STATEMENT

of

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Executive Privilege and Congressional Oversight

Introduction

Chairman Nadler, Ranking Member Collins, and Members of the Committee, I thank you for your invitation to appear today and to present testimony on the issue of "Executive Privilege and Congressional Oversight." My name is Paul Rosenzweig and I am a Senior Fellow at the R Street Institute.[1] I am also the Principal and founder of a small consulting company, Red Branch Consulting, PLLC, which specializes in, among other things, cybersecurity policy and legal advice; and a Professorial Lecturer in Law at George Washington University, where I teach a course on Cybersecurity Law and Policy and another on Artificial Intelligence Law and Policy.

My testimony today is in my individual capacity and does not reflect the views of any institution with which I am affiliated or any of my various clients.

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Personal Background and Introduction

Given the somewhat contentious nature of the topic of today's hearing it might be useful for me to put my remarks into context by expanding somewhat on my personal and political background. Normally, I prefer not to do so, since my views on policy and the law are, I hope, independent of any partisan affiliation. But today's topic does suggest that it is worthwhile to establish my political and philosophical *bona fides*.

For most of my adult life, I have been a registered Republican. The first political act I can recall was supporting the candidacy of Gerald Ford during a high school debate before I could legally vote. I have been a member of the Federalist Society (a conservative and libertarian legal group) since 1983, and remain so to this day. I am a co-founder of Checks & Balances, a group of conservative and libertarian attorneys founded in the fall of 2018 to speak out in defense of the rule of law.[2] After serving as a career prosecutor in the Department of Justice, my legal career has included stints as a defense attorney and as an investigative counsel for the Republican staff of the House Committee on Transportation and Infrastructure. From 2005 to 2009, I served as the Deputy Assistant Secretary for Policy in the Department of Homeland Security, as an appointee of President George W. Bush. In my non-legal career, I have worked for an extended stint at The Heritage Foundation and now work, as I said, at the R Street Institute, both generally characterized as conservative think tanks.

In short, I am a conservative. I have testified before Congress on more than a dozen occasions as an invited witness, almost always at the request of members of the Republican party. I dare say that on many issues of substance my policy views diverge from those of many of the members of the majority sitting here today.

In so far as my professional career goes, my most salient experience relative to today's hearing involves my work on the investigation of President Clinton. From 1997 to 2000, I served as Associate Independent Counsel and then Senior Counsel in the Office of the Independent Counsel (*In re: Madison Guaranty Savings and Loan*) under Judge Kenneth W. Starr. When I left the OIC in 2000, I continued to work as a contractor for that office as well as for two other Independent Counsels on issues relating to their inquiries and their final reports.

With that extended background in mind, I am pleased to be here to testify, as I think that the principles of law that animated the investigation of President Clinton that I worked on 20 years ago are verities that bear repeating. Intellectual consistency demands that our approach to questions of law must not vary based on partisan views or political benefit and for that reason, the same principles that counseled against President Clinton's invocations of executive privilege apply to the evaluation of President Trump's claims.

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[2] "About Checks & Balances," Checks & Balances, 2019. https://checks-and-balances.org/about. Following the release of the Special Counsel's report and the activities it documented, I joined a Checks & Balances statement calling for continuing Congressional investigation. *See* "Statement from co-founders and additional members of Checks & Balances," Checks & Balances, April 23, 2019. https://checks-and-balances.org/new-statement-from-checks-and-balances-on-the-mueller-report.

In my testimony today, I want to make a few points, which I can summarize as follows:

- There is a long history of congressional oversight of executive branch activity that dates back to the Founding of the American Republic.
- Throughout that time, at least until recently, Presidents have been circumspect in their assertion of a privilege to thwart congressional or criminal inquiry. Though views of the privilege have waxed and waned over time, throughout much of our nation's history, they have bent toward accommodation of investigative interests.
- Recent history tells a different tale – one of Presidential invocations of privilege intended to conceal wrongful conduct and thwart legitimate inquiries. I saw much of that firsthand during the investigation of President Clinton, an investigation that resulted in repeated invocations of privilege that were rejected, almost uniformly, by the courts.
- Much the same pattern of Presidential resistance to oversight can be seen today. For me, the application of the same principles that guided the Clinton inquiry should guide this committee. Claims of executive privilege should be narrow, focused, and justified only by legitimate executive interest in fostering candid advice to the president. Broader invocations (as, for example, with attempts to prevent private citizens from testifying or to conceal documents that have already been released to third parties) are ill-considered and ought to be rejected by this committee, by the courts to which these disputes might fall for adjudication, and by the American public.
- Finally, true adherence to the rule of law means that rules have to be applied even-handedly, regardless of whether a political party or other interest is immediately benefited. It means not invoking privileges to conceal wrongdoing; and it means not invoking them to frustrate legitimate congressional inquiry. That obligation falls on all citizens but, in my judgment, it falls even more strongly on the president, who takes an oath to uphold the law. Accordingly, if you continue to think that President Clinton's use of the privilege to avoid scrutiny of his actions was violative of his oath of office and deserving of condemnation—as I do—you can say no less about President Trump.

