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## Introduction to the Symposium: Executive Privilege and the Clinton Presidency

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# SYMPOSIUM: EXECUTIVE PRIVILEGE AND THE CLINTON PRESIDENCY

## INTRODUCTION

One outstanding characteristic of the Clinton presidency has been the Administration's contentious relationships with the courts and with Congress. These relationships have featured judicial and legislative inquiries that led to well-publicized clashes over such constitutional issues as the President's immunity from civil suit and what constitutes an impeachable offense. The Clinton Administration also has produced several controversies involving executive privilege, affecting the power of the executive branch and its ability to assert itself against the other branches. As the Administration nears its end and the nation prepares to elect a new leader, this Symposium examines the controversial executive privilege doctrine in light of the interbranch conflicts of the Clinton presidency.

### I. EXECUTIVE PRIVILEGE: UNSETTLED DOCTRINE

"Executive privilege" refers to the ability of the President to withhold information from the legislative and judicial branches in order to maintain secrecy.<sup>1</sup> This authority is not mentioned in the Constitution or the constitutional debates. The lack of an explicit provision of constitutional authority for executive privilege has led to controversy over whether such a privilege even exists. During the last days of the Nixon Administration, Raoul Berger published an influential study declaring executive privilege a "constitutional myth."<sup>2</sup> Berger favored a strict reading of the text of the Constitution, and he interpreted its structure as making the president subservient to Congress and granting Congress an absolute power of inquiry, enabling it to supervise effectively the executive branch.<sup>3</sup>

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<sup>1</sup> Executive privilege claims generally are classified into at least three different varieties of privilege based on distinct kinds of considerations: a military, foreign affairs, and diplomacy privilege; an informer's privilege; and an internal deliberations (or presidential communications) privilege. See 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 4-15, at 770.

<sup>2</sup> See RAOUL BERGER, *EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH* (1974).

<sup>3</sup> See *id.* at 344-47. For critiques of Berger's arguments, see MARK J. ROZELL, *EXECUTIVE PRIVILEGE: THE DILEMMA OF SECRECY AND DEMOCRATIC ACCOUNTABILITY* (1994); Louis Fisher & Mark J. Rozell, *Raoul Berger on Executive Privilege*, *PRESIDENTIAL STUDIES QUARTERLY* (Summer 1998); Abraham D. Sofaer, Book Review, 88 *HARV. L. REV.* 281 (1974); Ralph K. Winter, Jr., *The Seedlings for the Forest*, 83 *YALE L.J.* 1730 (1974).

In the landmark case of *United States v. Nixon*,<sup>4</sup> the Supreme Court rejected that view and held that the President has a constitutional right to withhold certain information. In *Nixon*, the Court recognized the existence of executive privilege as an inherent presidential power flowing from the nature of the enumerated powers in the Constitution.<sup>5</sup> The Court further held that it is the role of the Judiciary to decide whether the President has executive privilege in a given case and, if so, what is the scope of that privilege.<sup>6</sup> The Court thereby also rejected the contention that the Constitution provides an absolute privilege for all presidential communications.<sup>7</sup>

The Court in *Nixon* concluded that the executive privilege is required in some circumstances by the constitutional separation of powers doctrine.<sup>8</sup> The Court, however, has not identified precisely the scope of the privilege for most situations. Instead, the scope of the privilege remains in tension because of the competing demands created by the separation of powers: the judicial branch's need for evidence; the executive branch's need for confidentiality; and the legislative branch's need for information.<sup>9</sup>

## II. THE CLINTON ADMINISTRATION: TESTING THE SCOPE OF EXECUTIVE PRIVILEGE

In the aftermath of the Nixon administration and the Watergate scandal, presidents were reluctant to assert executive privilege. Presidents Ford, Carter, and Bush formally invoked the privilege only once, while President Reagan did so only three times.<sup>10</sup> The Clinton Administration, by contrast, has produced a flurry of activity involving executive privilege. This activity has included litigating executive privilege claims against grand jury subpoenas and invoking the privilege against congressional requests for information.

The most important executive privilege case litigated during the Clinton Presidency involved documents subpoenaed by a grand jury investigating former Secretary of Agriculture Mike Espy.<sup>11</sup> In finding a qualified privilege in that case, the District of Columbia Circuit Court expanded the scope of the presidential

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<sup>4</sup> 418 U.S. 683 (1974).

