

Executive privilege

Politics



Executive Privilege| | | Virginia Commonwealth University November 14, 2012| | In the past, the power of executive privilege has been used by Presidents to conceal information that has to do with foreign affairs and negotiations, military, national security issues as well as deliberations and policy making that is done between the President and his top aides. This power is only used when Congress asks the President or one of his top aides to produce all of the information pertaining to an event or situation.

If the President then feels that parts of this information needs to be kept secret to protect the best interest of the public, or the other issues listed previously, then he will use executive privilege in order to not give that information to Congress. A huge part of executive privilege is to protect the deliberations and advice given by the President's aides. When the President's advisors give him advice, they need to be able to give him the best advice possible and if there is a chance that everything they said could be made public.

For instance if the President and advisors are discussing what needs to be done in relation to a foreign power and one suggests to nuke them, one suggests a covert attack and one suggests a peaceful resolution. If the final decision is a peaceful resolution, and Congress asks for all of the information on the subject, then the President should use executive privilege to keep those other possible outcomes from going public, both to keep the public from getting out of control or uneasy and to keep the other country from finding out the other options and retaliating.

This power ensures that the President's advisors can be completely honest and say what needs to be said without being worried about their words being

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taken the wrong way or too harsh or hurt their image. A big argument for those against executive privilege is that there is nothing in the constitution about it even though there is something about Congress keeping secrets.

Article I states that " Each House shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy" (US Constitution, Article 1 Section 5). Their argument is that the Constitution states that each House can withhold information that they think should be kept secret and there is nothing about secrecy when it comes to the President's powers, however just because the words are not explicitly in the constitution does not mean that this power was not intended for the President.

Even our founding fathers appreciated the importance of executive privilege and that is highlighted by this passage taken from The Works of Alexander Hamilton. In 1794, the Senate asked President George Washington, "to lay before the Senate the correspondences which have been had between the Minister of the United States at the Republic of France, and said Republic, and between said Minister and the office of Secretary of State. " Washington consulted his cabinet members, Henry Knox, Alexander Hamilton, and Edmund Randolph.

Alexander Hamilton later wrote: General Knox is of the opinion that no part of the correspondences should be sent to the Senate; Colonel Hamilton is of the opinion that the correct mode of proceeding is to do what General Knox advises; but the principle is safe, by excepting such parts as the President may choose to withhold; Mr. Randolph is of the opinion that all correspondence proper, from its nature, to be communicated to the Senate,

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should be sent; but that what the President thinks is improper, should not be sent.

Washington later told the Senate " After an examination of [the correspondence], I directed copies and translations to be made; except in those particulars, which, in my judgment, for public considerations, ought not to be communicated. " (Hamilton 1851) Three of these men signed the constitution and contributed a great deal towards it and they clearly believe that it is the President's right to withhold information that he deems unfit to be made public. When it comes to foreign affairs it is very important that the President has the ability to use executive privilege.

For instance, if the United States was making a treaty with another country, both countries may have to give things up in order to come to an agreement, and everything considered by both sides as well as everything agreed upon should not be made public for everyone, including other countries to see. This is best stated in 1796 by George Washington after the House of Representatives requested that he give them information concerning his instructions to the United States Minister to Britain regarding the treaty negotiations between the United States and Britain.

Washington replied by saying: The nature of foreign negotiations requires caution, and their success must often depend on secrecy; and even when brought to a conclusion a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic; for this might have a pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers.

The necessity of such caution and secrecy was one cogent reason for vesting the power of making treaties in the President...the boundaries fixed by the Constitution between the different departments should be preserved, a just regard to the Constitution and to the duty of my office.. , forbids a compliance with your request. " (Richardson 1897) As Washington states, we cannot simply make every detail public because other countries may retaliate and they will also be less likely to deal with the United States in the future. However, by invoking executive privilege the President can protect that information from causing such havoc.

As he stated, it is not only the President's right to use executive privilege, but it is his duty to use it in situations that require secrecy. Without a doubt executive privilege can have its usefulness, but it should only be invoked in certain, specific situations. In our recent history this has not been the case, some of our Presidents have tried to abuse the power of executive privilege, giving it a bad name and encouraging people to believe it should be done away with. When President Richard Nixon was in office, the Watergate scandal surfaced and Congress asked him to produce all of the information he and his aides had on the case.