The Long History of Congressional Oversight

Congress's authority to demand and receive information from the executive has been recognized from the founding. At the Philadelphia Convention, George Mason emphasized that members of Congress "are not only Legislators but they possess inquisitorial powers. They must meet frequently to inspect the Conduct of the public office."[3] As James Wilson, a framer and later Supreme Court justice, emphasized in his writings and lectures, the House would constitute the "grand inquest of the state" and "diligently inquire into grievances, arising both from men and things."[4]

[3] Max Farrand, *The Records of the Federal Convention of 1787* (1911), 2 Farrands 206, *quoted in* United States House of Representatives, "Investigations & Oversight," United States Congress. https://history.house.gov/Institution/Origins-Development/Investigations-Oversight.

[4] Kermit L. Hall and Mark David Hall, eds*., Collected Works of James Wilson* (Liberty Fund, 2007), II, p. 74. http://lf-oll.s3.amazonaws.com/titles/2074/Wilson_4141_EBk_v6.0.pdf.

In 1792, President Washington and his cabinet recognized this principle—that the House is "an inquest" and "may institute inquiries," while "the Executive ought to communicate such papers as the public good would permit," refusing only those "the disclosure of which would injure the public."[5]

In this, as in so many things, Washington set a precedent that guides us to this day. The occasion was the St. Clair disaster, a military defeat in Indian country that resulted in the death of more than 650 men and the wounding of more than 250 others. It was likely the most significant Indian victory over American forces in the history of the nation—more than triple that of Little Bighorn, for example.

Congress undertook an inquiry into the military failure. They saw the separation of powers not as a prohibition on one branch examining the conduct of another, but as a means of checking the growth of power in any branch. And so, Congress chartered a select committee to examine the disaster.

When the committee asked the War Department for records, it caused a fair amount of consternation in the Cabinet (or so Thomas Jefferson tells us). Nobody was sure whether or not the House had the authority to make such a request for information or whether the Washington administration had a duty to answer. Ultimately, Washington, in effect, asserted for the first time the existence of what we have come to think of as executive privilege. But he did so in a way that preserved executive prerogative while also accommodating legitimate congressional interest.

Washington's successors, at least until the current administration, have recognized an obligation to provide information to Congress. As Mark Rozell has observed:

> Although executive privilege is a legitimate power with constitutional "underpinnings," it is not an unlimited, unfettered presidential power. Traditionally, presidents who have exercised executive privilege have done so without rejecting in principle the legitimacy either of Congress to conduct inquiries or of the judiciary to question presidential authority. For the most part, presidents have recognized the necessity of a balancing test to weigh the importance of legitimate competing institutional claims.[6]

The Fundamentals of Executive Privilege

Against that historical background the current contours of the executive privilege have developed. While much of the law and policy of the issue is unclear and often the product of negotiation and accommodation between the various branches of government, there are certain aspects of the question that are relatively well-settled.

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[5] 1 *Writings of Thomas Jefferson* 304 (Andrew Lipscomb, ed. 1903), *quoted in* William P. Barr, "Congressional Requests for Confidential Executive Branch Information," (June 19, 1989). https://www.justice.gov/file/24236/download.

[6] Mark Rozell, *Executive Privilege: The Dilemma of Secrecy and Democratic Accountability* (The Johns Hopkins University Press, 1994), p. 62.

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First, there is a positive value to the privilege. Broadly speaking, the idea is that we wish to enable the advice that senior officials give the president, which often involves matters of national security and domestic economic prosperity, and is of critical importance to the nation. A president will often have private conversations with members of his Cabinet or the administration. It hardly seems plausible that a president could do his or her job and fulfill their constitutional obligations without the candid advice of senior advisors. It is thought that protecting the confidentiality of these conversations will foster open communication.

And so, executive privilege extends not just to the legal advice that the president receives but, at least in theory, to all of the many communications that take place within the executive branch that are intended to develop policy for the benefit of the president. As the Supreme Court said in *United States v. Nixon* while reviewing President Nixon's claim of privilege, there is a "valid need for protection of communications between high government officials and those who advise and assist them in the performance of their manifold duties."[7]

Given such theoretical grounding, we have come to recognize that the phrase "executive privilege" is really a general term that covers a number of different, more-specific types of privilege. In assessing any claim, it is therefore critical to consider which of these types of specific privilege is under consideration. Broadly speaking, these sub-categories include: presidential communications, law enforcement investigative information, internal deliberations not involving the president directly (also sometimes called the deliberative processes privilege), confidential national security or diplomatic information (including classified information), and information related to the governmental attorney-client relationship.

Over time, I have come to believe that some of these sub-categories (like immediate communications with a president) are closer to the core of the constitutional values protected by the executive privilege than others (such as, for example, law enforcement investigative information) at least in part because they more directly serve the value of enabling presidential exercise of Article II authority. To be sure, there are confidentiality values in protecting the wholesale disclosure of other categories of information (such as law enforcement files), but the sensitivity of those documents often must yield to the committee's need for information.