<sup>5</sup> See *id.* at 705-06; ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 261 (1997).

<sup>6</sup> See *Nixon*, 418 U.S. at 703-05; CHEMERINSKY, *supra* note 5, at 260.

<sup>7</sup> See *Nixon*, 418 U.S. at 703; CHEMERINSKY, *supra* note 5, at 260.

<sup>8</sup> See *Nixon*, 418 U.S. at 706-06, 708.

<sup>9</sup> See LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 195 (1997).

<sup>10</sup> See Ruth Marcus, *Executive Privilege: An Old, Uphill Struggle; Clinton Unlikely to Prevail on a Claim to Limit Testimony in Starr Probe, Some Specialists Say*, WASH. POST, Feb. 20, 1998, at A9.

<sup>11</sup> See *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997).

communications privilege to cover communications made by presidential advisers in the course of preparing advice for the President, even when the communications were not made directly to the President.<sup>12</sup> The court also created a test regarding the showing of need required to overcome the privilege when asserted against a grand jury subpoena.<sup>13</sup>

In a second case, the U.S. District Court for the District of Columbia considered the President's assertion of executive privilege to prevent senior advisers Bruce Lindsey and Sidney Blumenthal from testifying before Independent Counsel Kenneth Starr's grand jury investigating the Monica Lewinsky affair.<sup>14</sup> The court held that the advisers' testimony was privileged presumptively even though it may have related to a private, rather than official presidential matter.<sup>15</sup> The court, however, also applied the District of Columbia Circuit's "showing of need" test from the Espy case and found that the Office of the Independent Counsel met the requirements for overcoming the executive privilege covering the testimony of Lindsey and Blumenthal.<sup>16</sup> The Administration dropped the executive privilege claim on appeal.<sup>17</sup>

In addition to these conflicts in the courts, the Clinton Administration also has invoked executive privilege several times in refusing congressional requests for information. Administration officials have claimed executive privilege against congressional committees investigating the firing of White House travel office employees;<sup>18</sup> the Clintons' "Whitewater" real estate investment;<sup>19</sup> the denial of an

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<sup>12</sup> See *id.* at 751-52. To limit its expansion of the privilege, the court noted that, "the privilege should apply only to communications authored or solicited and received by those members of an immediate White House adviser's staff 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. The court further cautioned that, "the privilege only applies to communications that these advisers and their staff author or solicit and receive in the course of performing their function of advising the President on official government matters." *Id.*

<sup>13</sup> See *id.* at 757 ("[I]t is necessary to specifically demonstrate why it is likely that evidence contained in presidential communications is important to the ongoing grand jury investigation and why this evidence is not available from another source."). The court held that the Independent Counsel successfully overcame the privilege in this case. See *id.* at 761-62.

<sup>14</sup> See *In re Grand Jury Proceedings*, 5 F. Supp. 2d 21 (D.D.C. 1998), *aff'd in part and rev'd in part sub nom.*, *In re Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998), *cert. denied*, *Office of the President v. Office of Indep. Counsel*, 525 U.S. 996 (1998).

<sup>15</sup> See *id.* at 25-27.

<sup>16</sup> See *id.* at 28-30.

<sup>17</sup> See Susan Schmidt & Ruth Marcus, *Clinton Revives Claim Of Executive Privilege*, WASH. POST, Aug. 6, 1998, at A1.

<sup>18</sup> See Ann Devroy & John E. Yang, *White House Gives Congress 1,000 Pages of Travel Office Papers*, WASH. POST, May 31, 1996, at A10.

