

The Executive's Privilege: Rethinking the President's Power to Withhold Information

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What is “executive privilege”? In the specific context of information disputes between the executive branch and Congress, the Supreme Court has never addressed—let alone answered—that question. Nevertheless, as the Trump administration repeatedly relies on that constitutional doctrine to reject demands for information and testimony, the question has been at the forefront of a spate of journalism and legal commentary. Almost every blog, newspaper and magazine has, at some point in the past year, published an “explainer” on executive privilege and its related doctrines or provided some descriptive account of the history of the doctrine. I have contributed several such pieces to *Lawfare*, and others have done the same.

Each of these pieces takes a different angle or addresses a different controversy. But each largely makes four basic points: (a) The concept of executive privilege is hotly disputed; (b) there are very few relevant court cases and none that provide definitive answers; (c) there are a number of historical incidents, from the administration of George Washington to that

of Barack Obama, that are of debatable—and contested—significance; and (d) the legal resolution of these highly disputed questions is likely of little *practical* significance. The last point is the result of three things: Civil lawsuits largely take too long; the executive branch controls criminal enforcement mechanisms; and Congress itself lacks any real enforcement mechanism—short of reviving its long-dormant authority to arrest people, which itself would pose a number of legal and practical problems.

Indeed, the contours of the long-standing dispute over executive privilege and related doctrines such as testimonial immunity have become so familiar that the only remaining question to be explored is often whether each subsequent invocation of the doctrine fits within recent past practice, represents an expansion or is outrageous in its departure from practice.

In a draft paper I have just posted online for comment, I have attempted to take a different tack. As explained below, my paper, “The Executive’s Privilege,” proposes an understanding of executive privilege that aligns more closely with historical precedent and better reflects first principles of constitutional interpretation. The central argument of my paper is that executive privilege should not be understood—as it is now—either as an implied, affirmative authority belonging to the president to withhold or control information or as an evidentiary privilege related to the various “executive” privileges recognized in judicial proceedings. Instead, it should be understood as an extremely narrow limit on Congress’s implied oversight authority—that is, the executive’s privilege against, or immunity from, compelled congressional process in the context of oversight.

Recognizing executive privilege as an immunity belonging to the president may seem like the wrong approach at present, given the broad assertions of immunity claimed by Trump and his advisers. But, as my paper describes, it would actually eliminate almost all of the grounds on which Trump and his advisers—as well as past administrations—have relied to refuse information requests. Trump, by my count, has asserted executive privilege as traditionally understood only one time, over 11 specific documents related to the inclusion of the citizenship question on the U.S. census. *Every other* refusal to provide information has been grounded in one of the prophylactic doctrines developed by the executive branch that themselves have no constitutional or historical foundation but, instead, have been developed by the executive branch over the past 40 years solely to *protect* the president’s authority to assert executive privilege.

Importantly, my paper also provides the theoretical basis to understand why executive privilege does not apply to impeachment. As the House is preparing to hold a vote to affirm its impeachment inquiry, establish impeachment procedures and undermine the White House’s objections to the impeachment process to date, neither executive privilege nor any of the related prophylactic doctrines I describe, such as testimonial immunity, have any continuing force.

Even under the prevailing doctrine within the executive branch, there are a number of reasons that an assertion of privilege would be difficult in the context of an impeachment inquiry (which may be why the administration has so forcefully denied that the House's current inquiries actually constitute impeachment proceedings). But understanding executive privilege as a limitation on Congress's *oversight* authority rather than as an affirmative presidential authority demonstrates why executive privilege does not apply to impeachment. Recently, Judge Neomi Rao dissented in support of Trump's refusal to turn over his tax returns—but much of the history Rao cites in support of her argument also makes it absurd to claim the House's implied authority to further its *impeachment* power should be interpreted as co-extensive with its implied authority to further its *oversight* functions. The executive's privilege is a limit on the latter authority. But there is no historical or theoretical support for considering that limitation to apply to impeachment as well. And, for the same reason, this would also eliminate related prophylactic doctrines, such as immunity, from the context of impeachment. Indeed, understanding the executive's privilege as I propose it would largely eradicate these prophylactic doctrines from the oversight context entirely.