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Second, it is abundantly clear the privilege (in all of its forms) is not absolute. That's why Richard Nixon ultimately lost his effort to prevent disclosure of the tapes he had made of conversations in the White House. Nixon asserted that the confidential nature of the conversations made all of them privileged against disclosure but the Court rejected Nixon's extreme reading that he had an absolute power to withhold the tapes, saying:

[7] *United States v. Nixon*, 418 U.S. 683 (1974).

> To read the Article II powers of the President as providing an absolute privilege as against a subpoena essential to enforcement of criminal statutes on no more than a generalized claim of the public interest in confidentiality of nonmilitary and nondiplomatic discussions would upset the constitutional balance of "a workable government" and gravely impair the role of the courts under Article III.[8]

And, one might add, quite obviously it might also impair the role of Congress under Article I.

The Court's balancing test suggests that the more significant the investigative interest, the greater the likelihood that the privilege should yield. As in *Nixon*, a criminal investigation would seem to be a high-value investigative interest, as would a congressional inquiry into presidential misconduct. By contrast, perhaps, a congressional interest directed at a more mundane legislative objective (say, reform of the carried-interest tax deduction to cite as abstruse an example as I can imagine), however important a topic it might be, is likely to carry lesser weight and less successfully justify piercing the privilege.

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Third, as my former colleague at The Heritage Foundation, Todd Gaziano, wrote over seven years ago, when the subject of inquiry is a congressional investigation, the president bears a burden of accommodation:

> [T]he president is required when invoking executive privilege to try to accommodate the other branches' legitimate information needs in some other way. For example, it does not harm executive power for the president to selectively waive executive privilege in most instances, even if it hurts him politically by exposing a terrible policy failure or wrongdoing among his staff. The history of executive-congressional relations is filled with accommodations and waivers of privilege. In contrast to voluntary waivers of privilege, Watergate demonstrates that wrongful invocations of privilege can seriously damage the office of the presidency when Congress and the courts impose new constraints on the president's discretion or power (some rightful and some not).[9]

Gaziano even went so far as to characterize an invocation of privilege to cover up wrongdoing as an "illegal invocation."[10]

Congressional Interpretation of the Privilege

The legislative and executive branches have fundamentally different views of the scope of executive privilege and these no doubt reflect their different institutional roles in our government.

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[8] *Id.* at 707.

[9] Todd F. Gaziano, "Executive Privilege Can't Shield Wrongdoing," *The Heritage Foundation*, June 22, 2012, https://www.heritage.org/the-constitution/commentary/executive-privilege-cant-shield-wrongdoing.

[10] *Ibid.*

Some constitutional scholars and members of Congress have argued that the executive has little or no authority to withhold any information from Congress. Raoul Berger famously maintained that executive privilege was a "myth," contending that the framers intended Congress to be a "grand inquest," with powers modeled on the historic powers of the British Parliament. Prominent members of Congress have also expressed skepticism of executive privilege. Representative John Moss, for example, "vigorously opposed the use of executive privilege by presidential administrations" and pressed every administration from Kennedy to Ford to adopt an explicit policy that it could only be invoked by the president personally.[11] Indeed, as University of Chicago law professor Aziz Huq has noted, the concept of executive privilege lacks any firm textual foundation at all in the Constitution—it exists, if at all, by implication from other provisions of the Constitution like the vesting clause and the structural requirements of the system, which is to say it is on relatively weaker ground than explicitly authorized constitutional powers.[12]

Nevertheless, as a matter of practice, Congress has generally accepted the legitimacy of the qualified presidential communications privilege recognized in *Nixon*, even though the Supreme Court noted that it was not addressing how the president's interests in confidentiality were to be balanced against congressional demands for information. It has also tacitly accepted the "states secrets" branch of the privilege (*i.e.*, military and diplomatic secrets), with the caveat that there are now established and usually trustworthy mechanisms, such as the intelligence committees, through which such information can be shared.

By contrast, under presidents of both parties, the executive branch has taken a much broader view of the privilege, arguing that it extends beyond presidential communications and state secrets to include deliberative process at the agency level, law enforcement information (particularly with respect to open law enforcement files), and attorney-client and work-product material.

Aside from a single district court decision (involving the Fast and Furious investigation), no court has ever recognized that any of these latter types of privilege apply to congressional inquiries and Congress has routinely rejected the idea that executive privilege applies in these areas.[13]

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Finally, as Rozell details, even the executive recognizes that the privilege is not absolute. Every modern president has accepted at least theoretical limitations on the invocation of executive privilege,

[11] Rozell, pp. 11, 14-20 and 47.

[12] Aziz Huq, "'Executive privilege' is a new concept built on a shaky legal foundation," *The Washington Post*, May 12, 2019. https://www.washingtonpost.com/outlook/executive-privilege-is-a-new-concept-built-on-a-shaky-legal-foundation/2019/05/10/fa92b82e-7292-11e9-9eb4-0828f5389013_story.html?utm_term=.0a4ca1010b11.

