The Politics of Executive Privilege

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To Morton Rosenberg,
public servant

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Foreword

For over two hundred years, Congress and the President have locked horns on an issue that will not, and cannot, go away: legislative access to executive branch information. Presidents and their advisers often claim that the sought-for information is covered by the doctrine of executive privilege and other principles that protect confidentiality among presidential advisers. In terms of constitutional principles, I see these battles as largely a standoff, with each side presenting fairly reasonable arguments either to get information (Congress) or to deny it (executive officials). Court decisions in this area are interesting but hardly dispositive. What usually breaks the deadlock is a political decision: the determination of lawmakers to use the coercive tools available to them, and political calculations by the executive branch whether a continued standoff risks heavy and intolerable losses for the President.

I take a few liberties with the title of this book, but not much. On many of the conflicts that I describe, the President or agency officials did not formally invoke or suggest executive privilege. Statutory grounds and other reasons were offered. However, whether executive privilege is exercised or not, the argument from the executive branch is couched in essentially the same terms: citing the constitutional need of the President and his advisers for confidentiality and candor when discussing and formulating national policy.

The emphasis on "politics," both in the title and the general theme, is not meant to belittle or neglect legal and constitutional arguments. Congress is not entitled to everything it asks for, and the executive branch cannot expect to win every time it says "deliberative process" or "active litigation files." Those are opening, not closing, arguments. In a system of separated powers, some autonomy is needed for each branch, but so is there a need for compromise and closure. Many useful and thoughtful standards have been developed to provide guidance for executive-legislative disputes over access to information. Those standards, constructive as they are, are set aside at times to achieve what both branches may decide has higher importance: settling differences and moving on.

I developed the theme of this book in several earlier articles: "Invoking Executive Privilege: Navigating Ticklish Political Waters," William & Mary Bill of Rights Journal, Vol. 8, No. 3 (April 2000), and "Congressional Access to Information: Using Legislative Will and Leverage," Duke Law Journal, Vol. 52, No. 2 (November 2002). I appreciate the courtesy of both journals for allowing me to reprint material from those articles. Over the years, I published many of these ideas in my books and in such articles as "Grover Cleveland Against the Senate," Capitol Studies, Vol. 7, No. 1 (Spring 1979); "Congressional Access to Executive Branch Information: Lessons from Iran-Contra," Government Information Quarterly, Vol. 6, No. 4 (1989); "Congressional Participation in the Treaty Process," University of Pennsylvania Law Review, Vol. 137, No. 5 (May 1989); "Congressional-Executive Struggles Over Information: Secrecy Pledges," Administrative Law Review, Vol. 42 (Winter 1990); "White House Aides Testifying Before Congress," Presidential Studies Quarterly, Vol. 27, No. 1 (Winter 1997); "When Presidential Power Backfires: Clinton's Use of Clemency," Presidential Studies Quarterly, Vol. 32, No. 3 (September 2002); and "Congressional Access to Presidential Documents: The House Resolution of Inquiry," Presidential Studies Quarterly, Vol. 33, No. 4 (December 2003).

Other sources for this book come from my work as Research Director of the House Iran-Contra Committee, where I analyzed the national security arguments of the Reagan administration to withhold information from Congress or even mislead it. Also, over the years I have testified on various aspects of executive privilege, particularly before the House Committee on Government Operations, the Senate Select Committee on Intelligence, and the House Permanent Select Committee on Intelligence.

For many decades it has been my good fortune to have close friends who study with great care congressional investigations, legislative oversight, and executive privilege. In particular, I want to single out Neal Devins, Fred Kaiser, Walter Oleszek, Harold Relyea, Morton Rosenberg, Mark Rozell, Stephen Stathis, and Charles Tiefer. All have made significant contributions to understanding these executive-legislative struggles. Mort and Charles read the manuscript and offered valuable comments. H. Jefferson Powell provided insights on the executive perspective. I appreciate the continued support of Keith Sipe of Carolina Academic Press, which recently published the fifth edition of my book, *American Constitutional Law*. I greatly respect the professionalism and integrity of the press. In both books I had the pleasure of working with Tim Colton, who handles production and has a talented eye for selecting and designing attractive covers.

I dedicate this book to Mort Rosenberg, a friend and colleague for three decades. To his training as a lawyer he adds a love of history and a keen sense of politics. In studying past disputes over documents or testimony, I frequently came upon his detailed memos preserved in committee reports, hearings, or the *Congressional Record*, setting forth with great clarity the issues that need consideration. Year in, year out, Mort shows how one person can make a difference in keeping our political institutions healthy and giving life to checks and balances.

Introduction

Presidents and their advisers cite various legal principles when they withhold documents from Congress and refuse to allow executive officials to testify before congressional committees. Congress can marshal its own impressive list of legal citations to defend legislative access to information, even when Presidents assert executive privilege. These legal and constitutional principles, finely-honed as they might be, are often overridden by the politics of the moment and practical considerations. Efforts to discover enduring and enforceable norms in this area invariably fall short.

This book explains the political settlements that decide most information disputes. Courts play a role, but it is a misconception to believe that handy cites from judicial opinions will win the day. Efforts to resolve interbranch disputes on purely legal grounds may have to give ground in the face of superior political muscle by a Congress determined to exercise the many coercive tools available to it. By the same token, a Congress that is internally divided or uncertain about its institutional powers, or unwilling to grind it out until the documents are delivered, will lose out in the quest for information. Moreover, both branches are at the mercy of political developments that can come around the corner without warning and tilt the advantage decisively to one side.

I begin by reviewing the constitutional principles at stake when presidential decisions to withhold documents from Congress collide with the needs of lawmakers for information about the executive branch. Which implied power should yield to the other? The next chapter analyzes the use of a fundamental legislative tool—the appropriations power—to extract information from the President. Subsequent chapters focus on other forms of congressional leverage: impeachment, the appointment power, congressional subpoenas, holding executive officials in contempt, House resolutions of inquiry, the "Seven Member Rule," investigations conducted by the General Accounting Office, and requests to White House aides to testify, all of which may force executive officials to release documents and discuss matters they would otherwise prefer to keep private and confidential.

The final chapter is devoted to executive claims of national security, which has special importance after the terrorist attacks of 9/11 and the U.S. military operations in Afghanistan and Iraq. Many scholars, judges, lawmakers, and executive officials believe that a President has great leverage when he withholds information in the areas of foreign policy and national defense. They think that a presidential assertion of executive privilege over this domain enjoys especially powerful, if not unreviewable, authority. I strongly disagree. Courts may decide to back off when Presidents assert that claim, but lawmakers have no reason to acquiesce. The Constitution grants them specific powers and duties in foreign and military affairs.

It is tempting to see executive-legislative clashes only as a confrontation between two branches, yielding a winner and a loser. It is more than that. Congressional access represents part of the framers' belief in representative government. When lawmakers are unable (or unwilling) to obtain executive branch information needed for congressional deliberations, the loss extends to the public, democracy, and constitutional government. Ever since World War II, there has been a steady flow of political power to the President. Some are comfortable with that trend because they believe that power is exercised more efficiently and effectively by the executive branch. The cost is great, however, to the checks and balances and separation of powers that the framers knew were essential to protect individual rights and liberties.