Background

Executive privilege remains such a controversial but nevertheless unresolved constitutional doctrine in part because, in the past, much of the practice of congressional oversight has been driven by norms and politics. Although constitutional theories regarding executive privilege have long existed, negotiation, normative expectations and political pressures have traditionally been the means by which disputes between Congress and the executive have ultimately been resolved. If you think of a "legal" doctrine as a rule according to which people adhere their behavior and pursuant to which parties can resolve disputes, executive privilege has not been a legal doctrine at all.

In 1974, Archibald Cox, the special prosecutor in the Watergate scandal and the victim of the 1973 Saturday Night Massacre, wrote that "[i]f the Executive Branch were left to itself, the practice [of executive privilege] would surely grow" because "[s]ecrecy, if sanctified by a plausible claim of constitutional privilege, is the easiest solution to a variety of problems." His words are, of course, prescient. The Supreme Court has never addressed a dispute over executive privilege between the executive branch and Congress. And only one appellate court—during the unique circumstances of the Watergate scandal—has ever resolved the merits of such a dispute.

In the context of congressional oversight, the executive branch has thus largely been, as Cox wrote, "left to itself." And the practice of executive privilege not only has grown, as Cox predicted, but also has transformed into comprehensive, multifaceted affirmative presidential authority to control the dissemination of a broad swath of information and to

issue directives to both executive branch officials and private individuals. Moreover, it also includes the authority to adopt unqualified prophylactic measures to protect that underlying, qualified privilege.

The era of compromise and accommodation between branches—and the lack of judicial intervention—may be coming to an end. The two branches have increasingly engaged in constitutional “hardball,” asserting more aggressive positions and engendering a more aggressive response from the other branch in return. During the Reagan administration, for example, only one committee in the House had the standing authority to issue a subpoena, and the executive branch operated for the most part under the premise that once a subpoena was issued, the administration had to either turn over the subpoenaed information or assert executive privilege before the subpoena’s return date. Now, all House committees have subpoena authority, which can largely be exercised by the chairperson alone, and the executive branch considers the return date of a subpoena essentially meaningless. Recent practice during the George W. Bush and Obama administrations was to assert executive privilege over specific documents only when the committee scheduled a contempt vote. But that norm has too begun to shift. The Trump administration has furthered existing prophylactic doctrines and created new ones that allow it to refuse to turn over information or provide testimony without a formal assertion of privilege, even in the face of a contempt vote. As a result, a number of cases are currently pending that may force the courts to resolve, or at least address, the constitutional contours of executive privilege that have, to date, remained unexplored by the judiciary.

In his seminal work calling executive privilege a “constitutional myth,” Raoul Berger wrote that when “seeking to ascertain the boundaries between the conflicting claims of Congress and the President, questions of practical convenience need to be separated from the issue of constitutional power.” I have been puzzling over executive privilege for a number of years. As a career attorney in the Office of Legal Counsel (OLC), I worked closely with officials in the Department of Justice and the White House on congressional oversight requests and appropriate responses, including numerous questions of privilege. My tenure included the aggressive oversight of the Obama administration by the Republican-controlled House, as well as the transition to the Trump administration and the development of oversight policies at the start of that administration. Informing each of these conversations and decisions was the extensive doctrine of executive privilege that the executive branch—primarily through formal opinions and informal advice from OLC—has developed over the past four decades. Because there is so little judicial precedent, almost all of the support for that theory is historical practice, which, in many instances, developed to further “practical” or political “convenience,” in Berger’s words.. But as he wrote, that practice should not be conflated with constitutional power without further inquiry.

