A Brief History Of Executive Privilege, From George Washington Through Dick Cheney

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In a letter dated January 30, 2002, Comptroller General David Walker, the head of the non-partisan Government Accounting Office, announced that he would sue Vice President Cheney, in order to obtain information about the National Energy Policy Development Group that Cheney chaired last year. The unprecedented lawsuit was made necessary, Walker's statement argued, by Cheney's refusal to cooperate voluntarily.

Walker's letter states that President Bush has not claimed an "executive privilege" in connection with the GAO's information requests. However, signs indicate that the Administration likely will assert such a privilege as the case proceeds. Certainly that is the tenor of public statements by the Vice President and the White House. The GAO is an arm of Congress and accordingly, the Administration contends, its efforts to uncover the inner workings of the Executive Branch violate the constitutional principle of separation of powers.

Who's right?

Although claims of executive privilege have been made since the administration of George Washington, the law remains remarkably unclear, partly because the relevant actors have usually tried to avoid a direct confrontation if possible. Thus, who prevails in the current controversy may turn out to be less a matter of what the law is, than of who blinks first: Congress (acting through Comptroller General Walker), the Administration, or the courts.

What is Executive Privilege and Where Does it Come From?

The Constitution nowhere expressly mentions executive privilege. Presidents have long claimed, however, that the constitutional principle of separation of powers implies that the Executive Branch has a privilege to resist certain encroachments by Congress and the judiciary, including some requests for information.

For example, in 1796, President Washington refused to comply with a request by the House of Representatives for documents relating to the negotiation of the then-recently adopted Jay Treaty with England. The Senate alone plays a role in the ratification of treaties, Washington reasoned, and therefore the House had no legitimate claim to the material. Accordingly, Washington provided the documents to the Senate but not the House.

Eleven years later, the issue of executive privilege arose in court. Counsel for Aaron Burr, on trial for treason, asked the court to issue a *subpoena duces tecum*--an order requiring the production of documents and other tangible items--against President Thomas Jefferson, who, it was thought, had in his possession a letter exonerating Burr.

After hearing several days of argument on the issue, Chief Justice John Marshall issued the order commanding Jefferson to produce the letter. Marshall observed that the Sixth Amendment right of an accused to compulsory process contains no exception for the President, nor could such an exception be found in the law of evidence. In response to the government's suggestion that disclosure of the letter would endanger public safety, Marshall concluded that, if true, this claim could furnish a reason for withholding it, but that the court, rather than the Executive Branch alone, was entitled to make the public safety determination after examining the letter.

Jefferson complied with Marshall's order. However, Jefferson continued to deny the authority of the court to issue it, insisting that his compliance was voluntary. And that pattern persists to the present. Thus, President Clinton negotiated the terms under which he appeared before Independent Counsel Kenneth Starr's grand jury, rather than simply answering a subpoena directing him to appear.

The Scope of Executive Privilege: The *Nixon* Case

Presidents often assert executive privilege even if the information or documents sought are not matters of national security. They argue that some degree of confidentiality is necessary for the Executive Branch to function effectively. Key advisers will hesitate to speak frankly if they must worry that what they say will eventually become a matter of public record.

The Supreme Court considered this argument in the 1974 case of *United States v. Nixon*. A grand jury convened by Watergate special prosecutor Leon Jaworski issued a subpoena to President Nixon requiring that he produce Oval Office tapes and various written records relevant to the criminal case against members of Nixon's Administration. Nixon resisted on grounds of executive privilege.

The Court recognized "the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties." It noted that "[h]uman experience 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."

Nonetheless, the Justices concluded that the executive privilege is not absolute. Where the President asserts only a generalized need for confidentiality, the privilege must yield to the interests of the government and defendants in a criminal prosecution. Accordingly, the Court ordered President Nixon to divulge the tapes and records. Two weeks after the Court's decision, Nixon complied with the order. Four days after that, he resigned.

