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Former Presidents and Executive Privilege

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Former Presidents and Executive Privilege

Laurent Sacharoff*

The Constitution provides former Presidents with no powers or role, and yet numerous former presidents including Truman and Nixon have asserted executive privilege in order to withhold information from Congress, historians, and the public. The most recent former President, George W. Bush, is likely to make similar assertions based upon his sweeping view of the rights of former Presidents as reflected in his recently revoked Executive Order 13,233, potentially leading to a constitutional collision between the rights of former Presidents and those of Congress. This Article argues that, notwithstanding Nixon v. Administrator of General Services *(*GSA*), former Presidents should retain no right to assert executive privilege based upon the text, structure, and historical context of the Constitution and its antimonarchical premises, as well as the nature of executive privilege when compared to other privileges.*

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> We are informed, that many letters have been written to the members of the fœderal convention from different quarters, respecting the reports idly circulating, that it is intended to establish a monarchical government, to send for the bishop of Osnaburgh, &c., &c.—to which it has been uniformly answered, "tho' we cannot, affirmatively, tell you what we are doing, we can, negatively, tell you what we are not doing—we never once thought of a king.["][1]

I. Introduction

The Constitution makes no provision for former Presidents. It vests them with no powers, titles, or role whatsoever; it does not even provide them a pension.[2] The founding generation vigorously opposed entrenched power and sought through the Constitution to make clear the President was not a king. And yet after leaving office, several presidents have asserted executive privilege in order to keep information secret from congressional investigations, historians, and the public. President Truman, after he left office, refused to testify before Congress despite a subpoena.[3] Though the Constitution does not mention executive privilege, Truman argued that its structure for separation of powers immunized Presidents *as well as former Presidents* from any obligation to testify.[4] President Nixon sought through litigation to keep secret the White House tapes on the grounds that he retained executive privilege under the Constitution even years after he had resigned.[5] Though the motives of Truman and Nixon may have varied, their arguments were similar and striking—that former Presidents continue to enjoy some constitutional power after they leave office and can assert a privilege enjoyed by no other private citizen.

This brings us to the most recent former President, George W. Bush, and to an imminent constitutional collision likely to test the power of a former President to assert executive privilege against the power of Congress to investigate. On the one hand, early in his presidency President Bush staked out an aggressive position: that former Presidents enjoy sweeping

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1. Extract from THE PA. J. & THE WKLY. ADVERTISER, Aug. 22, 1787, at 3, *reprinted in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 73, 73–74 (Max Farrand ed., 1911) [hereinafter FARRAND].

2. The only reference to former Presidents occurs indirectly in the Twenty-Second Amendment, which prohibits any person being elected President more than twice. U.S. CONST. amend. XXII, § 1.

3. President Harry Truman, Address Explaining to Nation His Actions in the White Case (Nov. 16, 1953), *in* N.Y. TIMES, Nov. 17, 1953, at 26.

4. *Id.*; Letter from Harry S. Truman to Harold H. Velde, Chairman of the House Comm. on Un-American Activities (Nov. 12, 1953), *in* N.Y. TIMES, Nov. 13, 1953, at 14.

5. Nixon v. Adm'r of Gen. Servs. (*GSA*), 433 U.S. 425, 440–41 (1977).

powers to assert executive privilege, even in the face of a contrary determination by the sitting President. In Executive Order 13,233, he asserted that former Presidents, former Vice Presidents, and their heirs retain absolute veto power over the incumbent President concerning the privilege; if a former President asserts privilege, the incumbent President may not release the information absent court order.[6] On the other hand, Congress has conducted numerous investigations into a wide range of allegations involving Bush, former Vice President Cheney, and their aides,[7] leading to regular assertions of executive privilege. Both the House and the Senate have made clear they intend to continue many of these investigations and to test these assertions of privilege.[8]

These two courses are set to collide. In one case, they already have: in 2007 and 2008 a House committee subpoenaed several White House aides, including Harriet Miers and Karl Rove, to testify concerning whether the firing of nine U.S. Attorneys was proper.[9] Miers and Rove both refused to testify and continued to assert executive privilege even after President Bush had left office.[10] But with pressure from the Obama White House, Miers and Rove reached an agreement with Congress under which they testified this summer, with the understanding that counsel could object to any questions concerning communications with then-President Bush.[11] Indeed, counsel for former President Bush attended the testimony to protect the former President's executive privilege.[12]

These issues will not disappear soon. One Senator predicted that the congressional investigations[13]—as well as any criminal prosecutions[14]—into

6. Exec. Order No. 13,233, 3 C.F.R. 815 (2002), *reprinted in* 44 U.S.C. § 2204 (2006). The order still presumably reflects former President Bush's view of his continuing powers, though President Obama revoked it. Exec. Order No. 13,489, 74 Fed. Reg. 4669 (Jan. 26, 2009).

7. Congress has investigated the leak of the identity of CIA agent Valerie Plame, the warrantless domestic-surveillance program, allegations of torture of terrorist suspects, destruction of CIA videotapes of enhanced interrogations, and extraordinary rendition, among other things. MAJORITY STAFF OF H. COMM. ON THE JUDICIARY, 110TH CONG., REINING IN THE IMPERIAL PRESIDENCY: LESSONS AND RECOMMENDATIONS RELATING TO THE PRESIDENCY OF GEORGE W. BUSH 72–269 (Comm. Print 2009).

8. *See id.* at 270 (recommending that Congress should pursue document and witness requests pending at the end of the 110th Congress).

9. Comm. on the Judiciary v. Miers, 542 F.3d 909, 910 (D.C. Cir. 2008); *Rove Subpoenaed on U.S. Attorneys*, N.Y. TIMES, Jan. 27, 2009, at A23.

10. David Johnston, *Top Bush Aides to Testify in Attorneys' Firings*, N.Y. TIMES, Mar. 5, 2009, at A19.

11. *Id.*; AGREEMENT CONCERNING ACCOMMODATION: *COMMITTEE ON THE JUDICIARY, US HOUSE OF REPRESENTATIVES V. HARRIET MIERS ET AL.* 1 (2009), *available at* http://judiciary.house.gov/hearings/pdf/Agreement090304.pdf.

12. *Interview of Karl Rove Before the H. Comm. on the Judiciary*, 111th Cong. 3 (2009).

13. In addition to congressional investigations begun during President Bush's term, the House has begun an investigation into whether Vice President Cheney improperly withheld information from Congress regarding CIA efforts to develop assassination squads to kill Al Qaeda leaders. Mark Mazzetti & Scott Shane, *House Looks into Secrets Withheld from Congress*, N.Y. TIMES, July 18, 2009, at A10. The Senate has begun an investigation into the CIA's detention and

Bush-era conduct could take "even a decade or longer."[15] Even beyond these congressional and criminal inquiries, the question of what rights former Presidents have to executive privilege will resound well into the future. As the amount of executive information, including e-mail and other electronic data, increases—Bush bequeathed 100 terabytes[16]—former Presidents will continue to face temptation. Some will assert the privilege for legitimate motives to protect the confidences and reputations of close and trusted aides, but others will do so simply to hide embarrassing information or, as in the case of Nixon, evidence of wrongdoing and crimes. Such secrecy will affect not only Congress but historians, journalists, and the public seeking access to information.[17]

Thus, the timely and long-term question arises: do former Presidents retain the right to assert executive privilege under our constitutional order, or may the sitting President unilaterally overturn the assertions of his predecessors? This Article addresses this largely neglected area of law[18] and concludes that former Presidents should not retain any right to assert executive privilege. It also reaches the related conclusion that the sitting President must enjoy plenary power under Article II to assert or waive the privilege, even concerning information created during the preceding administrations.

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interrogation program, including Bush White House involvement. Mark Mazzetti, *Senate Panel to Pursue Investigation of CIA*, N.Y. TIMES, Feb. 27, 2009, at A14.

14. Special Prosecutor Nora Dannehy continues a criminal investigation into the U.S. Attorney firings. Eric Lichtblau & Eric Lipton, *E-mail Reveals Rove's Key Role in '06 Dismissals*, N.Y. TIMES, Aug. 12, 2009, at A1. In addition, Attorney General Eric Holder has named John H. Durham, a federal prosecutor from Connecticut, to determine whether a full criminal investigation into possible torture and other interrogation abuses by the CIA in 2002 and 2003 was warranted. Mark Mazzetti & Scott Shane, *Investigation Is Ordered into C.I.A. Abuse Charges*, N.Y. TIMES, Aug. 25, 2009, at A1. Durham is already investigating the CIA's destruction of 92 videotapes of interrogations. *Id.*

15. Patrick Leahy, *The Case for a Truth Commission*, TIME, Mar. 3, 2009, at 25, 25. Senator Leahy made this prediction in arguing for a truth commission as an alternative to congressional investigations and prosecutions. *Id.*

16. Robert Pear & Scott Shane, *Bush Data Threatens to Overload Archives*, N.Y. TIMES, Dec. 27, 2008, at A10. These 100 terabytes were 50 times more than the Clinton Administration left. *Id.* Of that, archivists expect 20 to 24 terabytes to be e-mail, as compared to 1 terabyte for the Clinton Administration. *Id.* President Obama's use of a Blackberry will presumably increase the amount of presidential e-mail significantly.

17. For example, the Presidential Records Act requires that any documents an outgoing President designates as protected by executive privilege on the grounds of confidentiality be made available to the public in twelve years. 44 U.S.C. § 2204(a) (2006). Though President Obama revoked Bush's executive order, which permitted Bush, Cheney, and their heirs to extend the privilege period indefinitely, this order still reflects the possibility that Bush and Cheney will file court actions to prevent the disclosure of documents when the twelve-year statutory period elapses, arguing the documents are protected by executive privilege. Exec. Order No. 13,233, 3 C.F.R. 815 (2002), *reprinted in* 44 U.S.C. § 2204, *revoked by* Exec. Order No. 13,489, 74 Fed. Reg. 4669 (Jan. 21, 2009).

18. The only article to consider the question in-depth analyzed executive privilege in the context of property law rather than constitutional law. Jonathan Turley, *Presidential Papers and Popular Government: The Convergence of Constitutional and Property Theory in Claims of Ownership and Control of Presidential Records*, 88 CORNELL L. REV. 651, 687–96 (2003).

As noted above, the Constitution makes no provisions for former Presidents—they are constitutional nonentities.[19] Their outsider status becomes particularly clear in light of the traditional view of scholars and courts that executive privilege is best defined by constitutional checks and balances, i.e., by the political battle between the President and Congress. Naturally, a former President has no role to play in this constitutional dynamic of checks and balances. The view that executive privilege is purely a creature of checks and balances might mean that former Presidents should have no right to assert executive privilege. But it might just mean that former Presidents must rely on courts to protect whatever right they retain.

Consequently, this Article examines from first principles whether former Presidents retain any court-enforceable right to assert executive privilege and concludes they do not. Both the text and the historical context of the Constitution reflect the founding generation's decided break from monarchy and its attributes. The chief attribute of monarchy is hereditary and perpetual power, and the Constitution eliminates this attribute with a four-year term for the President,[20] ruling out any lingering powers for former Presidents. The Constitution does not mention executive privilege, but the Court in *United States v. Nixon*[21] found that executive privilege is an implied Article II power.[22] Since the Constitution ends a President's Article II powers at the conclusion of her term, it likewise ends her right to assert executive privilege after she has left office. The privilege itself of course survives the tenure of any particular President, but the holder of the privilege shifts entirely from the former to the new President. Article II, Section 1 vests the executive power in the President, not the former President.[23]

These bedrock principles of representative democracy also motivate a comparison between executive privilege and the attorney–client privilege for corporations, since corporate-governance law in the United States treats corporations as "representative democracies."[24] When new management takes over a corporation, it gains complete control over whether to assert or waive the attorney–client privilege; outgoing management retains no power over

19. I speak of the text of the Constitution. The Court in *GSA* afforded former Presidents the right to assert executive privilege, 433 U.S. 425, 439 (1977), and in *Nixon v. Fitzgerald* granted former Presidents immunity from civil lawsuits arising out of their official duties, 457 U.S. 731, 749 (1982).

20. U.S. CONST. art. II, § 1.

21. 418 U.S. 683 (1974).

22. *See id.* at 711 ("Nowhere in the Constitution, as we have noted earlier, is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based.").