I left OLC with a sense that the executive branch's doctrine of executive privilege was missing something. It was too malleable, too responsive to political pressure, too extreme in some ways and too restrictive in others. And the doctrine had been distorted over time by the conflation of the president's authority in the context of congressional oversight with the executive branch's privileges in the context of judicial proceedings, Freedom of Information Act litigation and grand jury subpoenas. I had an idea about a more accurate theoretical understanding of executive privilege that would provide clearer boundaries, eliminate the prophylactic doctrines that dominate the practice of oversight, better reflect history, and more consistently adhere to first principles of constitutional interpretation. And watching the implementation and further development of the executive branch theory over the past two years has only reinforced my original inclinations, even if it has made discussing executive privilege in a neutral, considered way much more difficult. I have called my theoretical construct "the executive's privilege."

The Executive's Privilege

As Chief Justice John Marshall said, "The peculiar circumstances of the moment may render a measure more or less wise, but cannot render it more or less constitutional." That advice is particularly apt to claims of privilege, both because of the partisan nature of such claims under the existing two-party structure and because each claim involves specific circumstances and facts that may make it unique. What is missing from the discussion of executive privilege—and what leads to the ability of each branch to assert constitutional rights that are directly contrary—is the lack of any neutral constitutional theory under which a claim of executive privilege is, in Marshall's words, "more or less constitutional." That is largely the result of the fact that no neutral body with the power to set precedent—that is, the Supreme Court—has ever addressed executive privilege in the context of congressional oversight. The closest thing is the opinion by the U.S. Court of Appeals for the D.C. Circuit in the *Senate Select* case during Watergate, but, when that case made it to the D.C. Circuit, the House *already had* the information that was at issue—the White House tapes—as part of its impeachment inquiry. In other words, that opinion did not address a situation in which the executive branch asserted a constitutional right to withhold information from Congress entirely, just a situation in which the executive branch asserted the authority to withhold the information from a particular committee. And it arose out of facts that are hard to analogize to typical oversight disputes.

In 1974, Cox also wrote that the "[a]bility to control what information to disclose and when to disclose it is a potent political weapon." When utilized by the executive branch, that potent political weapon is currently known as executive privilege. Mark Rozell, the preeminent authority on executive privilege defined the privilege in 1999 as "the right of the president and high-level executive branch officers to withhold information from Congress, the courts and ultimately the public." He recognized it as a "well-established constitutional power—one with a longstanding history in American government, going back to the George

Washington administration.” And Andy Wright has defined it more recently as “an assertion of presidential authority to preserve Executive Branch confidentiality interests by withholding information from a judicial or congressional proceeding.” Other scholars similarly define “executive privilege” as an implied, affirmative presidential authority to withhold information both from Congress and from the judicial branch.

These scholarly definitions track those used by the executive branch, which considers the doctrine of executive privilege to reflect “the President’s constitutional authority to control the disclosure of privileged information and to supervise the Executive Branch’s communication with congressional entities.” The premise that executive privilege is an affirmative, presidential constitutional authority to withhold information from Congress, the judicial branch and the public is thus the starting point for both the current academic treatment of executive privilege as well as the practice of executive privilege in the executive branch.

A second premise underlies the discourse and practice of executive privilege as well. Executive privilege is considered, at least in part, an evidentiary privilege related to the type of information sought. Rozell indicated in 1999, for example, that “[e]xecutive privilege is an accepted doctrine when appropriately applied to two circumstances: (1) certain national security needs and (2) protecting the privacy of White House deliberations when it is in the public interest to do so.” Todd David Peterson, formerly of OLC, has noted that “documents subject to such a presidential claim of privilege relate to several different categories of executive branch information.” And the executive branch similarly defines executive privilege to include a number of “components,” each of which reflects a particular category of information, such as presidential communications or national security information.

My paper posits that both of these underlying premises are incorrect, or at least imprecise. They should be revisited if, or when, a court addresses an oversight dispute on the merits. Their error results from the conflation of the historical concept of executive privilege—a doctrine exercised on a case-by-case basis in light of particular factual circumstances—with executive evidentiary privileges applicable in judicial proceedings and designed to protect and balance general, undifferentiated interests of the government.

