against former President Trump, was “the fact that the judgment of the Political Branches is unified as to these particular documents.”²⁰² The court was unwilling to “needlessly disturb ‘the compromises and working arrangements that’ the Congress and the President had already reached.”²⁰³

In light of these three factors, the D.C. Circuit held that “the profound interests in disclosure advanced by President Biden and the January 6th Committee far exceed [former President Trump’s] generalized concerns for Executive Branch confidentiality.”²⁰⁴ That holding was given added significance by the court’s determination that it would have been compelled to reach that conclusion “under any of the tests advocated by former President Trump,” including the “demonstrated, specific need” standard from *Nixon* or the “demonstrably critical” standard from *Senate Select*.²⁰⁵ As such, it appears the Select Committee would have been able to overcome the Communications Privilege in this circumstance even if President Biden had supported former President Trump’s Privilege claim.

The Supreme Court picked up on this point in denying former President Trump’s petition to stay the D.C. Circuit decision.²⁰⁶ In interpreting the opinion below, the Supreme Court—in an unsigned order—reasoned that Mr. Trump’s “status as a former President [] made no difference to the court’s decision” since the D.C. Circuit had “concluded that President Trump’s claims would have failed even if he were an incumbent.”²⁰⁷ Because the former President’s assertion of

¹⁹⁶ *Thompson*, 20 F. 4th at 32.

¹⁹⁷ *Id.* at 33.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 35.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 35-36.

²⁰² *Thompson*, 20 F.4th at 37.

²⁰³ *Id.* at 38 (quoting *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2023 (2020)).

²⁰⁴ *Id.* at 33.

²⁰⁵ *Id.* at 41 (“The legislative interest at stake passes muster under any of the tests pressed by former President Trump.”).

²⁰⁶ *Trump v. Thompson*, 142 S. Ct. 680 (2022). The Supreme Court later denied certiorari. 142 S. Ct. 1350 (2022).

²⁰⁷ 142 S. Ct. at 680. Justice Thomas would have granted the former President’s application. Justice Kavanaugh

privilege would have been unsuccessful either way, the Court declared the D.C. Circuit's discussion of when executive privilege claims could properly be asserted by former Presidents to be nonbinding dictum.²⁰⁸

A Summary of the Basic Judicially Established Contours of the Communications Privilege

The basic contours of the Communications Privilege that can be drawn from the judicial opinions discussed in this report appear to include the following:

- There is a privilege protecting confidential communications made in support of official presidential decisionmaking that is implicitly based in both the President's powers under Article II and the constitutional separation of powers.²⁰⁹
- The Communications Privilege does not protect all presidential communications, but only those made “‘in performance of [a President’s] responsibilities,’ ‘of his office,’ and made ‘in the process of shaping policies and making decisions.’”²¹⁰
- In addition to protecting communications directly involving the President, the Communications Privilege also appears to protect communications authored by, or solicited and received by, the President's closest advisers (or by staff of those advisers) for purposes of assisting the President in his decisionmaking, even if those communications are never ultimately received by the President.²¹¹
- The courts, and not the President, are the final arbiter of the Communications Privilege, but the invocation of the Communications Privilege by the President, in response to a demand for information from either the courts or Congress, creates “presumptive” protections for the communications in question.²¹²
- The presumptive protections triggered by an assertion of the Communications Privilege are not absolute. Because the Communications Privilege is a qualified one, the President's interest in preserving confidentiality must be balanced against the public interests served by disclosure in a given case and can therefore be overcome by an adequate showing of need made by the party seeking the privileged information.²¹³

authored a concurrence to clarify his position that “[a] former President must be able to successfully invoke the Presidential communications privilege for communications that occurred during his Presidency.” *Id.* (Kavanaugh, J., concurring) Once invoked, it appears to be Justice Kavanaugh's view that the tests from *Nixon* and *Senate Select* “may apply to a former President's privilege claim as they do to a current President's privilege claim.” *Id.* at 681.

²⁰⁸ *Id.* at 680.

²⁰⁹ *Nixon*, 418 U.S. at 705-08.

²¹⁰ *Nixon II*, 433 U.S. at 449.

²¹¹ *Espy*, 121 F.3d at 751-52. Though *Espy* explicitly reserved the question of whether this extension of the Privilege applies in the congressional context. *Id.* at 753.

²¹² *Nixon*, 418 U.S. at 708.

²¹³ *Id.* at 706.

- The requisite standard of need varies depending on the context in which the Communications Privilege is asserted. In a congressional investigation, the Communications Privilege yields when the subpoenaed material is “demonstrably critical to the responsible fulfillment of the committee’s functions.”²¹⁴ Drawing from the criminal context, that may require at least that the material sought is likely to contain “important evidence” that is “not practically available from another source.”²¹⁵
- In the context of legislation, “limited intrusions” on the Communications Privilege can be justified by “important objectives”—at least with respect to privileged communications of former Presidents, but possibly also for sitting Presidents.²¹⁶ More significant intrusions—for example, compelled disclosure outside the executive branch (rather than to an executive agency)—may not be treated in the same way.
- When another branch of government seeks to compel the disclosure of presidential communications, separation of powers protections may attach even before an assertion of the Communications Privilege.²¹⁷
- Former Presidents appear to retain the ability to assert the Communications Privilege to protect communications that occurred during their term of office.²¹⁸ But because the Communications Privilege seeks to protect the presidency and not individual Presidents, the strength, and therefore the ultimate success, of any Privilege claim by a former President may be highly influenced by whether that claim is supported by the sitting President.²¹⁹

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²¹⁴ *Senate Select*, 498 F.2d at 731.

²¹⁵ *Espy*, 121 F.3d at 754-55.

²¹⁶ *Nixon II*, 433 U.S. at 452-54 (assessing Congress’s interests in the context of a communications privilege claim by a former President).

²¹⁷ *Cheney*, 542 U.S. at 385.

²¹⁸ *Nixon II*, 433 U.S. at 451.

²¹⁹ *Id.* at 449-51; *Dellums*, 561 F. 2d at 247.

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