[13] *See Committee on Oversight and Government Reform v. Lynch*, 156 F.Supp.3d 101 (D.D.C. 2016). Counsel for the House of Representatives recently notified the court of appeals of a settlement of the matter that included a commitment by both the House and the Executive Branch not to rely on this decision (or an earlier decision on standing, *Committee on Oversight and Government Reform v. Holder*, 979 F.Supp.2d 1 (D.D.C. 2013)), in any subsequent litigation.

particularly the requirement that it must (ultimately) be invoked by the president personally.[14] In fact, even Richard Nixon adopted a policy limiting the use of executive privilege, promising that it would be exercised only "in the most compelling circumstances and after a rigorous inquiry into the actual need for its exercise" and "with specific Presidential approval."[15]

Senator Sam Ervin, however, was not satisfied with Nixon's implementation of this policy and supported a bill that would have required any assertion of executive privilege to be accompanied by a signed statement of the president invoking the privilege. Ervin's caution was wise. When the Senate Watergate hearings began, "Nixon tried to prevent his present and former aides from testifying by threatening a claim of executive privilege that would stop the committee from questioning them." Ervin responded by calling a press conference, which he ended "by threatening to have the aides arrested if the president did not allow them to testify publicly and under oath before the Senate committee."[16]

In the decades following Watergate, the stigma of executive privilege was such that administrations were motivated to reach an accommodation with Congress before a president was forced to make a decision to formally invoke it. However, as time passed, presidents have become more willing to invoke (or at least threaten to invoke) the privilege. Moreover, the Office of Legal Counsel has undermined the use of the criminal contempt statute in cases involving the assertion of executive privilege. In the absence of any reliable mechanism for enforcing congressional subpoenas and with no deadlines for asserting executive privilege, it has become increasingly attractive for the executive branch to stonewall and delay in response to congressional demands for information.[17]

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If I could summarize this broad expanse of law and history it would be as follows: While the legal rules are important, in this context, they are more like guideposts than firm mandates. You should therefore be wary of anyone who is excessively doctrinal on the question of what the "rules" are. In my judgment, the key to resolving most executive privilege disputes is accommodation. Congress needs information to

[14] Rozell, pp. 47-48 and 84-141.
[15] Karl E. Campbell, *Senator Sam Ervin, The Last of the Founding Fathers* (The University of North Carolina Press, 2007), p. 239. *See also*, Rozell, pp. 63-66. I can find no record of how Ervin thought he would implement his threat of arrest, should it have become necessary.
[16] Campbell, p. 285.
[17] *Senate Select Committee v. Nixon,* 498 F.2d 725 (D.C. Cir. 1974), denied the Senate committee access to the Watergate tapes in large part because the House Judiciary Committee, which was conducting impeachment proceedings, already had possession of the tapes. This holding is often used by the executive branch to suggest that Congress's interest in obtaining executive information is less compelling when it is merely for oversight purposes. This reading, however, is controversial and should be of no assistance to the executive branch when Congress is conducting an investigation preliminary to the consideration of impeachment questions. *See,* Todd Garvey, *Presidential Claims of Executive Privilege: History, Law, Practice, and Recent Developments,* Congressional Research Service, Dec. 15, 2014, pp.2-4. https://fas.org/sgp/crs/secrecy/R42670.pdf.

do its job. The executive branch may have a legitimate interest in protecting certain materials from disclosure, and that is either a formula for accommodation or for confrontation.

The Clinton Privilege Fights

Against this backdrop of history and these general principles, I want to review some of our experiences with the investigation of President Clinton. I raise this history not to re-litigate the merits of that inquiry, which are now well-settled by the judgment of history. Rather, I want to use the experience as a lens through which to view current events.[18]

In the opinion of Independent Counsel Starr (in his report to Congress), there was "substantial and credible information" that the president's repeated and unlawful invocation of executive privilege was inconsistent with his duty to faithfully execute the laws of the United States and constituted grounds for potential impeachment. In making this recommendation, the Independent Counsel was echoing the history of Watergate. In 1974, when this committee drafted articles of impeachment for the House to consider, the third article adopted recommended impeachment on the ground that the president had refused to comply with lawful subpoenas from Congress, in part by the wrongful invocation of executive privilege. Starr's report to this body suggested that Clinton had acted similarly, albeit with respect to a criminal investigation rather than a congressional one.

The Starr report recounts a history that echoes recent events. It recalls President Clinton's promise on public TV that he would "cooperate fully" with the investigation into his contacts with Ms. Lewinsky. We are reminded that in 1994, Lloyd Cutler, then the White House counsel, issued a legal opinion directing that the Clinton administration not invoke executive privilege in cases involving allegations of personal wrongdoing.[19]

In the end, however, those promises were unavailing. During the course of the Lewinsky investigation President Clinton invoked the presidential communications version of the executive privilege and the governmental attorney-client version of the privilege with respect to five witnesses: Bruce Lindsey, Cheryl Mills, Nancy Hernreich, Sidney Blumenthal and Lanny Bruer.