Executive privilege in the specific context of congressional oversight is a doctrine about the respective authority of the two branches. And it is best understood as a presidential immunity from compelled congressional process—the executive’s privilege. Only that understanding is most faithful to first principles of constitutional interpretation, historical practice and the appropriate balance between the branches. The executive’s privilege is not an affirmative constitutional authority belonging to the president to control the disclosure or dissemination of information, applying equally to congressional oversight requests, congressional process related to impeachment, judicial proceedings and public disclosures. Nor is it a doctrine protecting from disclosure all information that fits certain categories of information, such as presidential communications, as the executive branch argues today.

The executive's privilege is a presidential immunity that is limited to congressional demands for information pursuant to its implied oversight authority. In other words, in narrow circumstances, Congress lacks the implied authority to compel the president to provide information in the context of oversight. The executive's privilege, thus understood, provides no authority to the president to direct the dissemination of information more broadly. Nor does it allow for the withholding of information to "protect" the president's right to assert privilege over any and all information that implicates general, undifferentiated confidentiality interests of the government, such as deliberative communications. And, as discussed further below, the executive's privilege does not apply to impeachment inquiries; it is limited to the context of congressional oversight.

The executive branch has combined the broad scope of qualified evidentiary privileges that protect general interests and may apply in judicial proceedings with a constitutional theory grounded in unitary executive theory to erect a comprehensive doctrine of executive privilege that prevents any executive branch official from disclosing any information falling within those sweeping categories without consent from the president and protects them from any penalty for that refusal. In so doing, the executive branch has created a new prophylactic executive privilege that rarely, if ever, requires the president to assert privilege yet still renders Congress virtually impotent in oversight disputes when the executive branch plays hardball.

The executive's privilege as historically understood, however, would eliminate those prophylactic doctrines. It requires an explicit, and public, presidential determination that the disclosure of particular information at that time would cause identifiable harm to a specific interest of the United States, not a personal interest of the president, a particular political party or individual executive branch officials. The limits of such an assertion—and what constitutes national *public* interests—are informed by over two hundred years of historical practice. As then-Assistant Attorney General William Rehnquist described it to Congress in 1971, "Executive privilege does not authorize the withholding of information from Congress where disclosure may prove merely embarrassing to some part of the executive branch. The privilege is limited to those situations in which there is a *demonstrable justification* that executive withholding will further the public interest" (emphasis added). And he emphasized that the assertion of the privilege "necessarily requires the exercise of his judgment as to whether or not the disclosure of particular matters sought would be harmful to the national interest."

Exploring the historical practice of executive privilege, Cox reasoned that history "contains little evidence that the nation has suffered from the want of legal power to compel the President to satisfy the demands of Congress to information in the Executive Branch." But the nation will suffer if that "want of legal power" is not narrowly constrained, as it has been historically. Even if, in theory, the current executive branch doctrine traces its roots to the

same history catalogued by Cox, it has, left to its own devices and confronted with the new reality of digital information, blossomed into something new in practice—a prophylactic doctrine unmoored from history and first principles of constitutional interpretation and driven largely by political expediency.

The remedy is to begin with the executive’s privilege. From that starting point, grounded in both history and recognized constitutional principles, the balance between the branches can ultimately be restored.

Application to Impeachment

Understanding executive privilege as a limit on Congress’s implied oversight authority, rather than an affirmative, implied constitutional authority belonging to the president, would have two major effects on the current disputes between the House and the Trump administration.

First, neither executive privilege nor related doctrines such as testimonial immunity would apply to an impeachment inquiry. Second, prophylactic doctrines—such as protective assertions of privilege, the requirement that agency counsel be present at depositions, and letters to former employees instructing them not to disclose any information that is *potentially* within the scope of executive privilege—would also no longer be available.

Of course, the administration has contested the validity of the ongoing impeachment inquiry, most prominently in the letter from White House Counsel Pat Cipollone. Scholars and former executive branch officials have criticized the letter on a number of grounds, but one of the most astounding claims in the letter—as far as interbranch relations go—is that the White House is the entity that gets to determine when an impeachment inquiry is valid. And because the White House has determined that the current inquiry is *not* valid, Trump and other executive branch officials may direct current and former officials not to comply with congressional demands for information—a direction several witnesses have refused to follow.