23. U.S. CONST. art. II, § 1.

24. *See* Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 837 (2005) ("The U.S. corporation can be regarded as a 'representative democracy' in which the members of the polity can act only through their representatives and never directly.").

the privilege.[25] This remains true even though new management, like a new President, can decide to waive the privilege and expose the confidential statements made by previous officers and directors to counsel.[26]

Not everyone agrees that former Presidents lose executive privilege—the Supreme Court, for example. In *Nixon v. Administrator of General Services*[27] (*GSA*), the Court ruled that a former President retains executive privilege at least with respect to confidential communications and that he can assert that privilege in court even over the objections of the incumbent President.[28] *GSA* was wrongly decided on this point, however, as some scholars have pointed out.[29] This Article will analyze *GSA* in depth to show why it fails on its own terms and how it ignored both the strong antimonarchical norm of the Constitution as well as the basic nature of executive privilege as a privilege. And in any event, *GSA* is distinguishable in relation to any case concerning the disclosure of specific information.[30]

This Article is divided into three parts. Part II reviews the existing scholarship and case law to illuminate a predominant theme: that executive privilege should largely be defined by checks and balances, battles between the President and Congress, rather than in the courts. Former Presidents have no constitutional or other role to play in this checks-and-balances regime; instead, former Presidents inhabit a constitutional borderland that requires us to examine whether they have a court-enforceable right. Thus, Part III examines from first principles whether former Presidents retain any right to executive privilege that courts can or should recognize. It explores the weaknesses of *GSA* and then examines the privilege both from a constitutional point of view and from a privilege point of view. Part IV addresses possible objections. A brief conclusion follows.

25. *See* Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 349 (1985) ("[W]hen control of a corporation passes to new management, the authority to assert and waive the corporation's attorney–client privilege passes as well.").

26. *See id.* ("New managers . . . may waive the attorney–client privilege with respect to communications made by former officers and directors. Displaced managers may not assert the privilege over the wishes of current managers, even as to statements . . . made to counsel concerning matters within the scope of their corporate duties.").

27. 433 U.S. 425 (1977).

28. *See id.* at 447–49 (adopting the Solicitor General's view that executive privilege "is not for the benefit of the President as an individual, but for the benefit of the Republic[, and t]herefore the privilege survives the individual President's tenure").

29. *See* Turley, *supra* note 18, at 687–96 (criticizing the Court's analysis and arguing for a bright-line rule that executive privilege "attaches to the immediate officeholder").

30. The Court in *GSA* reviewed whether a statute on its face violated the constitutional principle of separation of powers; it did not address except in dicta whether a former President can, on the grounds of executive privilege, prevent an incumbent from releasing specific information. 433 U.S. at 455.

II. Existing Scholarship and Case Law

"Executive privilege" embraces several privileges that permit the President to withhold information from Congress, the courts, and the public.[31] The two main types are the presidential privilege, which protects confidential presidential communications, and the state-secrets privilege. This Article uses the term "executive privilege" to cover both types,[32] though most of the Article concerns the presidential privilege. There appears to be broad agreement that former Presidents do not retain the right to assert the state-secrets privilege.[33]

A. Existing Scholarship

The scholarship on whether former Presidents have a right to assert executive privilege is sparse.[34] Some scholars have simply raised the issue as a question without providing a definitive answer.[35] The main scholar to consider former Presidents' rights to executive privilege in any depth is Jonathan Turley, who recently addressed the rights of former Presidents to control their presidential documents through assertions of executive privilege.[36] In

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31. *See In re* Sealed Case, 121 F.3d 729, 736–40 (D.C. Cir. 1997) (recognizing privileges for presidential communications, state secrets, government informers, pending investigations, and deliberative processes).

32. Some scholars reserve the term "executive privilege" for the presidential privilege. *See* ROBERT M. PALLITTO & WILLIAM G. WEAVER, PRESIDENTIAL SECRECY AND THE LAW 205–06 (2007) (arguing that the Supreme Court in *United States v. Nixon* distinguished executive/presidential privilege from state-secrets privilege). Others use the term to include both the presidential privilege and the state-secrets privilege. *See* RAOUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 216–24 (1974) (discussing the evidentiary privilege of military and state secrets); MARK J. ROZELL, EXECUTIVE PRIVILEGE, PRESIDENTIAL POWER, SECRECY, AND ACCOUNTABILITY 43–46 (Univ. Press of Kan. 2d ed., rev. 2002) (1994) (stating that national security justifies executive privilege); Archibald Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383, 1426 (1974) (considering whether courts have the competence to assess a president's assertion of the privilege over military or diplomatic secrets).

33. *See GSA*, 433 U.S. at 447–49 (noting Nixon's concession that former Presidents may not assert the state-secrets privilege). *But see* Exec. Order No. 13,233, 3 C.F.R. 815 (2002), *reprinted in* 44 U.S.C. § 2204 (2006) (declaring a right for former Presidents to assert the state-secrets privilege), *revoked by* Exec. Order No. 13,489, 74 Fed. Reg. 4669 (Jan. 21, 2009).

34. Much of the scholarship discusses whether Bush's Executive Order No. 13,233 runs afoul of the Presidential Records Act, 44 U.S.C. §§ 2201–2207 (2006), rather than analyzing whether former Presidents enjoy any constitutional right. *See, e.g.*, Mark Rozell & Mitchel A. Sollenberger, *Executive Privilege and the Bush Administration*, 24 J.L. & POL. 1, 8–10 (2008) (arguing that the Presidential Records Act did not contain the "high obstacle" for those seeking access to presidential records that the Bush standard required).

35. *E.g.*, Saikrishna Bangalore Prakash, *A Critical Comment on the Constitutionality of Executive Privilege*, 83 MINN. L. REV. 1143, 1188–89 (1999). Prakash suggests that the arguments for executive privilege, which he finds unconvincing, would lead to the conclusion that a former President should enjoy a right to assert the privilege: "After all, being President is a short-term affair and many of the arguments for a privilege would seem to extend to conversations years after they occurred." *Id.*

36. *See* Turley, *supra* note 18, at 716–19 ("The creation of presidential papers in the course of public employment offers a clear and compelling basis for public ownership, not unlike a private company's ownership rights over the creations of its employees."). In doing so, Professor Turley

his view, property law, not constitutional law, explains the controversies of executive privilege and presidential papers.[37] Surveying the history of presidential papers, he argues that past presidents and earlier court cases have historically treated presidential papers as property in the Lockean sense—that what a person created through his own labor was his property by natural law.[38] Because those presidents used their labors to create their papers, those papers belong to the presidents who created them in a manner akin to an author's rights to intellectual property. But Turley argues that such an outmoded view of property should no longer apply to presidential papers,[39] which are now public property under the Presidential Records Act of 1978 (PRA).[40]

Turley's view makes sense, but this Article takes a different approach. First, it focuses on disputes between the President and Congress, which the PRA does not govern. Second, it expands substantially upon Turley's remark that both Bush's executive order and *GSA* diverge from the antimonarchical norms of the founding generation and the Constitution.[41] Third, and most important, it approaches executive privilege not as an aspect of property law but as a *privilege* that covers both documents and testimony, and compares executive privilege to other privileges to establish its true nature.

The scholarship concerning executive privilege for the sitting President, by contrast, is ample and concerns two main topics: first, whether executive privilege exists and second, if it does exist how disputes between the President and Congress should be resolved. The arguments against the existence of executive privilege are illuminating[42] and persuasive[43] but

noted that under the traditional view of executive privilege, the President and Congress make constitutional separation-of-powers arguments rooted in utilitarian goals: Congress argues that openness produces better government, while the President argues that the privilege and confidentiality afforded by secrecy produce better, more candid advice to the President. *Id.* at 654. But Turley did not see this battle as part of a healthy system of constitutional checks and balances; rather, he described this process as a "zero-sum game" that masks a deeper issue concerning "the true ownership of Presidential papers." *Id.* at 654–55.

37. *Id.* at 655.

38. *Id.*

39. *Id.* at 711.

40. 44 U.S.C. §§ 2201–2207 (2006).

41. *See* Turley, *supra* note 18, at 701 ("The attempt to extend executive privilege not only for the life of former presidents but also to his heirs is precisely the type of 'old leaven' that Maclay and others opposed in the First Congress.").

42. *See* William W. Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause*, 40 LAW & CONTEMP. PROBS. 102, 107–08 (1976) (arguing that the Necessary and Proper Clause applies only to Congress, and that the President may not establish executive privilege pursuant to his own view that the privilege is necessary and proper to his functions); *see also* Prakash, *supra* note 33, at 1145 (arguing that "there are reasons to doubt that the Constitution itself conveys a unilateral right to conceal executive communications" and using tools such as the text, structure, and history of the Constitution to conclude that, barring statutory action by Congress, the President lacks an executive privilege).

ultimately hard to maintain in the face of case law recognizing some constitutional right to executive privilege against both judicial process[44] and Congress.[45] This Article assumes that executive privilege exists and that it is constitutionally based; it therefore surveys the scholarship that assesses how disputes between the President and Congress over that privilege should be resolved.

Nearly everyone agrees that the political battle of checks and balances is the starting point in assessing executive privilege.[46] The premise for that starting point is Madison's conclusion in *Federalist No. 51* on how to maintain separation of powers: "by so contriving the interior structure of the government, as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places."[47] In disputes between the President and Congress, scholars also largely agree that Congress has numerous methods, such as withholding appropriations, to pressure the President to disclose information and that the political fight and accommodation between the branches leads, if not to an optimal balance, at least to a better equilibrium than the courts could divine.[48] But different

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43. *See* BERGER, *supra* note 32, at 1395–97 (arguing that the history and structure of the Constitution show the framers reposed the absolute authority in Congress, the senior branch, to obtain information from the Executive Branch).

44. *See* United States v. Nixon, 418 U.S. 683, 703–07 (1974) (holding that there is a qualified constitutional right of executive privilege against the Judicial Branch).

45. *See* Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 733 (D.C. Cir. 1974) (holding that the need demonstrated by the Senate Select Committee was not sufficient to overcome the presumption of confidentiality in favor of President Nixon's assertion of executive privilege); *see also* Nixon v. Adm'r of Gen. Servs. (*GSA*), 433 U.S. 425, 448–49 (1977) (recognizing that executive privilege can be asserted against a congressional statute).

46. *See, e.g.*, LOUIS FISHER, THE POLITICS OF EXECUTIVE PRIVILEGE 3 (2004) (presenting the difficult issue of resolving the implied powers of Congress and the President when they collide); ROZELL, *supra* note 32, at 157 ("The resolution to the dilemma of executive privilege is found in the political ebb and flow of our separation of powers system."); Joel D. Bush, *Congressional-Executive Access Disputes: Legal Standards and Political Settlements*, 9 J.L. & POL. 718, 745 (1993) (discussing the risk of judicial resolution undermining the political accommodations that the branches have reached with one another in information-access conflicts); Cox, *supra* note 32, at 1432 (noting that "the ebb and flow of political power" sufficed historically to resolve executive privilege disputes, but concluding that modern history shows a need for judicial enforcement of some subpoenas); Michael Stokes Paulsen, *Nixon Now: The Courts and the Presidency After Twenty-five Years*, 83 MINN. L. REV. 1337, 1341, 1375–78 (1999) (arguing that the scope of executive privilege is left to the interaction of the branches of government and not to an "ad hoc judicially-created constitutional balancing test"); Gary J. Schmitt, *Executive Privilege: Presidential Power to Withhold Information from Congress*, *in* THE PRESIDENCY IN THE CONSTITUTIONAL ORDER 154, 177 (Joseph M. Bessette & Jeffrey Tulis eds., 1981) (noting that understanding the separation-of-powers principle is "key to tempering the abuses possible in executive privilege while simultaneously avoiding the pitfalls of an imperial Congress"). *But see* David A. O'Neil, *The Political Safeguards of Executive Privilege*, 60 VAND. L. REV. 1079, 1119 (2007) (doubting the logic of the escalation model and rejecting its conclusion that "self-executing checks, left to deploy unfettered in the political process, will resolve information disputes in a manner that best reflects the constitutional balance between the branches").

47. THE FEDERALIST NO. 51, at 320 (James Madison) (Clinton Rossiter ed., 1961).

48. *See* O'Neil, *supra* note 46, at 1083 ("[S]cholarship contends that in any given conflict over information, the Constitution's structural distribution of powers will guide the political process to an

scholars come to different conclusions about what role, if any, the Judiciary should play in a kind of back-up capacity.