He withdrew one claim before litigation and lost the remaining claims in a ruling by the district court.[20] The breadth of the claim was, in some cases, striking. For example, Cheryl Mills (who was, at the time a Deputy White House Counsel) not only claimed privilege over internal communications with the president and other senior staff but also asserted that her communications with the president's private

[18] I take most of what follows in this section from the "Referral from Independent Counsel Kenneth W. Starr in Conformity with the Requirements of Title 28, United States Cod, Section 595(c)," House Doc. 105-310 (Sept. 11, 1998) [hereinafter *Starr Report*].

[19] Memorandum for all Executive Department and Agency General Counsels from Lloyd N. Cutler, Special Counsel to the President, "Congressional Requests to Departments and Agencies for Documents Protected by Executive Privilege," September 28, 1994.

[20] *In Re Grand Jury Proceeding*, 5 F. Supp. 2d 21 (D.D.C. 1998); *see also*, *In re: Bruce R. Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998) (affirming the district court).

lawyers (who, of course, are not part of the executive branch) were protected by the presidential privilege.

Even more ambitiously (if that is the proper word), President Clinton attempted to craft a new form of executive privilege related to, but distinct from, the privilege against the disclosure of law enforcement information. He authorized the assertion of a "protective function" privilege that would have permitted Secret Service agents to refuse to testify before a grand jury as to their observations of behavior that was the subject of a criminal investigation. The reasoning was (again echoing the confidentiality argument that undergirds the presidential communications branch of the privilege) that if agents could be called to testify, then a president would push the agents away, increasing his personal risk.

In a letter to the White House, Independent Counsel Starr wrote:

> We recognize the interests of the Secret Service and the Department in ensuring the continued safety of the President and future Chief Executives. We also believe that the inevitable delay that will result from litigating the 'protective function privilege' will hinder the grand jury's investigation and be against the best interests of the country.[21]

In May 1998, District Judge Norma Holloway Johnson determined that Secret Service agents had no such privilege, writing:

> In the end, the policy arguments advanced by the Secret Service are not strong enough to overcome the grand jury's substantial interest in obtaining evidence of crimes or to cause this court to create a new testimonial privilege. Given this and the absence of legal support for the asserted privilege, this court will not establish a protective function privilege [against giving testimony].[22]

On appeal, this effort to create a sort of loyal Praetorian Guard was unavailing and rejected by the court of appeals.[23]

In short, from my own personal perspective, the history of the Clinton experience teaches us that the invocation of an executive privilege is sometimes the refuge of one who is concealing misconduct. It is also frequently asserted in an overbroad manner as a way of thwarting or delaying an inquiry. I trust we can all agree that, when used in that manner, the invocation is both ill-founded legally and contrary to basic principles of the rule of law that demand the accountability of the president for his or her actions.

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[21] Kenneth W. Starr, "Re: Presidential Invocation and Waiver of the Proposed 'Protective Function Privilege'," Letter to the White House, April 28, 1998, p. 2. http://www.cnn.com/ALLPOLITICS/1998/05/20/secret.service.docs/starr.letter/2.jpg.

[22] Andrew Glass, "Secret Service agents ordered to testify in Lewinsky scandal," *Politico*, May 22, 2018. https://www.politico.com/story/2018/05/22/judge-orders-secret-service-agents-to-testify-in-lewinsky-scandal-may-22-1998-599428.

[23] *In re Sealed Case*, 148 F.3d 1073 (D.C. Cir. 1998).

President Trump's Invocation of Privilege

Today, we face a situation with many echoes from that earlier time. Unlike President Washington's original, generous and accommodating construction of his obligation to enable congressional oversight, President Trump, echoing Presidents Nixon and Clinton, has seemed to erect the executive privilege as a barrier to oversight and inquiry into his own conduct.

President Trump's "protective" invocation is broad and comprehensive. It nominally covers several things: First, and most obviously, it purports to cover all of the redacted material that Attorney General Barr has removed from the Mueller report. Second, it purports to cover all of the underlying documents and materials gathered by the Mueller investigative team as part of their efforts. As such, the invocation seems to resonate with a number of strands of executive privilege almost all of which ought, in the end, to yield to this committee's legitimate interests.

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Let us first consider the redactions themselves. As the committee is well aware, the redactions made by the Attorney General involved four categories: (1) national security, including material identified by the intelligence community as "potentially compromising sensitive sources and methods"; (2) material that relates to or would harm ongoing investigations, of the sort that may be kept confidential under the Freedom of Information Act; (3) materials that would compromise personal privacy; and (4) materials relating to grand-jury investigations.

We can start with the obvious—that compromises of personal privacy are not a matter for executive privilege. They may raise prudential concerns about good policy and may even involve application of statutory law, but none of the existing sub-categories of the privilege align, in any way, with the idea of personal privacy of non-government employees. Indeed, almost by definition, the executive branch's privilege cannot cover non-executive individuals.

Let me also briefly address the first category: national security matters that may include classified material. At the core of executive confidentiality requirements, this sort of material has long been recognized as potentially privileged. But as our history indicates, as far back as Washington, such questions are best addressed on a case-by-case basis, with any number of accommodations possible (limited distribution, for example) and perhaps, the engagement of the intelligence committee. I suspect that if the president's invocation were limited to this category a ready and quick accommodation would be reached.