A more nuanced argument appears in the declaratory judgment action recently filed by Charles Kupperman, the former deputy and acting national security adviser, which asks the court to resolve the question of his testimonial immunity: The White House argues he is immune, while the House demands his testimony. Kupperman contends that he is caught between the competing legal directives from two equal branches and, in essence, asks the court to tell him what to do. His complaint notes that the subpoena requiring him to appear was issued pursuant to House Rule XI, clause 2(m)(1), which authorizes the committee to issue a subpoena “[f]or the purpose of carrying out any of its functions and duties under this rule and rule X (including any matters referred to it under clause 2 of rule XII).” The “functions and duties” identified in the cross-referenced rules, however, do not include

impeachment. According to Kupperman, then, the actual subpoena issued to him could not have been issued pursuant to the committee's impeachment authority because the rule under which it was issued does not reference that authority.

It is not surprising that, to date, the administration has mounted its defense wholly on the grounds that there is no impeachment inquiry or that the subpoenas are not issued pursuant to Congress's impeachment power. In an impeachment inquiry, the executive branch is on very shaky ground attempting to withhold information. As a number of experts have recently pointed out, including Jean Galbraith and Michel Paradis, the historical evidence suggests that impeachment alters the calculus in terms of executive privilege. George Washington and his cabinet opined that the president could withhold information in response to a congressional oversight demand but that he would not be able to do so in response to a congressional demand pursuant to its impeachment authority. As described in 1796 by Rep. William Lyman, the "power of impeachment ... certainly implie[s] the right to inspect every paper and transaction in any department, otherwise the power of impeachment could never be exercised with any effect."

Statements by a number of other presidents, including Andrew Jackson, James K. Polk, Grover Cleveland and Theodore Roosevelt, provide additional support for the proposition that the executive's privilege against congressional demands for information would not apply to an impeachment inquiry. And one of the principal architects of the Constitution, James Wilson, described the British Parliament, on which the House's impeachment authority was expressly based, as having the "character of grand inquisitors of the realm" and recognized that "[t]he proudest ministers of the proudest monarchs have trembled at the[] censure" of the House of Commons and "have appeared at the bar of the house, to give an account of their conduct, and ask pardon for their faults."

Accordingly, unlike executive privilege more generally, the executive branch cannot rely on a string of historical incidents to support a claim that the president has the authority to withhold information from Congress in the context of an impeachment inquiry. Indeed, there do not appear to be any applicable historical examples or any presidents who have disagreed with Polk's view that, in the exercise of the impeachment power, the House could "penetrate into the most secret recesses of the Executive Departments[,] ... command the attendance of any and every agent of the Government, and compel them to produce all papers, public or private, official or unofficial." That is not to say, of course, that some *evidentiary* privileges—such as attorney-client privilege—could not be validly raised in response to demands from the House or in a Senate impeachment trial. But the judge of those privileges would be the House and the Senate, pursuant to their respective constitutional authorities related to impeachment.

As my paper demonstrates, distinguishing the constitutional executive's privilege in the context of oversight from the assertion of such evidentiary privileges is vital to restoring the executive's privilege to its previous, limited role. Such evidentiary privileges may very well

have a role to play in guarding against excess in congressional oversight requests and information demands. But they are not, as the executive branch has redefined them, each various components of a more general affirmative constitutional authority belonging to the president. They protect general, undifferentiated confidentiality interests and have developed attendant balancing tests and waiver rules corresponding to the weight and purposes of those confidentiality interests. The executive's privilege is not an evidentiary privilege but an immunity applicable only to oversight and designed to protect only specific, identified national interests when absolutely necessary as determined by the president.