<sup>19</sup> See Susan Schmidt, *White House Rejects Subpoena; Whitewater Notes Called Confidential*, WASH. POST, Dec. 13, 1995, at A1. In this case, the White House formally

Indian casino license;<sup>20</sup> political killings in Haiti;<sup>21</sup> a memo criticizing the administration's drug policy;<sup>22</sup> campaign finance abuses;<sup>23</sup> and the decision to grant clemency to sixteen members of Fuerzas Armada de Liberacion Natcional (FALN), a terrorist Puerto Rican nationalist group.<sup>24</sup>

### III. THE SYMPOSIUM

Given the Clinton Administration's aggressive—and sometimes abusive—use of executive privilege, Mark Rozell takes the opportunity to review and critique Raoul Berger's position that executive privilege lacks a constitutional foundation. Professor Rozell responds to Berger's textual, historical, and structural arguments and concludes that executive privilege is a legitimate, though not unlimited, constitutional power. Professor Rozell proposes that the dilemma of executive privilege can be resolved by the separation of powers doctrine, as the political branches settle informational disputes between themselves, with limited judicial intervention.

Louis Fisher also recognizes executive privilege as a legitimate constitutional power, but he argues that legal and political limits render the scope of the privilege narrower than recent events seem to indicate. He points to early precedents set during the Washington Administration and to congressional leverage over the executive branch as evidence that Congress can force the executive branch to disclose more information than is commonly believed. Dr. Fisher further argues that Congress's need for information to govern supports an investigatory power that trumps the executive branch's claim to exclusive control of information in national security and foreign affairs cases.

Neil Kinkopf focuses on the judicial treatment of executive privilege claims, and the courts' use of a legal framework based on the separation of powers doctrine. Professor Kinkopf notes that the separation of powers doctrine unifies executive privilege claims with other related claims made by the Clinton Administration,

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claimed the documents in question were protected under the attorney-client privilege, but also noted that they were protected by executive privilege. *See id.*

<sup>20</sup> See George Lardner, Jr., *White House Seeks to Keep Indian Casino Memos Secret*, WASH. POST, Oct. 18, 1997, at A2.

<sup>21</sup> See Thomas W. Lippman, *Clinton Keeps Papers On Haiti From House; Executive Privilege Invoked in Panel's Probe of Killings*, WASH. POST, Sept. 26, 1996, at A20.

<sup>22</sup> See Peter Baker & Pierre Thomas, *GOP Steps Up Call for Drug Memo Release; Dole, Kemp, Gingrich Attack Clinton for Executive Privilege Stance*, WASH. POST, Oct. 3, 1996, at A12.

<sup>23</sup> See Guy Gugliotta, *White House Averts Contempt Action on Finance Probe Subpoenas*, WASH. POST, May 21, 1997, at A14.

<sup>24</sup> See Charles Babington & Juliet Eilperin, *No Letup In Probes Of Clinton Presidency; Executive Privilege Claim in Clemency Case Angers GOP*, WASH. POST, Sept. 17, 1999, at A1. Translated, Fuerzas Armada de Liberacion Nacional means the "Armed Forces of National Liberation."

including the government attorney-client privilege and temporary presidential immunity from civil suit. He argues that the courts have misapplied the separation of powers doctrine in ruling on the Clinton claims by treating differently claims made in the judicial and legislative arenas: Because federal court jurisdiction is based on statutes, privilege claims in the judicial arena implicate the legislative, not the judicial constitutional position.

Turning to the political aspects of executive privilege, Jonathan Entin discusses the negotiation of privilege disputes after the Clinton Administration. Professor Entin offers structural and practical arguments for preferring negotiation over litigation of such disputes. Although noting that the Clinton Administration's lack of success in litigating similar disputes may have weakened the presidency to some degree, Professor Entin remains optimistic regarding the prospects for interbranch accommodation, even under divided government.

Neal Katyal explores the distinction drawn between the public and private lives of the President, particularly in the Paula Jones and Monica Lewinsky cases. He argues that the Administration's difficulties in asserting executive privilege claims following these cases demonstrate that the public/private distinction is not entirely valid. Professor Katyal proposes that presidents have only a limited reservoir of secrecy, so that assertions of privilege on private matters weaken their ability to make such assertions on appropriate public matters.

Even after the increased attention during the Clinton Administration, the scope and, for some, the existence of executive privilege remains controversial. The variety of legal and political themes in this Symposium demonstrates that the tensions inherent in executive privilege and related separation of powers principles will not be settled soon. Still, it is the hope of the *Bill of Rights Journal* that this Symposium will inform the ongoing discourse, and perhaps assist future administrations and other officials to achieve effective governance by improving their understanding of executive privilege claims.

*IAIN R. MCPHIE*