In an attempt to conceal what had been done as well as to protect everyone from punishment, President Nixon tried to use executive privilege. This case was brought to the United States Supreme Court because the executive privilege was being used to protect one of Nixon's advisors from criminal prosecution, thus obstructing justice. This was by far an abuse of executive privilege and leads many to want it gotten rid of, however just because a

power can be abused does not mean that its use should stop; it just means that restrictions need to be put in to place.

This is highlighted by the ruling of the Supreme Court. The Court acknowledged the need for the President to use executive privilege, but determined that in cases of inquiry into possible criminal actions, the Executive has to release relating information. If we want to curb the abuse of executive privilege, we need to put guidelines into place, because without them, the meaning of executive privilege is at the discretion of the President until checked by other branches. President Nixon was neither the first nor last President to abuse this power (*United States v Nixon* 1974).

President Bill Clinton also tried to invoke executive privilege in a very wrong way as well. Clinton tried to use executive privilege to prevent his advisors from testifying on whether he had sexual relations with Monica Lewinski or not. However, this claim of executive privilege was shot down, rightfully so (Baker 2012). These instances of abuse may lead some to think it is just a better option to not have executive privilege, but as long as barriers and restrictions can be put into place on it to prevent this from happening in the future, this power needs to stay around.

This comes with some exceptions; this power should only be used when the President truly believes that if this information were to get out it would either be damaging to the public or in the best interest of the public to not find out. This power should also be used in situations where the President needs to protect national security intelligence and other matters as well as being used to protect military secrets, operations and intelligence.

Lastly, this power should be used in situations where the United States is dealing with a foreign power, whether it is a treaty, a negotiation, a meeting or anything else containing sensitive material that either the United States or the foreign power needs to be kept secret. This brings up another argument against executive privilege. Some feel that this power should be done away with because Congress does not have the power of checks and balances over executive privilege; however that is not the case.

If the President is refusing to give Congress the information that they are asking for, they can decide to stop funding things that the President is trying to do. They can also hold people in contempt of Congress, which was done as recently as this year in the Fast and Furious case where Congress demanded that Attorney General Eric Holder give them all the information on this case. President Obama stepped in and claimed executive privilege, however in a response to this, Congress moved, then voted to hold Holder in contempt of Congress unless he hands over the information (Silverleib 2012).

Another thing Congress can do if the President continues to refuse to cooperate is to impeach him. This would obviously be only done in serious situations, but would work either to get their message across or to show future Presidents that they cannot just invoke executive privilege without consequence. On top of this, the courts can rule on cases where the President tries to use executive privilege like they did in the case with President Nixon.

Articles II of the Constitution states that the President “ shall from time to time give to the Congress information of the state of the union, and

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recommend to their consideration such measures as he shall judge necessary and expedient” (US Constitution Article II Section 3) As the Constitution says, the President does need to inform Congress on the State of the Union from time to time, however it does not say anywhere that the President is required to divulge all the information having to do with certain incidents.

Between Article I and Article II, others take this to mean that Congress has an unlimited power of inquiry, but in reality that is not the case. This fact has been ruled on multiple times by different courts, where usually they determine that either the President does not have to give up the information, or that the President has to give up certain aspects of that information based on other laws. It is also Congress’s right and duty to challenge the President when he uses executive privilege, in order to make sure that the power is not being abused, which is the exact reason for having separate branches and a balance of power.

If it wasn’t for executive privilege, other countries might be less inclined to deal with the United States because they fear that every detail could go public. Along the same lines the president’s advisors can’t give their best advice if they have to worry that anything they say could be made public. Military secrets and intelligence also needs to be protected to better ensure our troops safety as well as protect our country and citizens from retaliation after an exposed military operation. There is also information that needs to remain secret because it is in the best interest of the public to not find out.

Lastly and most importantly, if it wasn’t for executive privilege, national security and military intelligence matters could be made public, exposing our

informants and jeopardizing our national security. In order to keep this power alive and protect sensitive information, the United States needs to add guidelines or an amendment that properly codifies executive privilege to prevent its abuse. Once this is done, in theory, there would not be any more issues of whether power can or cannot be used.

Everything would be stated to say that the President can only use executive privilege in the situations previously stated and any other instance where executive privilege is claimed would be thrown out. Executive privilege helps to protect our citizens, our national security and our good standing and ability to negotiate with other countries. If we were not able to guarantee that level of secrecy it would be nearly impossible to conduct policy making, decision making, foreign negotiations, treaties, as well as threaten the United States and their citizens' safety.

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