7-16-2017

The Origins and Boundaries of Executive Privilege

John M. Greabe

University of New Hampshire School of Law, john.greabe@law.unh.edu

Follow this and additional works at: https://scholars.unh.edu/law_facpub

Part of the American Politics Commons, Constitutional Law Commons, Law and Politics Commons, President/Executive Department Commons, and the Rule of Law Commons

Recommended Citation

Special Counsel Robert Mueller, a number of congressional committees and one or more grand juries are actively investigating persons associated with President Donald Trump's presidential campaign and administration for their complicity, if any, in Russia's interference in the 2016 election.

When the president or persons working with the president are under investigations such as these, the doctrine of executive privilege - which entitles the president to keep confidential certain communications to and from his advisers - inevitably becomes relevant.

Indeed, multiple witnesses in the Russia investigation have already refused to answer congressional questions on the grounds that they do not want to compromise the president's ability to claim executive privilege.

So where does the doctrine of executive privilege come from? And what are its boundaries?

Let's start by discussing the role privileges play in the law. Privileges bar investigators from obtaining information from certain sources. They are grounded in the notion that, within certain relationships and in certain situations, the public's interest in obtaining information is not as important as protecting privacy, autonomy, and free and open communication.
Court first recognized doctrine of executive privilege in U.S. v. Nixon

CONSTITUTION FROM D1

Critically, privileges protect specified individuals and relationships, but not the information itself. Investigators remain free to obtain the information they are seeking from any unprivileged source. Thus, a criminal defense attorney will not disclose whether a client discussed the whereabouts of a weapon used in a crime. But that does not prevent the prosecutor from discovering the weapon's location through other means.

Most privileges are rooted in federal or state statutory or common law. Familiar statutory and common-law privileges include the just-mentioned attorney-client privilege, the spousal privilege, the doctor-patient privilege and the clergy privilege. But some privileges derive from the United States Constitution. Most famously, the Fifth Amendment contains a privilege against self-incrimination that, among other things, entitles a criminal defendant to decline to testify at trial. Also, article one's speech and debate clause protects members of Congress (and their aides) from having evidence of their "legislative acts" used against them in criminal or civil proceedings.

Executive privilege is like these latter privileges in that its origins lie in the Constitution. It is unlike these privileges in that there is no explicit textual basis for it in the Constitution. Rather, the Supreme Court has justified it as a necessary, if implicit, feature of our constitutional structure - one that protects the presidency from unwarranted intrusions by the Legislature or judiciary.

Ironically, the case in which the Supreme Court first explicitly recognized the doctrine of executive privilege, United States v. Nixon, is one of the foremost examples of the judiciary asserting its supremacy vis-a-vis the other branches in interpreting the Constitution.

The Nixon decision was handed down on July 25, 1974. It was the culmination of a long battle over whether the president was obliged to provide a special prosecutor with tape recordings of Oval Office conversations about how to handle the fallout from the June 17, 1972, burglary of Democratic National Committee headquarters in Washington's Watergate office complex.

President Nixon made two arguments in support of withholding the tapes. First, he claimed an absolute presidential entitlement - not subject to court review - to keep private any communication he made or received in the discharge of his duties. The Supreme Court rejected this argument, holding that it was the court's prerogative, not the president's, to say what if anything the Constitution permits the president to shield from investigators seeking evidence of a crime.

Second, he made an alternative argument that, even if the president lacks an absolute entitlement to withhold presidential communications, the court should recognize that the president has a constitutional entitlement - that is, a constitutional executive privilege - to withhold "confidential" communications made or received in the discharge of his duties. The court accepted this second argument, in part. The court agreed that, even though the Constitution does not mention executive privilege, our constitutional structure implies a presidential entitlement to withhold confidential communications from investigators in ordinary circumstances. Otherwise, the president and his aides "may well temper candor with a concern for appearances and for their own interests to the detriment of the decision-making process."

But the court further held, the interests underlying this qualified executive privilege are outweighed by the judicial branch's interest doing justice in criminal prosecutions - at least in cases where there has been no additional showing of a need to protect military, diplomatic or national security secrets.

The court ordered that the tapes be produced. The president complied and simultaneously made them public. The tapes showed that he had attempted to interfere with the FBI's investigation of the Watergate burglary. Three days after disclosure, on August 9, 1974, President Nixon became the first and only president to resign from office.

Since the Nixon decision, the Supreme Court has considered an issue of executive privilege only once. In 2004, while reviewing preliminary procedural rulings in a civil lawsuit seeking to force disclosure of members of an energy task force chaired by Vice President Dick Cheney, the court discussed executive privilege and made clear that it is significantly more protective of the president's privacy in the civil context than in the criminal context. But the court did not resolve whether this doctrine applies; it simply remanded the case for further consideration.

So as matters now stand, we know that the Constitution provides the president with a privilege to withhold confidential communications from investigators. The privilege is qualified, however, and is significantly less likely to apply in the context of a criminal investigation than in other contexts. As the Russia investigation proceeds, it will be interesting to see whether President Trump formally invokes executive privilege and, if he does, whether the courts uphold his claim.

(John Greabe teaches constitutional law and related subjects at the University of New Hampshire School of Law. He also serves on the board of trustees of the New Hampshire Institute for Civics Education.)