



# Executive Privilege and Former Presidents: Constitutional Principles and Current Application

September 20, 2021

A number of congressional committees, including the newly created [House Select Committee to Investigate the January 6th Attack on the United States Capitol \(Select Committee\)](#), are currently investigating issues associated with the events of January 6, 2021. The Select Committee, which has suggested that it will conduct an inquiry that includes scrutinizing the actions of then-President Donald Trump, recently [announced](#) it was seeking a variety of relevant documents from the National Archives and Records Administration (National Archives) and other executive branch agencies. These initial requests [included](#) demands for Trump Administration documents, including “communications within and among the White House and Executive Branch agencies during the leadup to January 6th and on that day.” Signaling a possible legal confrontation, former President Trump [responded](#) to that announcement by asserting that the Select Committee’s requests were “being performed at the expense of long-standing legal principles of privilege,” and that “Executive privilege will be defended.”

This apparently brewing dispute over congressional access to evidence of former President Trump’s actions and direct communications appears to implicate the presidential communications privilege, a particular component of what is often referred to as executive privilege. As a result, the Select Committee’s investigation is likely to raise both constitutional questions of a former President’s authority to use executive privilege to shield from Congress communications he made while in office, and statutory questions arising from the [Presidential Records Act \(PRA\)](#) and its treatment of congressional access to presidential records possessed by the National Archives.

This Sidebar addresses the general legal principles governing these questions. It provides an overview of executive privilege and its application to claims by former Presidents in the context of a congressional investigation. It also highlights the significant weight given to the views of the incumbent President by courts when they consider privilege claims raised by a former President. A [companion Sidebar](#) addresses the treatment of executive privilege claims by a former President under the PRA and outlines judicial and legal considerations specific to the January 6 investigations. Ultimately, and as discussed in both Sidebars, it appears that an important factor in how this dispute unfolds is likely to be whether the *current* President supports the *former* President’s potential privilege claim.

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## Executive Privilege and Congressional Investigations

*Executive privilege* is a term that has been used to describe the President's [prerogative](#) to "resist disclosure of information the confidentiality of which [is] crucial to fulfillment of the unique role and responsibilities of the executive branch of our government." However, there is not a single "[executive privilege](#)." Instead, there exists a [suite of distinct executive privileges](#) that protect different types of executive branch communications. These privileges generally arise from different sources of law, apply with different strengths, and, in the congressional context, are balanced against Congress's [Article I](#) powers in different ways.

At least some of the Select Committee's demands for Trump-era White House documents appear to implicate one of the stronger executive privileges known as the *presidential communications privilege*. The [Supreme Court has established](#) that this privilege derives from a combination of the constitutional separation of powers and the President's [Article II](#) prerogatives. It protects presidential communications and records produced "in performance of [a President's] responsibilities . . . of his office . . . and made in the process of shaping policies and making decisions. . . ." The privilege covers [both](#) communications directly involving the President and those made by close presidential advisors for purposes of assisting the President in his constitutional functions. By ensuring a degree of privacy for presidential deliberations, the presidential communications privilege seeks to encourage informed presidential decisionmaking. The Supreme Court has [reasoned](#) that the importance of maintaining the confidentiality of communications between the President and those who advise him is "plain," as "[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."

Any discussion of the application of the presidential communications privilege generally revolves around the seminal 1974 Supreme Court case *United States v. Nixon* (*Nixon*). In that case, President Richard Nixon sought to quash a judicial trial subpoena issued at the request of a special prosecutor for recordings of conversations the President had in the Oval Office with close advisors regarding the Watergate break-in. The *Nixon* Court acknowledged the existence of a presidential communications privilege, but [concluded](#) that the privilege was not "absolute," as President Nixon had argued. The privilege could instead be overcome in certain circumstances by the party seeking the information. In what is now the hallmark of executive privilege disputes, the Court proceeded to [balance](#) the competing interests of confidentiality and disclosure, holding that the President's "generalized interest in confidentiality" was outweighed by the "demonstrated, specific need for evidence in a pending criminal trial." The Court therefore ordered that the tapes be delivered to the district court for [in camera](#) review.

The *Nixon* Court expressly [abstained](#) from addressing how a reviewing court should weigh a claim of executive privilege if Congress, rather than a prosecutor, were seeking the disclosure of presumptively privileged communications. A few months before *Nixon* was decided, however, the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit), engaged in such an analysis in *Senate Select Committee on Presidential Campaign Activities v. Nixon* (*Senate Select*), a lawsuit stemming from a congressional committee's attempt to obtain the Nixon tapes. There, the court balanced Congress's investigative and legislative functions against the President's interest in confidentiality, and determined that the congressional need was insufficient to overcome the privilege. The appeals court [held](#) that in order to obtain privileged presidential communications, Congress would need to show that "the subpoenaed evidence is demonstrably critical to the responsible fulfillment of the Committee's functions." The committee attempted to make that showing by arguing it had a "critical" need for the tapes in carrying out both its oversight and legislative functions. The court, however, [determined](#) that the committee failed to make the requisite showing—principally on the grounds that President Nixon had released written transcripts of the tapes and the House Judiciary Committee, in the conduct of its own impeachment inquiry, had already obtained the tapes.