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I want to focus the remainder of my remarks on the facially overbroad assertions that underlie the second and fourth categories of the redactions and which (at least if public reports are to be credited) have been extended beyond the four corners of those categories to include all related investigative matters (like FBI 302s – that is, notes of interviews), documents shared with third parties and even (or so it seems) to an invocation intended to prevent percipient witnesses from testifying.

To begin with, redactions and limitations involving harm to ongoing matters, law enforcement information, and grand jury materials do sound in the executive privilege but, by any measure, they are less weighty than other core executive privilege claims. For one thing, none of them involve direct presidential communications. For another, unlike classified matters, none of them are likely threats to our national security.[24] Thus, the underlying grounds of effective executive action that animate the privilege generally are weaker in this context than, for example, in the context of diplomatic discussions with the president.

Indeed, my own personal experience is that law enforcement materials are frequently turned over to Congress and are the subject of your oversight and review. I recall quite vividly my service as a trial attorney in the Environmental Crimes Section of the DOJ. In the early 1990s, it came to pass that the office had determined to decline prosecution of a particular matter that arose in Hawaii. That declination was controversial especially in that it came over the objection of the investigators at the EPA who had presented us with the matter.

Given the difference of views, Congress got involved. Over the objections of political officials in the Bush White House and at the Department of Justice, a decision was eventually made to turn over our case files to the House Energy and Commerce Committee (then-chaired by Congressman John Dingell). I personally sat for several hours of depositions to review the investigative steps I had taken and the prosecutorial judgments that I, and my superiors, had made. You may well imagine that as a young trial attorney—barely five years out of law school—I found the experience daunting in the extreme, and most unpleasant. And I think it was a grave mistake for the DOJ not to have worked harder to defend me against an effort to examine the work of career line prosecutors. But I don't think anyone doubted the lawfulness of Congress's investigation nor did any official seriously contemplate a wholesale invocation of privilege to prevent the inquiry. In fact, quite to the contrary, although we sought to convince the committee to focus its questioning on accountable political officials rather than careerists such as me, we all understood that, in the end, we were obliged to respond in a full-and-complete manner.[25]

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[24] To be sure, the category of grand jury material is subject to other law [namely Rule 6(e) of the Federal Rules of Criminal Procedure] that may restrict its disclosure, but that is not a claim of executive privilege. Nor is it likely to be a barrier to this committee's inquiry. As *McKeever v. Barr*, No. 17-5149 (D.C. Cir. Apr. 7, 2019) (petition for rehearing *en banc* pending), https://www.documentcloud.org/documents/5796185-Mckeever-Cadc-20190405.html, makes clear, the limitations of Rule 6(e) can accommodate a congressional inquiry if it addresses the type of governmental misconduct that could be grounds for impeachment. More importantly, as the D.C. Circuit held in *In re Sealed Case No. 99-3091*, 192 F.3d. 995 (D.C. Cir. 1999), the protections of Rule 6(e) are limited to matters that actually occur before a grand jury (such as transcripts of proceedings) or are immediately preliminary to a grand jury proceeding. The prohibition on disclosure does not encompass internal prosecutorial deliberations, draft indictments or interview notes and, as such, this category is likely to be quite modest in scope and irrelevant to the bulk of this committee's subpoena.

[25] Although the Department of Justice has long had a formal policy that investigative materials are confidential and that congressional access would not be in the public interest, Congress has never acquiesced in that judgment and as my own experience demonstrates, it has been honored as much in the breach as in its application. *See* 40 Op. Att'y Gen. 45 (1941).

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Notwithstanding my general view that privilege claims are best examined on a case-by-case basis with respect to specific instances of testimony or specific documents, three overarching general considerations should inform this committee's response to President Trump's wholesale privilege invocation with respect to law enforcement materials.

- First, this invocation does not occur in a vacuum, nor is this committee required to ignore the context in which it arises. By any measure, the president has determined to resist all congressional inquiries through a variety of means. By one count, he is currently defying as many as 20 different efforts to examine his conduct.[26] Not all of these involve executive privilege. Indeed, some involve the form of non-assertion of a privilege, in a manner that deviates from well-settled executive practice that goes back more than 30 years to President Reagan.[27] Perhaps some of these invocations of privilege and refusals to assist congressional investigation are well-meaning and well-justified. But the pattern of resistance is such that this committee may fairly evaluate the instant invocation against that background and, rightly in my view, conclude that much of the president's resistance is undertaken in bad faith in an attempt to avoid, or at a minimum delay, scrutiny of his conduct.

- Second, the claim of privilege is especially weak where it appears to be designed to thwart congressional inquiry into presidential wrongdoing. Indeed, some have called this type of effort an "illegal invocation" that is, itself, ground for concern. Here, as more than 800 former federal prosecutors with experience in the administrations of both parties have said, the evidence already public in Special Counsel Mueller's report strongly evinces that the president has engaged in criminal conduct. Indeed, for them, the question is not even a "matter[…] of close

[26] Rachel Baude and Seung Min Kim, "A guide to 20 inquiries Trump and his allies are working to impede," *The Washington Post*, May 12, 2019. https://www.washingtonpost.com/politics/a-guide-to-20-inquiries-trump-and-his-allies-are-working-to-impede/2019/05/11/83114574-733a-11e9-9eb4-0828f5389013_story.html?utm_term=.a7e3158f9dbc.