By one view, the Judiciary should play no role.[49] Archibald Cox tended toward the view that a dispute between the President and congressional committees over executive privilege was nonjusticiable because the courts lack "judicially manageable standards by which the controversy can be adjudicated."[50] He echoed *Baker v. Carr*,[51] in which the Court enunciated the guides courts should follow in declining to hear cases on the grounds that they are "political questions."[52] One factor is if a court lacks "satisfactory criteria for a judicial determination."[53] In addition, Cox wrote, when courts make such decisions, they fix through precedent the relationship between the President and Congress.[54] Better, he said, to let the political branches battle it out.[55] On the other hand, Cox did propose that judges should enforce subpoenas that an entire chamber of Congress votes to enforce against the Executive Branch and that it should do so without balancing Congress's need for the information against the President's need for secrecy.[56] It should simply confirm that the material sought is relevant and within the jurisdiction of that chamber—thus avoiding the justiciability problem.[57] Paulsen echoed this view in stating that the Constitution contains no rule for courts to apply, but he came out in favor of the President rather than Congress.[58]

In addition to highlighting the limits of judges, many scholars also point positively to the virtues of checks and balances as a well-founded mechanism to reach a sensible or workable equilibrium;[59] that is, even putting aside

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optimal accommodation of the competing interests of each branch."). O'Neil rejects this view and argues that the political processes are not enough by themselves. *Id.*

49. *See, e.g.*, Bush, *supra* note 46, at 744–46 (arguing that the Judiciary should avoid resolving such disputes on the merits); Todd Peterson, *Prosecuting Executive Branch Officials for Contempt of Congress*, 66 N.Y.U. L. REV. 563, 626–31 (1991) ("[T]he courts are ill-equipped to resolve executive privilege disputes."); Schmitt, *supra* note 46, at 178–82 ("[Such a judicial role] is constitutionally suspect, potentially ineffective, and, in the end, most imprudent."); Viet D. Dihn, *Executive Privilege: The Dilemma of Secrecy and Democratic Accountability*, 13 CONST. COMMENT. 346, 347 (1996) (reviewing MARK J. ROZELL, EXECUTIVE PRIVILEGE: THE DILEMMA OF SECRECY AND DEMOCRATIC ACCOUNTABILITY (1994)) (criticizing Rozell for advocating for a role for judicial intervention in executive privilege disputes).

50. Cox, *supra* note 32, at 1424.

51. 369 U.S. 186 (1962).

52. *Id.* at 210.

53. *Id.*

54. Cox, *supra* note 32, at 1426.

55. *Id.* at 1432.

56. *Id.* at 1434.

57. *Id.*

58. Paulsen, *supra* note 46, at 1341. Professor Paulsen does not call it a classic "political question" because executive privilege is not textually consigned to another branch; rather, executive privilege arises from the structure of the Constitution and is only a political question in the sense that the Constitution provides no rule for resolving disputes over it. *Id.* at 1377.

59. *See* Peterson, *supra* note 49, at 1432 ("[T]he political process [is] a much better mechanism for balancing executive and congressional interests as the Constitution requires in these cases."); *see*

whether judges have competence in this area, checks and balances is itself a good that leads to positive results. This results in part from escalation *within* each branch and *between* the branches. For example, as Peterson has described, a dispute might begin when a staff member in Congress informally requests documents from an agency official.[60] Often the agency will provide the information, but if not, the staff member may escalate to a representative or senator for added pressure. If that is unsuccessful, the request may be forwarded to a committee chair (who can issue a subpoena), the full committee, the full chamber, and perhaps the entire Congress.[61] Similarly, the issue will likely escalate within the Executive Branch.[62] At each step each branch must decide whether the fight is worth the political costs.[63] Or, as Madison put it, "The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack."[64]

Many recognize that courts have some role to play as a last resort but still emphasize that this process of political checks and balances remains the chief mechanism to resolve executive privilege disputes.[65] It has proved successful throughout history in resolving such disputes; the President and Congress have fought over information hundreds of times since President Washington and have almost never resorted to the courts.[66] An important component of this success is accommodation—each branch has incentives and a duty to try to reach accommodation rather than always take maximalist approaches.[67]

A chief goal of this process is to check presidential abuse of executive privilege, and proponents of checks and balances argue that Congress has

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also Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991, 1006, 1010–12 (2008) (asserting that interbranch conflicts are beneficial because they clarify the Constitution's allocation of power).

60. Peterson, *supra* note 49, at 626.

61. *Id.* at 626–27.

62. *Id.* at 627–28.

63. *Id.* at 626–29.

64. THE FEDERALIST NO. 51 (James Madison), *supra* note 47, at 322.

65. *See* FISHER, *supra* note 46, at 258 (concluding that, while messy, battles between the President and Congress have generally been effective at resolving privilege disputes, and that the courts should retain only a minor role); ROZELL, *supra* note 32, at 165–66 (acknowledging that though the courts may have a minor role when necessary, compromise between the two branches is the most desirable outcome).

66. *See* Peterson, *supra* note 49, at 625 ("The history of congressional-executive negotiation and compromise over executive privilege claims suggests that Congress does not need a judicial mechanism, criminal or civil, to protect its interests."); Patricia M. Wald & Jonathan R. Siegel, *The D.C. Circuit and the Struggle for Control of Presidential Information*, 90 GEO. L.J. 737, 745 (2002) (observing that the President and Congress usually debate privilege issues as if they were governed by law but usually reach a satisfactory conclusion through the political rather than judicial process).

67. *See* Dawn Johnsen, *Executive Privilege Since* United States v. Nixon*: Issues of Motivation and Accommodation*, 83 MINN. L. REV. 1127, 1139 (1999) ("The institutional conflicts and political motivations sometimes inherent in this aspect of the relationship between the President and Congress are best resolved through a process that allows for flexibility, a balancing of competing interests, and compromise.").

sufficient tools to check presidential abuse without resort to the Judiciary.[68] Behind this view lies Madison's justification for separation of powers: "Ambition must be made to counteract ambition."[69] These tools include withholding appropriations, refusing to vote on nominees, and refusing to ratify treaties.

Ultimately, Congress can control nearly everything the President and the Executive Branch do by cutting off appropriations.[70] For anyone who doubts the extent of Congress's appropriations power, Charles Black noted that Congress could abolish all the departments and agencies, reduce the President's staff to a social secretary, and auction the White House.[71] There is some doubt, however, whether Congress has used this tool effectively to compel the disclosure of information.[72]

Impeachment is also a powerful tool. A President's use of executive privilege can itself, if thought abusive, be the grounds for impeachment. For example, it formed the basis for one article of impeachment drafted against President Nixon.[73] Kenneth Starr also recommended impeachment of President Clinton in part because of Clinton's assertion of executive privilege, but the House did not impeach on those grounds.[74] Presidents also recognize that when the House seeks information in connection with an impeachment, it has stronger and perhaps an unfettered right to the information.[75] For example, President Washington refused to give the House information concerning the ratification of the Jay Treaty on the grounds that the House had no role to play in the ratification of a treaty, but he suggested that if the House had indicated it needed the information for impeachment, he would have provided the information.[76]

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68. *See, e.g.*, Paulsen, *supra* note 46, at 1400 (noting that the Constitution's check against the President's abuse of power or other misconduct is impeachment); Schmitt, *supra* note 46, at 178 (listing the checks that Congress has against executive privilege claims and asserting that resolution of such claims should be political).

69. THE FEDERALIST NO. 51 (James Madison), *supra* note 47, at 322.

70. Charles L. Black, Jr., *The Working Balance of the American Political Departments*, 1 HASTINGS CONST. L.Q. 13, 15–16 (1974).

71. *Id.*

72. *See* Van Alstyne, *supra* note 42, at 134 (agreeing with Black's assessment of the potential scope of Congress's power but noting that Congress has rarely had the will to exercise it against the Executive). Fisher gives numerous examples in a chapter entitled "Appropriations," but none shows Congress refusing appropriations to compel the President to disclose information he had withheld. FISHER, *supra* note 46, at 27–48. For example, he says that Jefferson *would have* given the House whatever information it needed to pay for the Louisiana Purchase. *Id.* at 39–40.

73. *See id.* at 61 (listing Nixon's articles of impeachment, one of which concerned the withholding of documents).

74. *Id.* at 65–66.

75. *See id.* at 49–50 (giving examples of presidents who have recognized Congress's right to documents when exercising the power of impeachment).

76. *Id.* at 35–36. Washington's premise that the House had no role to play concerning the Jay Treaty was untrue; it was debating whether to pass domestic laws implementing the treaty and sought documents in connection with that debate. *Id.*

Congress has regularly compelled disclosure of information in connection with presidential nominees. For example, in 1986 the Senate Judiciary Committee sought memoranda William Rehnquist had written while in the Justice Department's Office of Legal Counsel.[77] President Reagan refused in order to protect the confidentiality and candor of the legal advice Presidents receive.[78] But as Senator Ted Kennedy put it in the title of an op-ed piece: "Rehnquist: No Documents, No Senate Confirmation."[79] In the end, both sides compromised, and the Reagan Administration provided a group of six Senators and six staff members access to some of the memoranda.[80]

But others have persuasively argued that these political processes produce inferior results. O'Neil launched a sustained attack on what he called the escalation model and on practically all the above premises.[81] Likewise, Kitrosser has argued that when the President keeps secrets, and keeps secret even the existence of those secrets, the President deprives Congress of the very information necessary to fulfill its checking function.[82]

Nevertheless, as O'Neil concedes, the escalation model is in fact how executive privilege disputes are largely resolved, and it is therefore the model within which we must attempt to situate former Presidents.

B. Key Case Law on Executive Privilege and the Congress

The D.C. Circuit has largely endorsed checks and balances as the primary method by which executive privilege disputes should be resolved. It has adopted a hybrid between abstention on the grounds of the political question doctrine and a kind of supervision through gradual mini-rulings. Because of its location, the D.C. Circuit has heard the main cases concerning battles between the President and Congress. Since these cases did not reach the Supreme Court, the view of the D.C. Circuit has become the leading precedent.[83]

For example, in *United States v. AT&T*[84] (*AT&T I*) Congress sought information from AT&T concerning a secret government surveillance

77. *Id.* at 76.

78. *Id.*

79. Edward M. Kennedy, Op-Ed., *Rehnquist: No Documents, No Senate Confirmation*, L.A. TIMES, Aug. 5, 1986, § 2, at 5.

80. FISHER, *supra* note 46, at 77.

81. O'Neil, *supra* note 46, at 1099–1136.

82. *See* Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 IOWA L. REV. 489, 543 (2007) (concluding that checks and balances cannot be used against a program that is kept secret). Professor Kitrosser argues that when the President keeps secrets, the Congress lacks the information needed to fulfill its checking function. *Id.* I elaborate on her views below. *See infra* text accompanying notes 188–91.

83. *See* O'Neil, *supra* note 46, at 1088 (stating that the D.C. Circuit stands on the front line of the battle over Executive Branch information and that district court decisions have built on the D.C. Circuit's assumptions).

84. 551 F.2d 384 (D.C. Cir. 1976).

program, and the Ford Administration asserted executive privilege to prevent any disclosure.[85] The D.C. Circuit took an avowedly gradualist approach. Rather than decide this delicate question of separation of powers and justiciability, the court sent the parties back to negotiations, stating that "a better balance would result in the constitutional sense, however imperfect it might be, if it were struck by political struggle and compromise than by a judicial ruling."[86]

The parties narrowed but did not resolve their differences and returned to the D.C. Circuit, each continuing to assert an absolute right.[87] The court could thus no longer rely on negotiations and found itself forced to decide the case.[88] It first held that it did have power to decide the case despite the political question doctrine.[89] In deciding the merits, the court examined the history of the negotiations and the concerns of each side and ordered a middle ground.[90] Congress would receive some of the information it sought, and if after reviewing that information Congress required more, it could come back to court.[91]

Thus, the court sought to avoid deciding for as long as it deemed feasible, and even when it decided, it avoided the ultimate question whether either political branch enjoyed an absolute right.[92] The decision does not purport to be a legal decision in the normal sense of determining the parties' rights. Rather, the court imposed a nakedly practical middle ground in an effort to avoid fixing the constitutional relationship between the political branches in a permanent or precedential way.[93] The court concluded that this "approach of gradualism" takes account of the framers' view that disputes between the branches are best resolved through "dynamic compromise."[94]

C. Conclusion: Former Presidents Occupy a Constitutional Borderland

The scholarship and case law above evince two main views. The first view maintains that courts have no role to play in battles between the President and Congress because there are no judicially manageable standards to decide such questions. But the second view maintains that while the

85. *Id.* at 387.