## Executive Privilege and Former Presidents

*Nixon* and *Senate Select* establish that there is a privilege protecting presidential communications that is based in the Constitution and can be asserted against Congress, but that privilege can also be overcome by a sufficient showing of need, including by an investigating congressional committee. However, neither case addressed whether the presidential communications privilege or other executive privileges can be asserted by a former President, and if so, how such an assertion should be balanced against Congress's investigative interests.

Although no court appears to have directly considered the latter question, the former was addressed in the 1977 case of *Nixon v. Administrator of General Services* (*Nixon II*). In that case, the Supreme Court **determined** that the protections of the presidential communications privilege survive beyond the conclusion of the presidential administration within which they occur and may be asserted by a former President. *Nixon II* involved a challenge brought by former-President Nixon to the Presidential Recordings and Materials Preservation Act, a records disposition law enacted shortly after President Nixon's resignation, and a precursor to the PRA. In upholding the law, the Court **concluded** that a former President may "legitimately" assert the privilege to prevent disclosure of his official records after he has left office. In reaching that conclusion, the Court **reasoned** that the confidentiality necessary to ensure the free exchange of ideas between the President and his advisors

cannot be measured by the few months or years between the submission of the information and the end of the President's tenure; the privilege is not for the benefit of the President as an individual, but for the benefit of the Republic. Therefore the privilege survives the individual President's tenure.

The Court's determination appears to have rested on the reasoning that the general purpose of the presidential communications privilege—that the confidentiality of presidential decisionmaking is necessary to ensure the provision of frank advice to the President—could be threatened or undermined regardless of when the disclosure of the covered communications occurs. However, *Nixon II* distinguished former Presidents from incumbents in two important ways. First, the Court **explicitly stated** that "to the extent that the privilege serves as a shield for executive officials against burdensome requests for information which might interfere with the proper performance of their duties, a former President is in less need of it than an incumbent." Second, the Court **concluded** that the "expectation of the confidentiality of executive communications [is]... subject to erosion over time after an administration leaves office."

This constitutional distinction between incumbent and former Presidents was recently emphasized by a **federal district court** in the latest chapter of *Trump v. Mazars*. *Mazars* began when then-President Trump sued to block his financial and accounting firms from complying with various House committee subpoenas for his personal financial records. Lower courts upheld the subpoenas, but the **Supreme Court reversed** in 2020 when it announced a nonexhaustive four-part test for evaluating congressional subpoenas for certain presidential documents. That test (discussed in detail [here](#)) stemmed directly from the "weighty concerns regarding the separation of powers" that arise from such a subpoena.

The case was remanded to the lower courts to apply the new test. In the meantime, however, President Trump left office, which forced the district court to consider how and whether the *Mazars* test would apply to a congressional subpoena for the personal documents of a *former* President. In doing so, **the district court** acknowledged that "separation of powers considerations do not entirely disappear merely because the entanglement is between Congress and a former President" but ultimately concluded that any separation of powers worries were "less substantial when a former President is involved." As a result, the **court** applied "reduced judicial scrutiny" through what it called the "*Mazars* lite" test and ultimately concluded that some of the committees' asserted investigative purposes were adequate to obtain the President's records. The case has been appealed to the D.C. Circuit.

## Importance of the Incumbent President's Views

*Nixon II* therefore establishes the framework for considering executive privilege claims by former Presidents. That case identified another important factor that can further diminish the strength of a former President's privilege claim: whether the incumbent President supports the former President's position. According to *Nixon II*, the fact that President Carter—the sitting President at the time—did not support Nixon's privilege claim “detract[ed] from the weight of” Nixon's argument because it “must be presumed that the incumbent President is vitally concerned with and in the best position to assess the present and future needs of the Executive Branch, and to support invocation of the privilege accordingly.” In the Court's view, it is the incumbent President that is better situated to make determinations about the need for executive confidentiality, because it is the incumbent President who may suffer the harm that the privilege purports to protect against if privileged documents were disclosed (namely that current advisors would be dissuaded from giving the incumbent President candid advice). As a consequence, when a former President's privilege claim does not receive the support of the incumbent President, the strength of the claim declines.

This principle can be seen in a D.C. Circuit case, *Dellums v. Powell*, decided just before *Nixon II*. *Dellums* involved a civil discovery subpoena for tapes and transcripts of former President Nixon's conversations regarding the 1971 May Day demonstrations. In deciding the case, the court directly addressed a privilege claim by a former President that was **not affirmatively supported** by the incumbent President. The court **concluded** that “the significance of the assertion by a former President is diminished when the succeeding president does not assert that the document is of the kind whose nondisclosure is necessary to the protection of the presidential office and its ongoing operation.” That lack of support from the incumbent does not necessarily defeat the former President's claim, the court reasoned, but rather was of “cardinal significance” in considering “whether the claim is overcome by a showing of other need....” The result of *Nixon II* and *Dellums* is that while a former President has authority to invoke the presidential communications privilege, the strength of that claim—and the likelihood that the asserted interest in confidentiality will succumb to the need shown by the party seeking the documents—is heavily influenced by the position of the current President.

This Sidebar covers the basic constitutional principles governing claims of executive privilege by former Presidents. A [companion Sidebar](#) turns to the PRA—the federal law governing the disclosure of presidential records held by the National Archives—before presenting a selection of legal considerations specific to the January 6 investigations.

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