[27] See, e.g., Ronald Reagan, "Memorandum from President Ronald Reagan for the Heads of Executive Departments and Agencies, on Procedures Governing Responses to Congressional Requests for Information," The White House, Nov. 4, 1982. https://www.govinfo.gov/content/pkg/GPO-CHRG-REHNQUIST/pdf/GPO-CHRG-REHNQUIST-4-16-4.pdf. The case law leaves open many questions about the proper application of executive privilege, including "whether the President must have actually seen or been familiar with the disputed matter; whether the presidential privilege encompasses documents and information developed by, or in the possession of, officers and employees in the departments and agencies of the executive branch, outside of the Executive Office of the President; whether the privilege encompasses all communications with respect to which the President may be interested or is confined to presidential decision making and, if so, whether it is limited to a particular type of presidential decision making; and precisely what kind of demonstration of need must be shown to overcome the privilege and compel disclosure of the materials." Todd Garvey, *Presidential Claims of Executive Privilege: History, Law, Practice, and Recent Developments,* Congressional Research Service, Dec. 15, 2014. https://fas.org/sgp/crs/secrecy/R42670.pdf.

professional judgment."[28] Though this committee should not, of course, prejudge the case in the absence of a complete record, the *prima facie* validity of the allegations is further ground to justify broad congressional access to the materials in question and also to judge the presidential invocation as comparatively weaker that other variants of the privilege.

- Third, the Attorney General's determination that the president has not committed any crime and thus to exonerate him of any criminal wrongdoing has the effect of reducing, if not eliminating, much of the executive interest in the confidentiality of law enforcement information. As the Office of Legal Counsel has noted:

> Once an investigation has been closed without further prosecution, many of the considerations previously discussed lose some of their force. Access by Congress to details of closed investigations does not pose as substantial a risk that Congress will be a partner in the investigation and prosecution or will otherwise seek to influence the outcome of the prosecution; likewise, if no prosecution will result, concerns about the effects of undue pretrial publicity on a jury would disappear. [29]

It would seem, therefore, that the Attorney General's decision to close the criminal investigation of the president further weakens the executive claim of privilege.[30]

One final, broad point is worth making – however weak President Clinton's invocation of the privilege was (and I think it was not well-founded), it was systematically stronger than that of President Trump today. First, it is clear that, however ill-founded the claims might have been, Clinton's privilege invocation was related to core presidential communications that merit the highest degree of protection. By contrast, as we are discussing, President Trump's invocation has wandered much further afield, to include the protection of law enforcement information and even personal privacy of non-executive individuals. Second, Clinton's invocation was related to his own personal conduct, a circumstance that, while significant, was of little systematic import to the nation, and thus, arguably, was of less importance to Congress. By contrast, the investigation of Russian interference into our elections that is at the bottom of the special counsel's investigation is a critical matter for the nation, and so this committee's justification for inquiring into the matter is all the greater. In short, President Clinton's efforts to interpose an executive privilege, which were in my judgment properly rejected, were on a stronger footing than the invocation facing this committee today.

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[28] DOJ Alumni Statement, "Statement by Former Federal Prosecutors," May 6, 2019. https://medium.com/@dojalumni/statement-by-former-federal-prosecutors-8ab7691c2aa1.

[29] Charles J. Cooper, "Response to Congressional Requests for Information Regarding Decisions made Under the Independent Counsel Act," 10 U.S. Op. Off. Legal Counsel 68, 77 (1986). https://www.justice.gov/sites/default/files/olc/opinions/1986/04/31/op-olc-v010-p0068_0.pdf.

[30] As the Barr redactions indicate, this argument is not applicable to some ongoing matters (e.g. relating to Roger Stone) that have not yet closed. Likewise, if there were any material connected to ongoing criminal investigations of President Trump personally (for example, the much-rumored investigations in the Southern District of New York) those, too, would be more highly protected as ongoing, open matters.

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Let me now turn to some specific questions that are raised by the president's invocation of a privilege. While we could profitably go through each aspect of the invocation in detail, two particular aspects seem worthy of specific consideration, both on their own merits and for the light they shed on the broader question.