86. *Id.* at 391.

87. United States v. AT&T (*AT&T II*), 567 F.2d 121, 125 (D.C. Cir. 1977).

88. *Id.* at 127.

89. *Id.* at 123. In 1997, the Supreme Court in *Raines v. Byrd*, 521 U.S. 811 (1997), denied standing to six members of Congress who sued over the line-item veto law. *Id.* at 813–14. But the Court made clear that they lacked standing because they represented only themselves, not Congress, and that Congress had not only passed the law but also opposed this particular lawsuit. *Id.* at 829.

90. *AT&T II*, 567 F.2d at 130–31.

91. *Id.* at 131–32.

92. *See id.* at 130–31, 133 (explaining that the separation of powers required mutual accommodation between the branches).

93. *See id.* at 131 (giving the subcommittee a small amount of information but explaining that, if more is needed in the future, the holding could be adjusted).

94. *Id.* at 127, 131.

political branches should be permitted and encouraged to resolve differences over executive privilege through "dynamic compromise," eventually a court is competent to render a decision, at least when the parties are sufficiently close to settlement. Both views strongly agree that Congress has the tools in the first instance to counterbalance presidential assertions of the privilege.

But former Presidents of course have no role to play in this regime of checks and balances. On the one hand, Congress has none of its usual tools to check any abuse or overuse of executive privilege by a former President. Congress cannot withhold appropriations, and it could violate the Fifth Amendment to take away a former President's pension.[95] It cannot impeach a former President, and a former President has neither treaties in need of ratification nor nominees requiring confirmation. A former President enjoys wide latitude, therefore, to assert the privilege without suffering any of these potential setbacks.[96] Even the power of negative press will have less effect on a former President—at least one who may no longer seek reelection. For example, when former President Truman refused to testify before Congress despite a subpoena, Congress was largely powerless to compel him to testify through traditional tools of checks and balances.[97] Or when Karl Rove and Harriett Miers refused to testify even after former President Bush had left office,[98] Congress again possessed little leverage, and it was President Obama's White House counsel who pressured the Bush aides to testify—perhaps by threatening to withdraw any assertion of executive privilege.[99]

Conversely, a former President may no longer feel bound to assert executive privilege only in the public interest. That is, the sitting President may only assert executive privilege if to do so would be in the public interest,[100] and we rely upon the sitting President to execute this trust faithfully, in part because he has taken an oath to uphold the Constitution.

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95. *Cf.* McNeil v. United States, 78 Fed. Cl. 211, 235–36 (Fed. Cl. 2007) (holding that federal employees have a vested property interest in pension benefits after they retire that is protected by the Due Process Clause).

96. *See* David Johnson, *Top Bush Aides to Testify in Attorneys' Firing*, N.Y. TIMES, Mar. 5, 2009, at A19 (reporting that, although Bush aides would testify concerning alleged misconduct during the Bush Administration, the Committee agreed not to ask about conversations with the President because of executive privilege).

97. *See* Peterson, *supra* note 49, at 628–29 (noting that once the President decides to ignore a subpoena, Congress may not be able to negotiate through traditional means, but recognizing that the President may be persuaded to comply in order not to antagonize Congress or to avoid negative press); Truman, *supra* note 3 (justifying his refusal to comply with a congressional subpoena by asserting that a congressional committee may not compel a President, while in office or after his term, to reveal information regarding "the performance of his official duties").

98. *See* Johnson, *supra* note 96 (reporting the difficulties Congress had in obtaining testimony from Rove and Miers).

99. *See id.* (reporting that it was pressure from President Obama's legal team, not from Congress, that finally led Miers and Rove to testify).

100. *See infra* notes 215–16 and accompanying text.

Former Presidents are presumably no longer bound by this oath.[101] As private citizens, former Presidents may succumb entirely to self-interest.

Thus, the normal mechanism for resolving executive privilege disputes between the President and Congress cannot resolve whether any given assertion of a former President is proper. One could therefore conclude that former Presidents should have no right to assert executive privilege, especially if one believes executive privilege is entirely a creature of checks and balances. Plus, if, as some argue, courts have no role to play in resolving disputes between the sitting President and Congress, they likewise should have no role to play when a President leaves office—either way, issues of executive privilege, at least vis-à-vis Congress, are out of bounds for courts.[102]

But as seen in the scholarship and case law above, this conclusion probably overstates the extent to which executive privilege is entirely a creature of checks and balances. First, the D.C. Circuit has shown a willingness to decide questions of whether the executive can assert executive privilege against the Congress and therefore does treat the privilege as a court-enforceable right.[103] Second, the Supreme Court in *United States v. Nixon* treated executive privilege as an assertable right at least as against a special prosecutor and the grand jury.[104] Since executive privilege is not entirely a creature of checks and balances, it may survive with former Presidents, especially if it is sufficiently similar to other privileges enjoyed by Presidents that do survive, such as the right against self-incrimination and the personal attorney–client privilege.

We must therefore return to first principles to determine whether a former President retains the right to executive privilege after he has left office. Nevertheless, in undertaking this inquiry, it counts against former Presidents that they are not part of the political regime of checks and balances, and that this leading method for resolving such disputes has thus been rendered inapplicable. It also counts against former Presidents that

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101. *See* U.S. CONST. art. II, § 1, cls. 1, 7 (setting the President's term at four years and requiring the President to take the oath of office upon entering office).

102. Congress could arrest a former President to compel his testimony. *See* McGrain v. Daugherty, 273 U.S. 135, 180 (1927) (holding that it is lawful for the Senate to arrest a witness who refuses to appear and testify when testimony is ordered for a legitimate object). If a former President brought a habeas action to challenge the confinement, the court would likely hear his petition. *Cf.* Cox, *supra* note 32, at 1424–25 (predicting that a court would likely hear a claim of executive privilege if, hypothetically, Congress arrested a subordinate of the President for contempt).

103. *See AT&T II*, 567 F.2d 121, 123 (D.C. Cir. 1977) ("Complete judicial abstention on political question grounds is not warranted."); Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 731 (D.C. Cir. 1974) (holding that executive privilege would only give way to a showing that the evidence would be "demonstrably critical to the responsible fulfillment of the Committee's functions," and that the Committee had failed to make such a showing).

104. 418 U.S. 683, 696–97 (1974).

Congress can use none of its tools to check former Presidents' abuse of the power and that former Presidents are no longer constrained by any official duties. Thus, even if not dispositive, a former President's position outside the political regime of checks and balances contributes, along with the arguments below, to the overall conclusion that former Presidents should have no right to assert the privilege.

III. Former Presidents: The Privilege and the Constitution

This Article will next address *GSA* and show that the Court's conclusion—that former Presidents may assert executive privilege—did not follow from the Court's premises. Its holding is a non sequitur. More important, *GSA* did not consider the antimonarchical norm reflected in the Constitution. The Court also did not attempt to discern the real nature of executive privilege by comparing it to other privileges. Thus, after addressing *GSA*, this Article will undertake those neglected inquiries.

A. Nixon v. Administrator of General Services *(*GSA*)*

After Nixon's resignation, Congress passed the Presidential Recordings and Materials Preservation Act (PRMPA) to ensure the White House tapes and other material would not be destroyed.[105] The Act directed the Administrator of General Services to take the material, assign archivists within the Executive Branch to review it, and release certain categories of information to the public, including Watergate material.[106] In *GSA*, former President Nixon sued to prevent release of the White House tapes and other material.[107]

Nixon mounted a facial challenge to the PRMPA, arguing that disclosure even to Executive Branch archivists violated executive privilege.[108] But as a threshold question, the Supreme Court had to determine whether former President Nixon could assert executive privilege even though he was no longer President,[109] even though President Ford had signed the Act, and even though President Carter defended the lawsuit, arguing the PRMPA's legality.[110]

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105. Pub. L. No. 93-526, 88 Stat. 1695, tit. 1 (1974) (codified as amended at 44 U.S.C. § 2111 (2006)).

106. *Id.*

107. Nixon v. Adm'r of Gen. Servs. (*GSA*), 433 U.S. 425, 429–30 (1977).

108. *See id.* at 451 ("We are thus left with the bare claim that the mere screening of the materials by the archivists will impermissibly interfere with candid communication of views by Presidential advisors.").

109. *Id.* at 448.

110. *Id.* at 441.

The Court ruled that former President Nixon could assert the privilege.[111] The Court stated that the presidential privilege, like any privilege, can only fulfill its function in eliciting candid advice if it assures that the confidences will remain secret in the future.[112] From this premise the Court correctly concluded that the privilege must therefore survive the end of any particular President's term to fulfill this function of protecting confidentiality.[113] The Court also correctly held that the privilege survives a particular President's tenure for a separate reason: the privilege is not personal to that President but is in the public interest and so must survive the tenure of any individual President to vindicate the public interest.[114]

All of these premises are true—of course the privilege survives any individual President's tenure. But the Court then concluded, in a non sequitur, that former Presidents hold this surviving privilege in addition to the incumbent.[115] That conclusion is unsupported because the sitting President may, and indisputably does, hold executive privilege and therefore can guarantee, at the very least, that the privilege *survives*. The fact that the privilege survives does not lead to the conclusion that a former President may exercise it. Indeed, the fact that the privilege is not personal to any individual President suggests that the privilege should be controlled exclusively by the sitting President.

Once it had established that a former President could assert the privilege, the Court in *GSA* rejected Nixon's argument on the merits, holding that disclosure to government archivists did not violate executive privilege or separation of powers.[116] The tapes were released to the Administrator (now called the Archivist), who continues to review and release them, but the pace has been slow and much remains undisclosed.[117]

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111. *Id.* at 439. It was unclear whether the Court treated the question as one of standing. It did not use the term standing; rather, it said a former President "may also be heard to assert" the privilege. *Id.* Moreover, in its discussion it did not advert to traditional principles of standing; rather, it simply addressed whether a former President retained the right to assert the privilege as necessary to his Article II powers. *Id.* In any event, it seems a former President would meet the constitutional minimum requirements of standing because he has a particularized and concrete injury (e.g., reputation, privacy, etc.) fairly traceable to disclosure of the information that would be redressed by a favorable court ruling. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (identifying these three elements as the irreducible constitutional minimum for standing). As for prudential guidelines, one could argue that a former President is raising the rights of a third party, namely, the incumbent President, but this merely collapses into the question of whether the former President has his own right to assert the privilege. *See* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 223 (1988) (arguing that standing questions are best addressed as questions of rights on the merits).

112. *GSA*, 433 U.S. at 448–49.

113. *Id.* at 439.

114. *Id.* at 448–49.

115. *Id.* at 439.

116. *Id.* at 441.

117. Patricia Cohen, *John Dean's Watergate Role at Issue in Nixon Tapes Feud*, N.Y. TIMES, Feb. 1, 2009, at A1. Some tapes from 1973—the year of key Watergate cover-up conversations—were released after a lawsuit in the 1990s. *Id.*; Maarja Krusten, *Why Aren't All the Nixon Tapes*

GSA failed in its internal logic because it made the jump from the need for the privilege to survive to the conclusion that it must be former Presidents who assert it. But *GSA* failed in a broader way because it failed to analyze the problem properly. It neither assessed the structure and text of the Constitution concerning the relationship between the sitting President and former Presidents,[118] nor did it evaluate executive privilege through point-by-point comparison to other privileges. Rather, though it never said so, the Court seemed to accept Nixon's argument that executive privilege is analogous to the attorney–client privilege for individuals. That is, Nixon argued that a client continues to possess the right to assert attorney–client privilege even after his relationship with his lawyer has ended and thus former Presidents should similarly enjoy the right to assert the executive privilege even after their terms have ended.[119] The Court mentioned Nixon's argument, and though the Court did not expressly rely upon it, Nixon's argument nevertheless seems to provide the missing link in the Court's logic between the survival of executive privilege and the notion that former Presidents should be the ones to assert it.