Even if executive privilege did apply to an impeachment inquiry, it would not solve all the administration's problems: The executive branch acknowledges that the privilege is qualified. Every formal assertion of executive privilege is accompanied by an opinion from the Department of Justice, and the latter half of the opinion always balances the executive branch's interests in maintaining the confidentiality of the information against Congress's needs. The opinions adopt the standard from the D.C. Circuit's opinion in *Senate Select*: that, to overcome the privilege, Congress must show the information is "demonstrably critical" to the fulfillment of its legislative responsibilities. And the opinions often recite the statement from *Senate Select* that Congress has no real need for a "precise reconstruction of past events" in fulfilling its legislative function. Because Congress has no need for those precise facts, the executive branch unfailingly concludes that Congress's interests do not outweigh the executive branch's confidentiality interests.

In an impeachment inquiry, however, Congress has precisely that need for an accurate and definitive reconstruction of past events to determine if a "high crime or misdemeanor" has occurred. Thus, even if executive privilege *could* potentially be applicable to impeachment, it is hard to see how Congress's need for all the information relevant to that inquiry would not outweigh the need for confidentiality.

Indeed, the Supreme Court's decision in *U.S. v. Nixon* makes it clear that Congress's need would prevail. The House's role in an impeachment inquiry has been analogized to a grand jury, and, in *Nixon*, it was the grand jury's need for all the relevant information about the alleged wrongdoing that the Supreme Court found outweighed the president's need for confidentiality in his communications with his closest advisers. The same reasoning would apply to any claim of privilege during an impeachment inquiry. The executive branch would likely claim that formal *criminal* proceedings, such as a grand jury investigation, are distinct from an impeachment inquiry. But that formal distinction would appear to have little relevance to the question of Congress's need. Both the grand jury and the House would be engaged in the same task—weighing all relevant evidence to determine whether probable cause existed to believe the individual under investigation engaged in wrongdoing in the past—even if the offenses are different—criminal wrongdoing versus an impeachable offense, respectively.

There is thus a substantial historical and doctrinal argument that executive privilege does not apply to an impeachment inquiry. My paper provides theoretical support for that position as a matter of constitutional interpretation. If the executive's privilege is no more than a limitation on Congress's implied oversight authority, it has no application to the separate impeachment authority or the implied authorities of Congress in support of that impeachment authority.

Judge Rao's recent dissent in the *Mazars* case, which argues that the House has no power to investigate misconduct by executive branch officials unless it is pursuing impeachment, misunderstands the importance of the historical materials on which it relies. The repeated statements by presidents and other officials to which she refers—which distinguish between oversight pursuant to legislative authority and demands for information as part of an impeachment inquiry—stand for the proposition that Congress's authority to demand information as part of an impeachment inquiry is not limited at all by executive branch confidentiality interests. As a number of scholars have demonstrated conclusively—most notably Raoul Berger in 1974 and Josh Chafetz more recently—Congress has always had authority to inquire into wrongdoing by executive branch officials as part of its general legislative and oversight responsibilities. That authority is limited, in my view, by the narrow executive's privilege as historically understood. But there is no such limitation on the implied authority to investigate pursuant to an impeachment inquiry. Executive privilege simply does not apply in impeachment.

Importantly, if executive privilege does not apply in an impeachment proceeding, then neither do any of the prophylactic doctrines that have developed to protect it, including the immunity of presidential advisers such as Kupperman. Much has been written about the doctrine of testimonial immunity, and the executive branch does consider it a separate and distinct doctrine from executive privilege. It may be a separate doctrine, but even its "founder," William Rehnquist, understood it to be a prophylactic doctrine arising out of and reliant on the doctrine of executive privilege.

Much has been made of Rehnquist's congressional testimony in 1971 on the Pentagon Papers in which the U.S. District Court for the District of Columbia suggested he had "apparently recanted" his original, tentative conclusion that senior presidential advisers were absolutely immune from compelled congressional testimony. That testimony—and the statement at issue read in context—addressed executive privilege for *documents*, claiming that the executive branch official "who himself had custody of the documents" over which the president was asserting privilege would "have to respond" to a subpoena. That testimony did not, however, address the compelled *testimony* of senior advisers. Testimony by Rehnquist on August 4 of that same year, often overlooked, confirms that he did not have a change of heart or recant his original conclusions. And it also makes it clear that the doctrine of immunity arose squarely out of executive privilege.