First, consider this committee's pending document subpoena to former White House Counsel Don McGahn. It appears that the current White House Counsel is of the view that the records provided to Mr. McGahn remain subject to White House control, and may be prevented from disclosure by exercise of an executive privilege. [Notably, his letter to this committee does not actually appear to invoke the privilege—yet another example of the way in which this administration's practice reminds me of President Clinton's efforts to prevent cooperation without the formal necessity of a privilege invocation.][31]

Leaving aside whether or not the president might have been able to assert a plausible deliberative process privilege over the documents in question in the first instance, there can be little doubt that the current assertion is without solid legal foundation. As I understand it, the subpoena to Mr. McGahn involves documents that were provided to him and to his counsel in connection with their preparation for the Mueller investigation. To my mind, the law here is abundantly clear that disclosure to an outside third party (here Mr. McGahn's attorney) constitutes a waiver of any claim of executive privilege. Indeed, this case is on all-fours with the holding of the D.C. Circuit in *In re Sealed Case (Espy)*, which also involved disclosure to the attorney for a former government official, and clearly determined that the White House "waive[s] its claim of privilege in regard to specific documents that it voluntarily reveal[s] to third parties outside the White House."[32]

Thus, while the administration may take the position that there has been no waiver of executive privilege, it would seem that the real question is the scope of the waiver that has occurred. At a minimum, the privilege would seem to be waived as to all documents previously disclosed to third parties and as to testimony related to those portions of the Mueller report that have already been made public.[33] I find it completely implausible to argue, for example, that this committee is only entitled to get Mr. McGahn's story with respect to President Trump's telling him to lie through Mueller's narration of the event. At a minimum, the committee should be able to get Mr. McGahn's actual statements and records on which Mueller based his report and the documents produced to his attorney, as well as to question McGahn directly about the incident.

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[31] Thus, to the extent that the invocation has not yet been made, the subpoena recipient is not excused from compliance with the committee's subpoena. The privilege only applies when, and if, a showing has been made that a particular individual record satisfies the prerequisites for the invocation of the privilege. *See, e.g.*, *Committee on the Judiciary v. Miers*, 558 F.Supp.2d 53 (D.D.C. 2008).

[32] *In re Sealed Case*, 121 F.3d 729, 741-42 (D.C. Cir. 1997).

[33] There is a plausible argument based on *Espy* that the scope of the waiver should be narrowly construed. But that narrowness cannot apply to matters that have actually been disclosed. The extent to which it applies to related collateral matters is a more difficult question.

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One other potential invocation of the privilege bears mentioning. If the president's public statements are to be taken at face value, he intends to try and prevent private citizens who never worked for him in any official, governmental capacity from testifying before this committee regarding his interactions with them.

It is easy to see why the president might wish this were the case. To cite but one example from the current docket of issues facing you, among the information that is being withheld under the president's invocation of privilege is Corey Lewandowski's 302s (the FBI's notes about his interview with them). The committee is rightly interested in determining whether President Trump told Mr. Lewandowski to pressure Attorney General Sessions to "un-recuse" himself from overseeing the Mueller investigation. No matter what your legal view on the merits of the claim with respect to notes of interview are, it is fair to say that any court fight will result in a lengthy legal battle that will delay this committee's work. By contrast, the expedient of calling Mr. Lewandowski to testify should not engender a legal assertion of privilege and would give this committee direct access to the testimony of a percipient witness.

There can be no colorable executive privilege claim over the president's conversations with a private citizen. As the *Espy* case we just discussed makes clear, it is a complete waiver of any executive privilege to disclose matters to non-executive branch individuals who are outside third parties. The nearest analogy I can find in the Starr investigation for such a frivolous claim would be if then-Deputy White House Counsel Cheryl Mills had asserted that a privilege protected her communications with the private attorneys of present and former employees of the Clinton White House.[34]

Were President Trump to extend his claim this far, it would be a Nixonian excess. As I've already recounted, "Nixon tried to prevent his present and former aides from testifying by threatening a claim of executive privilege that would stop the committee from questioning them." Ervin's response—to threaten their arrest—abated Nixon's effort[35] and President Trump's similar suggestion should, likewise, be met with derision.

Indeed, to put this point as bluntly as possible, were President Trump to attempt to invoke the executive privilege to prevent a private citizen like Corey Lewandowski from testifying before this committee as to matters that the president conveyed to him while Lewandowski was a private citizen, it would be as absurd an invocation as if President Clinton had tried to use the same theory to prevent Vernon Jordan from speaking about their interactions.

Conclusion

The invocation of executive privilege ought to be a moment of high consideration and thoughtfulness for the executive branch. Sadly, today, it increasingly appears that the president is acting in a manner designed to denigrate and disregard checks on his use of executive authority. To date, his actions appear

[34] *Starr Report*, p. 208.
[35] Campbell, p. 285.

unable to distinguish between the public interests that undergird the privilege and his own personal and political interests.

Every aspect of American history rejects such an idea. Indeed, we had a revolution to overthrow the idea of a kingly prerogative. As James Wilson, one of the founders and a member of the first Supreme Court put it: "far from being above the laws, [the president] is amenable to them in his private character as a citizen."[36] The framers of our Constitution rightly thought that presidents could and should be subject to congressional oversight and that the thoughtless invocation of privilege is in derogation of that high principle. I remain hopeful that, in the end, the Department of Justice and the administration will recognize these principles and make reasonable accommodations to enable this committee to receive the information it needs while protecting the legitimate public interests embodied in the executive privilege.

[36] *Speech at the Constitutional Convention in Philadelphia, 1787*. https://www.u-s-history.com/pages/h2413.html.