But even on its own terms, the holding in *GSA* has important limits. In *GSA*, Nixon challenged the PRMPA as unconstitutional on its face.[120] The Act provided that the Administrator and government archivists in the Executive Branch would review the Nixon materials to determine what should be released to the public.[121] Nixon argued that even permitting these Executive Branch officials to review the material would violate executive privilege, but the Court held that such a disclosure *within* the Executive Branch did not violate the privilege.[122] In ruling on the constitutionality of the PRMPA and how it allocated power, the Court performed a more traditional judicial function: ruling on whether a statute violated separation of powers.[123]

Now Available?, HIST. NEWS NETWORK, Feb. 16, 2009, http://hnn.us/articles/62329.html. The Archivist released another 154 hours of tapes from January–February 1973 in June 2009. Press Release, Nat'l Archives and Records Admin., White House Tape Recordings and Textual Materials (June 19, 2009), http://www.archives.gov/press/press-releases/2009/nr09-96.html.

118. *See GSA*, 433 U.S. at 448 (merely conceding that "[i]t is true that only the incumbent is charged with performance of the executive duty under the Constitution").

119. *Id.* at 440.

120. *Id.* at 429.

121. Pub. L. No. 93-526, § 104, 88 Stat. 1695, 1696–98 (1974) (codified as amended at 44 U.S.C. § 2111 (2006)).

122. *GSA*, 433 U.S. at 454–55.

123. *Id.* at 441; *see also* Morrison v. Olson, 487 U.S. 654, 693–97 (1988) (holding that the Ethics and Government Act does not violate the principle of separation of powers); INS v. Chadha, 462 U.S. 919, 958–59 (1983) (holding a provision of the Immigration and Nationality Act unconstitutional as violating the separation-of-powers doctrine); Humphrey's Ex'r v. United States, 295 U.S. 602, 629–30 (1935) (discussing the fundamental importance of the separation-of-powers doctrine in the context of the Federal Trade Commission Act); Myers v. United States, 272 U.S. 52, 293–95 (1926) (Brandeis, J., dissenting) (arguing that the separation-of-powers doctrine was

By contrast, the Court was not faced with an individual assertion of executive privilege over particular information and was not asked to decide whether disclosure of that information in particular would be in the public interest. That is, the Court in *GSA* was not asked to weigh Congress's need for subpoenaed information *plus* the sitting President's determination that he will release the information *against* the rights of a former President to keep the information secret.

Thus, in a later case the Court may well narrow the holding in *GSA*. If faced with a lawsuit by a former President over individual disclosures of information, the Court could find the case nonjusticiable as a political question, especially in circumstances in which the sitting President and Congress agree that the information should be disclosed. It could note that justiciability was not a problem in *GSA* since the Court in *GSA* reviewed the constitutionality of a statute, for which there are judicially manageable standards as well as a long experience in addressing separation-of-powers challenges to statutes. If so, this later Court would look not only at principles of justiciability but also at whether a former President retains the right to assert executive privilege over particular information. I therefore now turn to first principles and show that former Presidents should not enjoy a right to assert the privilege. By examining the text, structure, and historical context of the Constitution, and by comparing executive privilege to other privileges, I demonstrate that the right to assert the executive privilege belongs solely to the sitting President.

B. The Text, Structure, and Historical Context of the Constitution

The text, structure,[124] and historical context of the Constitution emphatically deny former Presidents lingering powers of any sort, including executive privilege. This emerges in two ways that mirror each other. First, both the structure (the provisions of the Constitution read together) and historical context of the Constitution mark a break with monarchy. The founding generation reflected this antimonarchy sentiment by establishing a Constitution with such provisions as limited terms of office and the means of ensuring presidential accountability. An end to a President's powers means an end to a President's right to assert executive privilege. Second, the incumbent President has plenary Article II powers mirroring a former

adopted to preclude the exercise of arbitrary power and that restrictions on the President's removal power would be consistent with that doctrine).

124. In this Article, I use the term "structure" in two senses. In this subpart, I use it simply to mean provisions of the Constitution read together—a holistic approach. *See* Michael C. Dorf, *Interpretative Holism and the Structural Method, or How Charles Black Might Have Thought About Campaign Finance Reform and Congressional Timidity*, 92 GEO. L.J. 833, 834–38 (2004) (distinguishing the structural method of interpretation from interpretive holism). In section II(B)(3), I use the term "structure" as described by Charles Black. *See* CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 7 (1969).

President's lack of power; if former Presidents were to enjoy any powers, these would subtract from those of the President.

1. The Text of the Constitution.—Individual provisions of the Constitution read both singly and together instantiate this antimonarchy view. Most important, Article II provides that the President "shall hold his office during the term of four years,"[125] in contrast to the perpetual, hereditary powers of the King.[126] Hamilton repeated this difference throughout *Federalist No. 69*, italicizing the word "four" in every instance.[127] As Alexander Bickel noted about the Constitution's term clauses generally, "there is embedded in their totality something of the essence of the democratic political system."[128]

The Constitution announces its departure from monarchy in many other provisions that give the President powers inferior to those held by King George III: the President can be impeached and later prosecuted,[129] whereas the King was legally inviolable;[130] the President's veto is qualified,[131] whereas the King's was absolute; the President may not declare war,[132] but the King could; and so on. The Tenth Amendment also shows that the President (and the federal government) reserves no powers not enumerated,[133] unlike the King, who reserved prerogatives not reserved against him.[134]

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125. U.S. CONST. art. II, § 1.

126. 1 WILLIAM BLACKSTONE, COMMENTARIES *196–97.

127. THE FEDERALIST NO. 69 (Alexander Hamilton), *supra* note 47, at 416, 422. Cato, in his *Letter No. V*, argued for annual elections. CATO, LETTER V (1787), *reprinted in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 317, 320 (Ralph Ketcham ed., 1986). Either way, the point was to end perpetual power with limited terms. THE FEDERALIST NO. 37 (James Madison), *supra* note 47, at 227 (stressing the genius of republican liberty in its demand that elected officials "should be kept in dependence on the people by a short duration of their appointments").

128. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 36 (Yale Univ. Press 2d ed. 1986) (1962).

129. U.S. CONST. art. II, § 4.

130. Or at least usually—Charles I was tried and convicted of treason by a high court specially constituted by Parliament and then executed. *See generally* GEOFFREY ROBERTSON, THE TYRANNICIDE BRIEF: THE STORY OF THE MAN WHO SENT CHARLES I TO THE SCAFFOLD (2005).

131. *See* U.S. CONST. art I, § 7, cl. 2 (describing Congress's ability to override a presidential veto through a two-thirds majority vote by each House). On the other hand, providing the President with any veto power at all made him more powerful than the governors of many states, such as South Carolina, who had no veto power at all. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 141 (2d ed. 1998).

132. U.S. CONST. art. I, § 8, cl. 11 ("The Congress shall have Power . . . To declare War."). *But see generally* John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 246–47 (1996) (arguing the President may start wars without Congress declaring war and that Congress's role comes through funding and impeachment).

133. U.S. CONST. amend. X.

134. WOOD, *supra* note 131, at 540–41.

Article II also requires that the President be a natural-born citizen, an antimonarchical provision designed to prevent a foreign prince from being installed as a monarchical President—a fear at the time that included George III's son, the Bishop of Osnaburgh.[135] As Akhil Reed Amar has pointed out, "in repudiating foreign-born heads of state, the framers meant to reject all vestiges of monarchy."[136] The framers also feared the hereditary aspect of monarchy, i.e., that Presidents would install their sons as successors, and Amar argues that Article II's requirement that the President be at least thirty-five is also antimonarchical by hindering a son from replacing his father.[137]

The framers used other, structural means to prevent a President from entrenching himself and thus to prevent the perpetual-power aspect of monarchy. For example, the President is elected not by Congress but by electors more directly responsive to the people.[138] Such relatively direct elections make the President more accountable certainly, but this regime—at least in the view of Hamilton—also prevents the President from conferring favors on Congress in order to be reelected.[139] Later, the Twenty-Second Amendment forbade entrenchment directly by prohibiting a person from being elected President more than twice.[140]

Taken together, these constitutional provisions reflect an antimonarchical norm and, more specifically, ensure a definite end to a President's Article II powers.[141] And as relevant here, those provisions also end any right to assert executive privilege—an incident of Article II power. The Constitution does not mention executive privilege, but the Court in

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135. *Maximizing Voter Choice: Opening the Presidency to Naturalized Americans: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. 17 (2004) [hereinafter *Hearings*] (statement of Akhil Reed Amar, Southmayd Professor of Law and Political Science, Yale Law School).

136. *Id.*; *see also* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 164–66 (2005) (indicating that at the time of the founding, Americans were inclined to "associate the very idea of a foreign-born head of state with the larger issue of monarchical government").

137. *Hearings*, *supra* note 135, at 23–24 (testimony of Akhil Reed Amar).

138. *See* U.S. CONST. art. II, § 1 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . . The Electors shall meet in their respective States, and vote by Ballot for two Persons . . . . The Person having the greatest Number of Votes shall be the President.").

139. *See* THE FEDERALIST NO. 68 (Alexander Hamilton), *supra* note 47, at 413 ("[T]he executive should be independent for his continuance in office on all but the people themselves. He might otherwise be tempted to sacrifice his duty to his complaisance for those whose favor was necessary to the duration of his official consequence. This advantage will also be secured, by making his re-election to depend on a special body of representatives . . . .").

140. U.S. CONST. amend. XXII, § 1.

141. *See* Jack M. Beermann & William P. Marshall, *The Constitutional Law of Presidential Transitions*, 84 N.C. L. REV. 1253, 1271–72 (2006) (asserting that the Term Clauses are "absolute" and require the outgoing President to "relinquish all official powers").

United States v. Nixon found that executive privilege is a power implied by the express grants of power in Article II.[142]

The foregoing primarily assumes that a former President becomes a former President because his term ends, but impeachment provides a starker hypothetical example. Namely, a President removed by impeachment ought not to enjoy the right to assert executive privilege, especially if he was impeached *because of* his abuse of executive privilege—as Nixon nearly was. Of course as a practical matter we could have a special rule for Presidents removed by impeachment, or a President removed by impeachment for abusing executive privilege, but the example shows in exaggerated form the same principle regarding the normal end of a President's term—that the end of the term must end his powers.

Thus, when a President's Article II powers end at the end of his term, his right to assert executive privilege must likewise end. The privilege itself survives, but the outgoing President no longer controls it after he leaves office. A former President who seeks to assert executive privilege attempts, in fact, to continue his presidency, weakening and subverting the bedrock premises of democracy and limited duration of power. Put more simply, to allow former Presidents to assert presidential powers violates the unambiguous mandate of the text of the Constitution.

2. *The Historical Context: A Rejection of Monarchy.*—The historical context[143] also shows that the public and the ratifiers understood that the Constitution replaced monarchy with a republic, and the framers crafted an instrument with this understanding in mind. The American Revolution represented a revolution against monarchy.[144] Thomas Paine's *Common*

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142. United States v. Nixon, 418 U.S. 683, 711 (1974) ("Nowhere in the Constitution, as we have noted earlier, is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based.").

143. In reviewing the historical context, I focus on how the public and the ratifiers would have understood the Constitution in light of the arguments in the press, especially the *Federalist Papers*, as well as the debates of the various state conventions, whereas I review the records of the Federal Constitutional Convention not to discern the framers' intent but to find evidence of what the public and the ratifiers understood—much as an originalist would. *See* Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1131 (2003) (defining originalist textualism as a "faithful application of the words and phrases of the text in accordance with the meaning they would have had at the time they were adopted as law, within the political and linguistic community that adopted the text as law"); David Thomas Konig, *Why the Second Amendment Has a Preamble: Original Public Meaning and the Political Culture of Written Constitutions in Revolutionary America*, 56 UCLA L. REV. 1295, 1301–07 (2009) (characterizing his article's approach as one of original public meaning as opposed to one of original intent, i.e., the meaning understood by the public at the time of ratification rather than the intent of the framers or ratifiers). But because executive privilege itself was only recognized as a constitutional power in 1974, it naturally makes no sense to rely *exclusively* upon any original public meaning of the Constitution in determining if former Presidents should enjoy the privilege. *See supra* note 22 and accompanying text.