Can Vice President Cheney Invoke Executive Privilege?

The Comptroller General's plan to sue the Vice President raises a host of unresolved legal issues. As a threshold matter, there is a question whether the courts will permit a representative of Congress (here, the Comptroller General of the GAO) to invoke judicial process against the Executive. The courts often rely on the standing and political question doctrines to avoid adjudicating conflicts between the other branches.

Nor is it clear, even assuming the court chooses to hear the Comptroller General's case, that the *Vice* President can assert executive privilege. The Constitution vests the Executive Power in the President. So long as the President remains healthy, the Vice President has no constitutionally assigned executive function. As far as the Constitution is concerned, the Vice President's role is legislative in nature: to preside over and break ties in the Senate.

Furthermore, the Comptroller General has not, to this point, requested information about what was said to or by Vice President Cheney's National Energy Policy Development Group. Rather, the Comptroller General has thus far only asked for the names of participants in the Group's various meetings. It is not clear that executive privilege, even if it applies, extends beyond the content of discussions to cover the fact that they occurred at all. (By comparison, the attorney-client privilege generally covers the content of consultations with a lawyer, but not the fact that they occurred.)

A Precedent from the Clinton Years

Finally, no case to this point holds that executive privilege applies to conversations between Executive officials and persons *outside the government*, such as corporate officers of Enron and other companies.

The closest the courts have come to extending the privilege to such discussions was in the 1993 decision of the U.S. Court of Appeals for the D.C. Circuit in *Association of American Physicians and Surgeons, Inc. v. Hillary Clinton.* That case raised the question whether the Federal Advisory Committee Act ("FACA") applied to the health-care-reform panel chaired by then-First Lady Hillary Clinton. And that question, in turn, depended on whether the First Lady is, or is not, an officer or employee of the government.

Under FACA, if a person who is not an officer or employee of the government is a member of a government group, then the group's proceedings must be open to the public. The health-care-reform panel had kept its proceedings private, so if the First Lady was not a government officer or employee, it had broken the law. Fortunately for the Clinton Administration, however, the court held that the First Lady is indeed an officer or employee of the government, and FACA thus did not apply.

The court strained the statutory language in order to reach this conclusion - but why? The answer is that a contrary result--to be precise, a finding that the statute's requirement of public meetings applied to the health-care-reform panel--would have raised a difficult constitutional question. And, under a well-established principle of legal interpretation, courts construe statutes in order to avoid difficult constitutional questions. The D.C. Circuit applied that principle in this case.

According to the D.C. Circuit, the difficult constitutional question was this: Does executive privilege extend to conversations between Executive officials and persons outside the government? If so, then FACA unconstitutionally violates that privilege by requiring those conversations to be disclosed. Had the court ruled that the First Lady was neither a government officer nor a government employee, it would have had to decide the difficult constitutional

question--for FACA then would have required disclosure of deliberations between the (non-government) First Lady and the executive branch government officials on the commission.

Why the Hillary Clinton Case Suggests Cheney's Privilege Claim May Prevail

The relevance of this complex case to Cheney's situation is straightforward: The D.C. Circuit thought that executive privilege *might* extend to conversations between executive officials and persons outside the government. And any appeal in the Comptroller General's case against Vice President Cheney would go to the D.C. Circuit (before possibly going to the U.S. Supreme Court).

Thus, a claim of privilege by the Vice President could succeed - particularly if GAO were to go beyond its current requests and seek not only the names of people with whom Cheney consulted, but also the content of deliberations. The D.C. Circuit's speculation as to the breadth of the executive privilege indicates that even if private industry representatives acted as members of the Energy Group, the Group's deliberations may still be privileged, and thus not subject to FACA disclosure.

Will we soon learn the answer to the question the D.C. Circuit left open and the other puzzles surrounding executive privilege? Probably not. If history is our guide, it seems more likely that at least one branch of the government will find a way to avoid deciding the question directly.