In that testimony addressing executive privilege before the Senate Subcommittee on the Separation of Powers of the Committee of the Judiciary, Rehnquist recognized “that in judicial proceedings a witness who claims privilege must normally appear in court and claim it in person” but then noted the “exception[] to that rule” when “it appeared that all the testimony to be elicited from a witness would be privileged.” After discussing a case supporting that exception, he concluded that advisers “whose sole responsibility is that of advising the President ... should not be required to appear at all” in response to a congressional subpoena because “all of their official responsibilities would be subject to a claim of privilege.”

Immunity thus originates in the position that almost all of a senior presidential adviser’s testimony would be privileged and that therefore that adviser need not appear at all. Accordingly, immunity is dependent on the premise that privilege applies. In fact, Janet Reno’s 1999 opinion on the immunity of President Clinton’s counsel referred to immunity as a “separate legal basis that would support a claim of executive privilege for the entirety of the Counsel’s testimony.” And even OLC’s most recent, more expansive opinions on immunity continue to justify it, in part, by noting that compelled testimony creates a risk of “inadvertent or coerced” disclosure of information protected by executive privilege. Likewise, OLC argues that compelled testimony would produce the same chill on deliberations that privilege protects. To be sure, the opinions take pains to note that executive privilege and immunity are distinct. And one recent opinion goes so far as to disclaim entirely Reno’s characterization of immunity as another facet of executive privilege. But if you look at the origins of the immunity doctrine closely, it is clear it originated out of the same considerations and doctrines that informed executive privilege and that continue to underlie much of the executive branch’s position today.

The same is true of more recent constitutional doctrines asserted by the executive branch, such as the authority to countermand a deposition subpoena if executive branch officials are not allowed to be present; the idea that a witness, including a private individual, can decline to answer to protect the ability of the president to ultimately assert privilege; the practice of executive branch officials refusing to comply with subpoenas or answer questions because the information is *potentially* privileged despite the lack of any actual assertion of privilege; or the president’s ability to make a “protective” assertion of executive privilege over a broad swath of information and thereby immunize an executive branch official from contempt without the need to balance Congress’s interests. Each of these positions relies, ultimately, on the premise that executive privilege—that is, the affirmative authority of the president to control the dissemination and disclosure of information—is applicable and needs to be protected. However, if the privilege is not an affirmative authority but, instead, is a limited immunity that is not applicable to impeachment, none of these prophylactic doctrines apply.

More generally, if the executive's privilege is understood as a narrow limit on Congress's oversight authority, rather than an affirmative presidential authority, most of these prophylactic doctrines would disappear from oversight as well, or at least be substantially inhibited. The president—and only the president—would have to decide, and justify with particularity, whether to withhold documents and which documents to withhold in response to congressional subpoenas. In other words, the various defenses designed to “protect” the president's authority to assert privilege, which is the primary rationale that animates the executive branch's response to oversight demands today, would no longer be valid. The president has no constitutional “authority” to control the dissemination of privileged information; the president has a very narrow, fact-specific privilege that he may assert. His assertion is a valid defense, but it is the only defense.

In sum, the question of “what is executive privilege?” is an enormously difficult one, particularly in the current partisan environment. But it is a vitally important question to try to answer as the conflicts escalate between the executive branch and Congress. I have proposed one definition, but I by no means think it is the only possible one.

Regardless of the answer, however, it should be clear that the privilege does not apply to impeachment. And what has gone unrecognized to date, I think, is that if executive privilege does not apply to impeachment, then these other related prophylactic doctrines disappear along with it, whatever one thinks of their applicability to oversight more generally. The executive's privilege, in my view, is limited to oversight. An impeachment inquiry—soon to be affirmed by the full House—is now under way. As a result, executive privilege—and all its attendant prophylactic doctrines—should be set aside. The president and executive branch officials must, in Wilson's words, “appear[] at the bar of the house, to give an account of their conduct.”