144. *See* WOOD, *supra* note 131, at 3 (remarking that, unlike other revolutions, the American Revolution was motivated by politics and ideology rather than oppression and tyranny).

Sense turned the tide toward revolution in part through an extended attack on monarchy,[145] and the Declaration of Independence excoriated the arbitrary tyranny of King George III.[146] The early state constitutions passed in 1776 created very weak executives,[147] and their purpose was unabashedly to reject monarchy. As the third draft of the Virginia Constitution said, it "destroyed 'the kingly office' outright and 'absolutely divested [it] of all [its] rights, powers and prerogatives . . . .'"[148] Jefferson wrote in the summer of 1777 that Americans "seem to have deposited the monarchical and taken up the republican government with as much ease as would have attended their throwing off an old and putting on a new suit of clothes."[149] Adams in 1776 likewise wrote that he was "'surprized at the Suddenness, as well as the Greatness of this Revolution. . . . Idolatry to Monarchs, and servility to Aristocratical Pride, was never so totally eradicated, from so many Minds in so short a Time.'"[150] By 1776, "[m]onarchical institutions had become extremely unpopular."[151]

This sentiment among the public continued throughout the Revolution.[152] At the close of the war, the soldiers of the army were discontent because they had not been paid for their long sacrifice and had families at home in poverty.[153] The solution of Colonel Lewis Nicola was to make Washington a king, as he proposed in a letter to the general.[154] Washington rejected the proposal outright, forever burnishing his reputation, but also revealing that the public continued to revile monarchy.[155] Washington's rejection of the offer "deserves praise, not only for its spirit of renunciation, but also for its recognition that the American people had become fundamentally antimonarchical in sentiment."[156]

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145. *See* THOMAS PAINE, COMMON SENSE 6 (Ronald Herder ed., Dover Publ'ns 1997) (1776) (attacking "monarchical tyranny in the person of the king" and opining that "[t]here is something exceedingly ridiculous in the composition of monarchy").

146. *See* THE DECLARATION OF INDEPENDENCE para. 5 (U.S. 1776) ("The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States.").

147. WOOD, *supra* note 131, at 137–38.

148. *Id.* at 136 (quoting Thomas Jefferson, Third Draft of a Virginia Constitution, *in* 1 THE PAPERS OF THOMAS JEFFERSON 356, 357 (Julian P. Boyd ed., 1950)).

149. *Id.* at 92 (quoting Letter from Thomas Jefferson to Benjamin Franklin (Aug. 3, 1777), *in* 2 THE PAPERS OF THOMAS JEFFERSON, *supra* note 148, at 26, 26).

150. *Id.* (quoting Letter from John Adams to Abigail Adams (July 3, 1776), *in* ADAMS FAMILY CORRESPONDENCE 27, 28 (L.H. Butterfield et al. eds., Belknap Press 1963); Letter from John Adams to Richard Cranch (Aug. 2, 1776), *in* ADAMS FAMILY CORRESPONDENCE, *supra*, at 73, 74).

151. LOUISE BURNHAM DUNBAR, A STUDY OF "MONARCHICAL" TENDENCIES IN THE UNITED STATES, FROM 1776 TO 1801, at 26 (1922).

152. *See id.* at 35 (noting the enduring resentment in 1778 toward monarchies, in particular toward the French King).

153. *Id.* at 40.

154. *Id.* at 40–46.

155. *See id.* at 46–49 (highlighting in particular Washington's faith in the American people's ability to create a functioning democracy and noting their love and desire for freedom).

156. *Id.* at 46.

This antimonarchical sentiment continued among the populace through 1787 and beyond.[157] In her book, *A Study of "Monarchical" Tendencies, from 1776 to 1801*, Louise Dunbar concludes that "[n]early all of the evidence observed reinforces the belief that the people of the United States were essentially antimonarchical in the period studied."[158]

The framers of the Constitution recognized this strong antimonarchical sentiment among the public and, despite whatever private and secret desires some may have held, and despite their manifest desire to strengthen the executive department, they also recognized that any President they created could not be a monarch. During their deliberations in the summer of 1787, the framers became aware that the public feared they were creating a monarchy and took out an advertisement in two Philadelphia newspapers stating that they were certainly not creating a king—as set forth in the epigraph.[159] During the secret deliberations, Hamilton admitted he preferred the British system—including a President to serve for life during good behavior—but also admitted that the public would only accept a republican government.[160] George Mason, an opponent of a strong executive and ultimately of the Constitution, similarly noted that "the people never will consent" to monarchy.[161] John Dickenson praised the British limited monarchy; he conceded that for America, "[a] limited monarchy however was out of the question. The spirit of the times—the state of our affairs, forbade the experiment, if it were desireable."[162]

Once the Constitution was unveiled, the public in voting for its delegates and the ratifiers in adopting the Constitution relied upon and were ultimately persuaded by the arguments of Madison, Hamilton, Jay, and others in the *Federalist Papers* and in the state convention debates that the presidency was not a monarchy.[163] Hamilton wrote at length in several

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157. *Id.* at 127–28; *see also* WOOD, *supra* note 131, at 429 ("Monarchy, of course, could control a corrupt society, but it was out of the question for most."); Ralph Ketchum, *Introduction* to THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES, *supra* note 127, at 1, 6 ("Hence, virtually all shades of opinion reviled monarchy and democracy, and, publicly at least, affirmed republicanism.").

158. DUNBAR, *supra* note 151, at 128.

159. Extract from THE PA. J. & THE WKLY. ADVERTISER, *supra* note 1; *Philadelphia, Aug. 20*, THE PA. PACKET, & DAILY ADVERTISER, Aug. 20, 1787, at 3.

160. 1 FARRAND, *supra* note 1, at 288. Hamilton nevertheless proposed a plan in which the President would serve for life during good behavior, saying that he hoped public opinion would change. *Id.* at 289. He also tried to argue that life tenure did not really amount to monarchy in the bad sense of the word since the President under his plan would still have been elected. *Id.* at 290–91.

161. *Id.* at 101.

162. *Id.* at 87.

163. *See* Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1603–05 (2002) (highlighting Hamilton's insistence in the *Federalist Papers* that the President was not meant to be a king—particularly because he could not declare war—and noting that several state conventions, including North Carolina, South Carolina, and Pennsylvania, relied on this line of logic during their constitutional ratification processes).

articles in the *Federalist Papers* that the Constitution sought through numerous provisions to prevent monarchy rather than install it.[164] He particularly emphasized that the President was not a monarch because he would be elected for only four years, and "[i]n these circumstances there is a total dissimilitude between *him* and a king of Great Britain, who is an *hereditary* monarch, possessing the crown as a patrimony descendible to his heirs forever . . . ."[165] He also stressed in *Federalist No. 69* that the King could not be removed by impeachment, could veto laws absolutely, and declare war, whereas the President lacked these powers and privileges.[166]

Perhaps more significant than arguing that the President had fewer powers than the King of England, the Federalists also made an important strategic argument that even if the President was stronger than the executives in the state constitutions, he was *elected by the people*, and therefore should no longer be seen as a monarch but rather as another representative of the people.[167] For example, Richard Law stated in the Connecticut convention, "Our President is not a King, nor our Senate a House of Lords. They do not claim an independent, hereditary authority. But the whole is elective; all dependent on the people."[168] This argument was new but not brand new. It reflected the strategy of those arguing for stronger state executives during the

164. THE FEDERALIST NOS. 67, 69, 70–77 (Alexander Hamilton). Hamilton's pro-monarchy preferences may well have led him to minimize the dangers of a tyrannical President. *See, e.g.*, ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 9 n.12, 11 (1956) (mentioning that, because of Hamilton's preference for monarchy, "he might be expected to deprecate the dangers of tyranny from [the Executive Branch]"); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 612 (1994) ("Hamilton wrote his Federalist essays on the presidency in order to quiet the concern of the Anti-Federalists, who were worried that the Chief Executive would become a king."). He of course favored a strong, unitary executive in other sections of the *Federalist Papers*. *See, e.g.*, THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 47, at 424–31 (extolling the virtues of a unitary rather than plural executive).

165. THE FEDERALIST NO. 69 (Alexander Hamilton), *supra* note 47, at 416.

166. *Id.* at 416–19.

167. *See* WOOD, *supra* note 131, at 546–47 (explaining the Federalists' view that every office existed only through the election of the people, thus making every officer "in some way a representative of the people"); Alexander Hamilton, Address to New York Convention (June 21, 1788), *in* 2 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 251, 253 (Jonathan Elliot ed., J.B. Lippincott 1907) (1836) [hereinafter DEBATES IN THE SEVERAL STATES] (arguing that the President himself would be a representative of the people, induced to protect the rights of the people against encroachment by Congress); John Jay, Address to the People of the State of New York (1788), *in* 1 DEBATES IN THE SEVERAL STATES, *supra*, at 496, 498 ("The proposed government is to be the government of the people: all its officers are to be their officers, and to exercise no rights but such as the people commit to them."); *see also* James Wilson, Lectures on Law, *in* 1 THE WORKS OF JAMES WILSON 69, 293 (Robert Green McCloskey ed., Harvard Univ. Press 1967) (1804) (reflecting on the argument that the Judicial and Executive Branches, as servants to the laws they execute and administer, draw their power from the people, just like the Legislative Branch).

168. Richard Law, Address to the Connecticut Convention (Jan. 9, 1788), *in* 2 DEBATES IN THE SEVERAL STATES, *supra* note 167, at 200, 200.

1780s—that such governors would not be kings because they were elected by the people.[169]

The Anti-Federalists, of course, argued that the Constitution was a "long step toward monarchy,"[170] but closer examination reveals that many of the Anti-Federalists argued that the Constitution created a President likely *to become* a monarch rather than an office that was *as constituted* a monarchy. For example, Patrick Henry famously argued that the Constitution "squints towards monarchy . . . . Your President may easily become King" because he controls the army and will exceed his assigned powers.[171] And more relevant here, the Anti-Federalists particularly feared that the President would become a monarch by refusing to leave office at the end of his term. A "Federal Farmer" attacked reeligibility as likely to lead to monarchy since the occupant would use power to perpetuate himself.[172] Luther Martin in his letter to the Maryland convention similarly wrote that the vast powers afforded the President would allow him to stay in office indefinitely even if voted out and to pass his office on to his heirs.[173] Thus, the Anti-Federalists did not so much argue that the Constitution created a monarch as that the President would violate the Constitution and become a monarch.

The foregoing demonstrates that based upon the public debate, the public and the ratifiers understood that the Constitution did not create a monarchy but, rather, created a republic. But it is important to point out that many of the framers secretly desired a far stronger Executive. At the Constitutional Convention, Hamilton proposed a plan to rival the Virginia and the New Jersey plans that would have established a President's term to last for life.[174] The Convention did not vote on the plan as a whole, but it did vote on a motion to establish tenure during good behavior, rejecting it six states to four.[175] In his notes, Madison said this vote was more about tactics than a real desire for life tenure, but in a letter to Jefferson he wrote, "[A] few would have preferred a tenure during good behaviour—a considerable number would have done so, in case an easy & effectual removal by

169. *See* WOOD, *supra* note 131, at 388–89, 445–46 ("An independent governor would not be a king over the people but would instead by an 'umpire raised to the supreme power by their own suffrages.'").

170. CLINTON ROSSITER, 1787: THE GRAND CONVENTION 283 (1966).

171. Patrick Henry, Address to the Virginia Convention (June 5, 1788), *in* 3 THE DEBATES IN THE SEVERAL STATES, *supra* note 167, at 43, 58–59.

172. Letter from the Federal Farmer to the Republican (Jan. 17, 1788), *in* LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN 90, 94 (Walter Hartwell Bennett ed., 1978).

173. *See* LUTHER MARTIN, LETTER ON THE FEDERAL CONVENTION OF 1787 (1788), *reprinted in* 1 DEBATES IN THE SEVERAL STATES, *supra* note 167, at 344, 377–78 (criticizing an attempt to have the President "appointed during good behavior" without any interval of disqualification or time limitation as an "elective monarchy").

174. ROSSITER, *supra* note 170, at 178; *see also* 1 FARRAND, *supra* note 1, at 292 (reporting that Hamilton's plan provided that "[t]he supreme Executive authority of the United States [would] be vested in a Governour to be elected to serve during good behaviour").

175. 2 FARRAND, *supra* note 1, at 23.

impeachment could be settled."[176] Thus, as Gordon Wood has written, there was a "hiatus" between the Federalists' democratic rhetoric and their genuine desire "for a high-toned government filled with better sorts of people."[177] Nevertheless, it was that public rhetoric that led to the ratification of the Constitution, not the secret desires of some of the framers.

Finally, in the years after the Constitution was ratified, politicians and the Court viewed it as a decided break from monarchy. For example, Madison wrote, "We are teaching the world the great truth that Govts. do better without Kings & Nobles than with them."[178] And the Court has noted that the Constitution represented a break from monarchy by eliminating arbitrary power,[179] religious hegemony,[180] and the Executive's power to declare war.[181]

3. The Powers of the Incumbent President.—Looking at the mirror image, the incumbent President, not former Presidents, enjoys all Article II powers.[182] The presidential privilege is one incident recognized in *Nixon* as necessary to accomplish Article II powers, and the incumbent President should therefore enjoy plenary power over that privilege vis-à-vis a former President. A former President should enjoy no right to assert executive privilege because such an assertion subtracts from the powers of the incumbent President. The Court in *GSA* reflected these arguments, even though it came to a contrary conclusion. The Court conceded that "[i]t is true that only the incumbent is charged with performance of the executive duty under the Constitution."[183]

The text of Article II makes clear that a former President can retain no residual power, and the structure of the Constitution supports this view. By

176. Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *in* THE DEBATE ON THE CONSTITUTION 192, 194 (Bernard Bailyn ed., 1993).

177. WOOD, *supra* note 131, at 562.

178. Letter from James Madison to Edward Livingston (July 10, 1822), *in* 5 THE FOUNDERS' CONSTITUTION 105, 106 (Philip B. Kurland & Ralph Lerner eds., 1987).

179. *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 266 (1972) ("And the Framers knew 'that government by the people instituted by the Constitution would not imitate the conduct of arbitrary monarchs. The abuse of power might, indeed, be apprehended, but not that it would be manifested in provisions or practices which would shock the sensibilities of men.'" (quoting Weems v. United States, 217 U.S. 349, 375 (1910))); Myers v. United States, 272 U.S. 52, 294–95 (1926) (Brandeis, J., dissenting) (discussing the founders' view that protection against uncontrollable power was essential to free government).

180. *See* Engel v. Vitale, 370 U.S. 421, 429 (1962) (explaining the threat to religious freedom that comes with allowing the government to endorse a particular religion).

181. Hamdi v. Rumsfeld, 542 U.S. 507, 569 (2004) (Scalia, J., dissenting) ("A view of the Constitution that gives the Executive authority to use military force rather than the force of law against citizens on American soil flies in the face of the mistrust that engendered these provisions.").

182. *See* U.S. CONST. art. II, § 1 ("The executive Power shall be vested in a President of the United States of America.").

183. Nixon v. Adm'r of Gen. Servs. (*GSA*), 433 U.S. 425, 448 (1977).

structure I refer to the structural constitutional arguments made famous by Charles Black, who showed that the structure and *relationship* between the federal and state governments lead to certain inferences about federal power.[184] For example, even if there were no First and Fourteenth Amendments, federal judges could still find unconstitutional any state action that interfered with some political free speech based upon the structure of the Constitution, namely, political speech that touches on federal issues and in particular on federal candidates.[185] A government premised on popular control cannot run without free speech, and the states should not be permitted to interfere with the operation of the federal government by hindering speech that discusses federal candidates and the like.[186]

Similarly, the incumbent President has a structural relationship with his predecessor, a relationship more dramatically demarcated than that between the federal and state government because the incumbent President enjoys all Article II power and the former President enjoys none. The Constitution has no provision that says Presidents or other elected (or unelected) officers lose their powers upon leaving office. But this notion lies inherent in elections and is buttressed by the provisions of Article II vesting the executive powers in the President.

And just as the structure of federalism would mandate that states not interfere with free speech discussing federal issues, the incumbent President must be able to exercise his Article II powers without hindrance from his predecessors. In particular, the incumbent must be able to disclose information unfettered by a former President's assertion of executive privilege. He must be able to do so in general and in order to fulfill several express provisions of the Constitution that oblige the President to disclose some information, albeit at his discretion. The President shall "from time to time give to the Congress Information of the State of the Union,"[187] recommend measures to Congress,[188] and state his objections to a bill he has vetoed.[189] But more important, the need to disclose information lies inherent in the President's Article II powers, such as communicating to the Senate why it should ratify treaties or confirm nominees,[190] or to the Congress concerning whether to declare war or suspend the writ of habeas corpus.[191] Were a former President permitted to assert the privilege to block any such

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184. *See* BLACK, *supra* note 124, at 39 (arguing that "the nature of the federal government, and . . . the states' relations to it" are a more appropriate basis for protecting against state interference with federal constitutional rights than is the Due Process Clause).

185. *Id.* at 40–43.

186. *Id.*

187. U.S. CONST. art. II, § 3.

188. *Id.*

189. *Id.* art. I, § 7.

190. *Id.* art. II, § 2.

191. *Id.* art. I, §§ 8–9.

disclosure, he would interfere with the incumbent's execution of his constitutional powers and duties.

In other words, the end of one President's powers is the beginning of another's. New elections bring new government. One reason for elections is to allow new leaders to eliminate the corruption of their predecessors, to reverse unlawful policies and conduct, and generally to clean up.[192] Where the checks exercised by Congress on presidential abuse and corruption fail, or vice versa, new elections provide a more direct remedy—replacing the scoundrels. As applied to executive privilege, these principles mean that the new President, in cleaning up, must as part of his elected duties disclose any information improperly withheld by his predecessor.

A new President must be able to review controversial assertions of executive privilege by his predecessor to make sure they were valid because the checks of Congress can fail in curbing presidential abuse of the privilege. This follows because Congress often lacks the very information it would need to determine whether to fight the President on her assertion of executive privilege. Congress will obviously not know the content of the information withheld, so it cannot confirm that the privilege was properly asserted.

4. Deep Secrets and Abuse.—Congress often does not even know the nature of the secret information. For example, when Congress seeks documents by categories in a subpoena, a President's assertion of executive privilege can prevent Congress from understanding even generally what information exists. If Congress knows a certain memo exists and the President withholds it, that is one thing; but when Congress has asked for information on a particular topic, it will not even know certain memos exist. In this way, the President succeeds in creating and hiding deep secrets. Professor Kitrosser set forth a useful framework in this regard, arguing that Presidents or Congress may keep shallow secrets but not deep secrets.[193] "Shallow secrecy is secrecy, the very existence of which is known, even while the secrets' contents remain unknown. Deep secrecy is secrecy, the fact of which itself is a secret; . . . the Constitution demands that secrets generated by the political branches be shallow . . . ."[194] Shallow secrets give the other branches a chance to question that secrecy and try to get the information in a fair fight; deep secrecy precludes accountability entirely.

The only remedy to this problem—and it is only a partial remedy[195]—is review by a subsequent President. Only a subsequent President may peer

192. Yasmin Dawood, *The Antidomination Model and the Judicial Oversight of Democracy*, 96 GEO. L.J. 1411, 1445–46 (2008) (describing how elections retrospectively hold officials accountable to their constituents).

193. Kitrosser, *supra* note 82, at 493–94.

194. *Id.*

195. This remedy falls short of what Congress and the public really need: real-time access to information. It is only an additional check along with Congress's need to vigorously challenge assertions of executive privilege.

behind the curtain and quickly and easily (at least in cases of abuse) ascertain whether the privilege even arguably applies. In many cases of abuse in which Presidents have asserted the privilege to hide crimes, the subsequent President has little difficulty in determining the privilege was improperly asserted.

For example, before Nixon's former aide Alexander Butterfield testified to Congress in 1973, no one outside the White House knew that Nixon taped his conversations.[196] This is an example of a deep secret.[197] Had this fact not emerged during Nixon's presidency, a subsequent President should have disclosed at least the *existence* of the tapes to transform this deep secret into a shallow one. Going further, the new President in this hypothetical should review the tapes to determine whether any assertion of executive privilege would arguably protect them or whether they disclose evidence of crimes. Any successor would have had little difficulty in deciding that much of them must be disclosed—as Ford essentially did in signing the PRMPA.[198]

A new President can thus reestablish a proper checking role for Congress even if he only transforms deep secrets into shallow secrets. He may reveal the general nature of the information that his predecessor withheld without disclosing specific information about it. He may likewise brief certain members of Congress with more details, still general in nature, but then insist that the operational details remain secret. These limited disclosures would restore the proper role for checks and balances because Congress could then decide in a more informed way whether to fight for more specific information by withholding appropriations, refusing to vote on nominees, or applying other types of political pressure.

In disclosing his predecessor's deep secrets when in the public interest, the incumbent merely furthers his constitutional role as President, a role that should not be hindered by a former President's assertion of executive privilege. These disclosures of deep secrets will restore the appropriate balance between the branches, and, therefore, a new President *ought* to make those disclosures. The alternative to this subsequent check by the new President is unattractive: an entrenched presidency that acts as a secret club, each President passing to her successor an ever growing body of secrets, each new President faithful to executive secrecy rather than faithful to the public. This unattractive alternative exists today, a continuity within the Executive Branch from President to President of maintaining a vast structure of secrecy. Each President inherits command over this apparatus and the trust to keep it secret. But with that trust comes a complementary trust to reveal what she can to the public and Congress, since only Presidents get to see much of this information. It is the entrenchment of this increasing scope of bureaucratic

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196. Kitrosser, *supra* note 82, at 494.

197. *Id.*

198. *See supra* notes 105–06 and accompanying text.

secrecy that new Presidents must check by undoing, when necessary, improvident assertions of the privilege by their predecessors.

In sum, this idea that a new administration brings with it a mandate to set a new course as well as to clean up the corruption and misdeeds of previous administrations has strong roots not only in our republican democracy but also in contemporary notions of corporate governance in the commercial sphere, a topic to which I turn in the next section.

C. The Presidential Privilege Compared to Attorney–Client Privilege and Other Privileges and Immunities

GSA failed to assess the nature of executive privilege as a privilege and did not expressly compare that privilege to other privileges for guidance. It did appear, however, to implicitly analogize executive privilege to the attorney–client privilege for individuals.[199] Executive privilege differs from the attorney–client privilege and other personal privileges in key ways that undermine *GSA*, and it is far more analogous to the attorney–client privilege in the corporate context.

1. Attorney–Client Privilege.—The basic principles underlying the attorney–client privilege make clear just how personal that privilege is to the client and the numerous ways in which it differs from executive privilege.

The attorney–client privilege protects what a client says to his lawyer in order to encourage clients to make full and frank disclosure to their attorneys.[200] Most courts hold that the privilege does not provide independent protection for what the lawyer says; rather, it protects what the lawyer says only to the extent the lawyer incorporates what the client has told him.[201] In practice, a court may provide ample protection for the lawyer's advice simply because the advice will so often reflect, to some extent, what the client has said. But the premise and spirit of the attorney–client privilege is to protect the *client's* communications—it is truly the client's privilege.

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199. *See* Nixon v. Adm'r of Gen. Servs. (*GSA*), 433 U.S. 425, 440 (1977) ("[A] more generalized Presidential privilege survives the termination of the President–adviser relationship much as the attorney–client privilege survives the relationship that creates it.").

200. *See* Trammel v. United States, 445 U.S. 40, 51 (1980) ("The lawyer–client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out.").

201. *See, e.g.*, Mead Data Cent., Inc. v. U.S. Dep't of the Air Force, 566 F.2d 242, 254 (D.C. Cir. 1977) ("In the federal courts the attorney–client privilege does extend to a confidential communication from an attorney to a client, but only if that communication is based on confidential information provided by the client."); 1 PAUL R. RICE, ATTORNEY–CLIENT PRIVILEGE IN THE UNITED STATES §§ 5.2–5.4 (2d ed. 1999) (noting that most courts provide direct protection to client communications and only derivative protection to the lawyer's communication to the client). *But see In re* LTV Sec. Litig., 89 F.R.D. 595, 602 (N.D. Tex. 1981) (arguing that a rule protecting only advice that discloses confidential client information "fails to deal with the reality that lifting the cover from the advice will seldom leave covered the client's communication to his lawyer").

The privilege protects what the client says to encourage her to be candid with her lawyer and give the lawyer all the relevant facts, since legal advice is only as good as the facts upon which it is premised.[202] The attorney–client privilege must be absolute to fulfill this function.[203] "Absolute" means two things: First, that within the area of application, the privilege cannot be balanced away by a court subsequently determining that the adversary's need for the information outweighs the importance of the confidentiality.[204] Thus, a murderer will tell her lawyer the truth only if she is sure a court will not later be able to compel the lawyer to disclose the information on the grounds that the murder was particularly grisly and the public interest outweighs the need for secrecy. Second, any exceptions must come with bright-line rules that ensure the client will know beforehand which communications she makes will fall under the privilege.[205] For example, anything she says in the presence of a third person not associated with the lawyer will not be privileged.[206]

Another attribute of the privilege gives clients the assurance they need to tell all: the client has absolute discretion whether to assert or waive the privilege.[207] A client will have far less confidence that his secrets will be kept if his lawyer gets to decide whether to waive the privilege. Similarly, the client may assert or waive the privilege based entirely on what is in his best interest. Lawyers rarely encourage their individual clients to waive the attorney–client privilege in the "public interest" and expose themselves to

202. *See Mead Data Cent.*, 566 F.2d at 252 ("The opinion of even the finest attorney, however, is no better than the information which his client provides.").

203. *See* Swidler & Berlin v. United States, 524 U.S. 399, 408–09 (1998) (holding that preservation of the policy goals of the attorney–client privilege requires that it apply even posthumously); Golden Trade, SRL v. Lee Apparel Co., 143 F.R.D. 514, 522 (S.D.N.Y. 1992) (explaining that the attorney–client privilege, unlike most other privileges, is absolute).

204. *See Golden Trade*, 143 F.R.D. at 522 ("[The attorney–client privilege] is absolute in the sense that it cannot be overcome merely by a showing that the information would be extremely helpful to the party seeking disclosure.").

205. *See Swidler*, 524 U.S. at 408–09 (refusing to create posthumous exceptions to the attorney–client privilege for criminal but not civil cases because this inconsistency would "introduce[] substantial uncertainty into the privilege's application"); Upjohn Co. v. United States, 449 U.S. 383, 393 (1981) (emphasizing unpredictable outcomes as a primary reason to reject the control-group exception to the attorney–client privilege rule); 1 EDWARD J. IMWINKELRIED, THE NEW WIGMORE: EVIDENTIARY PRIVILEGES § 3.2.4 at 140–41 (Richard D. Friedman ed., 2d ed. 2002) (disagreeing with Wigmore that privileges should always be absolute but noting that Wigmore's general view of the privilege has prevailed in the courts).

206. *See, e.g.*, Jenkins v. Bartlett, 487 F.3d 482, 490 (7th Cir. 2007) ("[O]rdinarily, statements made by a client to his attorney in the presence of a third person do not fall within the privilege . . . ."); Cafritz v. Koslow, 167 F.2d 749, 751 (D.C. Cir. 1948) ("[T]he presence of a third person (other than the agent of either client or attorney) generally rebuts the presumption of confidentiality.").

207. 8 JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE § 2321, at 629 (John T. McNaughton ed., 3d ed. 1961) (citing as undisputed the proposition that the client, not the attorney, controls attorney–client privilege).

prison terms.[208] Rather, clients invoke the privilege particularly in order to shield crimes and for other entirely self-interested reasons, and it is proper to do so.

In sum, in considering the attorney–client privilege, we find that the same person whose communications we want to encourage also holds the privilege—that is, has the unilateral right to assert or waive it. And the standard he will use is entirely whether assertion or waiver is good for him—the public interest plays no role. In these ways, the attorney–client privilege for individuals is personal.[209]

The presidential privilege stands upon a completely different footing. True, the presidential privilege parallels the attorney–client privilege in that it provides secrecy for what advisers tell the President to ensure they will give the President candid advice.[210] But the presidential privilege differs because these very advisers do not control the privilege; the President does.[211] The President retains unilateral control in the first instance to decide whether to assert the privilege (though if he asserts it, a court may review that assertion).[212] The adviser whose advice we seek to protect may not prevent the President from disclosing that advice and would have no standing in court to do so.[213] It is important to distinguish a separate situation: an adviser may assert the privilege in court or before Congress *on behalf* of the

208. Instead, when lawyers do advise their clients to waive the privilege it is generally because it is in the client's own best interest. *See, e.g.*, Robert Zachary Beasley, Note, *A Legislative Solution: Solving the Contemporary Challenge of Forced Waiver of Privilege*, 86 TEXAS L. REV. 385, 395–99 (2007) (describing how many corporate defendants waive privilege because of the DOJ's policy of granting leniency in exchange for waiver).

209. Wigmore called this and all communication privileges "personal" in a similar sense: they can be asserted only by the person who made the communication and not by the party in the litigation who would benefit from excluding the evidence. 8 WIGMORE, *supra* note 207, § 2196, at 111.

210. *See* United States v. Nixon, 418 U.S. 683, 708 (1974) (stating that the nature of the topics discussed between Presidents and advisers necessitates privacy in order to promote candid discourse).

211. *See, e.g.*, Exec. Order 13,489, 74 Fed. Reg. 4669 (Jan. 26, 2009) (describing the procedure by which an incumbent President may exercise executive privilege over presidential records); 2 IMWINKELRIED, *supra* note 205, § 7.6.2, at 1087–88 ("The President is the person entitled to assert this privilege."); Memorandum from Lloyd Cutler to All Executive Dep't and Agency Gen. Counsels (Sept. 28, 1994) ("Executive privilege belongs to the President.") (quoted in ROZELL, *supra* note 32, at 124); Memorandum from President Richard Nixon to the Heads of Executive Dep'ts and Agencies: Establishing a Procedure to Govern Compliance with Congressional Demands for Info. (March 24, 1969) ("Executive privilege will not be used without specific Presidential approval.") (quoted in Mark J. Rozell, *The Law: Executive Privilege: Definition and Standards of Application*, 29 PRESIDENTIAL STUDIES Q. 918, 924 (1999)); *see also In re* Sealed Case, 121 F.3d 729, 745 n.16 (D.C. Cir. 1997) (citing cases suggesting that the President must personally invoke the privilege, but declining to decide the issue itself); United States v. Burr, 25 F. Cas. 187, 192 (C.C.D.Va. 1807) (No. 14,694) (holding that the President must personally invoke the privilege).

212. *See Nixon*, 418 U.S. at 705 ("We therefore reaffirm that it is the province and duty of this Court 'to say what the law is' with respect to the claim of privilege presented in this case." (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803))).

213. This follows from the fact that the President holds the privilege in the public interest, though no case of which I am aware has addressed the issue.

President in the same way a lawyer called to testify may assert the privilege on behalf of his client.[214] But just as the lawyer's assertion is simply as an agent, so too an adviser asserting the presidential privilege simply asserts a privilege held by the President.

The second key distinction between the presidential privilege and the attorney–client privilege concerns the standard for asserting the privilege. The President may assert the privilege only if to do so would be in the public interest.[215] The Court in *Nixon* confirmed this standard,[216] and nearly every president since Washington who has claimed a right to withhold information has said he did so in the public interest.[217] For example, in 1792 Washington convened his cabinet to discuss whether to produce papers requested by Congress as part of its investigation into a failed military expedition.[218] Based upon Jefferson's legal research, the group concluded "that the Executive ought to communicate such papers as the public good would permit & ought to refuse those the disclosure of which would injure the public. Consequently were to exercise a discretion."[219]

These different standards—a purely personal-interest standard for the attorney–client privilege versus a public-interest standard for executive privilege—lead to two sub-differences between the two privileges. First, a client may assert or waive the attorney–client privilege based entirely on what is good for him, even to prevent disclosure of a crime; a President may not withhold documents based upon what is good for her or her advisers, *especially* if it involves hiding a crime. Second, this standard, combined with the fact that the client holds the privilege, gives him complete assurance that what he says to his lawyer will stay secret; by contrast, a President's adviser cannot rely on any assurance the President gives him that his advice will be kept confidential because a President cannot predict what the public interest will require in the future.[220] For example, when the Nixon White House was

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214. 2 IMWINKELRIED, *supra* note 205, § 7.6.2, at 1088.

215. ROZELL, *supra* note 32, at 29–42.

216. *See Nixon*, 418 U.S. at 713 (holding that a President may invoke a claim of privilege against a subpoena if he determines that compliance with the subpoena would be injurious to the public interest); *see also* Nixon v. Sirica, 487 F.2d 700, 716 (D.C. Cir. 1973) (concluding that the application of executive privilege depends on "a weighing of the public interest protected by the privilege against the public interests that would be served by disclosure in a particular case").

217. ROZELL, *supra* note 32, at 29–42.

218. *Id.* at 29.

219. *Id.*; BERGER, *supra* note 32, at 169–70. Washington did not tell Congress he was applying this standard; rather, he produced the documents. *Id.* at 167–69.

220. Even those who argue that the presidential privilege should be as absolute as the attorney–client privilege from a judicial perspective do not argue that a President should never disclose confidences unless the adviser making the communication approves. *See, e.g.*, Paulsen, *supra* note 46, at 1382 (arguing that a President or his designee should assert or waive the presidential privilege).

under investigation, Nixon permitted his advisers to testify about what they had told him in confidence.[221]

These differences between the presidential privilege and the attorney–client privilege highlight that the presidential privilege is not personal. Even though we seek to protect the candid advice of advisers, we give the right to assert the privilege to the President, who must assert the privilege purely based upon public interest. The privilege survives his term in office, but he no longer enjoys the right to assert it; his successor does. As retired Justice Reed noted for the district court in *Kaiser Aluminum & Chemical Corp. v. United States*[222] in discussing the common law predecessor to the presidential privilege, "executive privilege . . . is granted by custom or statute for the benefit of the public, not of executives who may happen to then hold office. . . . It is not a privilege to protect the official but one to protect free discussion of prospective operations and policy."[223]

In the foregoing discussion, I assumed the purpose of the presidential privilege was to protect the confidences of advisers. But one might object that the presidential privilege also protects what the President says. This raises an interesting question: Is the privilege designed to protect the candid advice of advisers only, or is it also designed to protect what the President says?

The majority in *GSA* focused almost exclusively on protecting what advisers say, even though the Nixon tapes naturally recorded what the President said as well: "Unless he can give his advisers some assurance of confidentiality, a President could not expect to receive the full and frank submissions of facts and opinions upon which effective discharge of his duties depends."[224] In reciting Nixon's argument, the Court again noted that breaching the privilege would chill the candid advice of his advisers, without mention of its effect on what the President says.[225] Perhaps most significant, in making the final balancing, the Court in *GSA* focused exclusively on how disclosure to the Administrator would chill advisers, framing the ultimate question before it as whether "the mere screening of materials by the archivists will impermissibly interfere with candid communication of views by Presidential advisers."[226]

The Court in *United States v. Nixon* likewise focused, when balancing the need for disclosure against the need for privilege, upon the confidentiality of the advisers only: "[W]e cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure

221. *Sirica*, 487 F.2d at 705.

222. 157 F. Supp. 939 (Ct. Cl. 1958).

223. *Id.* at 944, 947.

224. Nixon v. Adm'r of Gen. Servs. (*GSA*), 433 U.S. 425, 449 (1977) (quoting Brief for Federal Appellees at 33, *GSA*, 433 U.S. 425 (No. 75-1695)).

225. *Id.* at 451.

226. *Id.*

because of the possibility such conversations will be called for in the context of a criminal prosecution."[227] On the other hand, in justifying the need for the privilege in the first place, the Court in *Nixon* wrote that both advisers and the President needed freedom to explore ideas: "A President and those who assist him must be free to explore alternatives . . . ."[228] And Chief Justice Burger and Justice Rehnquist in their dissents in *GSA* relied quite heavily on the negative effect that breaching the privilege would have upon what the President may say in seeking advice.[229]

Despite the lack of clarity, in the end it makes sense to consider the presidential privilege as protecting what the President says as well. Thus, in analogizing to the attorney–client privilege, we may think of the President as the client and the advisers as the lawyer. This scenario gives the analogy more force, since the same person whose communication we wish to protect also controls the assertion of the privilege. But the "public interest" standard remains an inescapable distinction between the presidential privilege and the attorney–client privilege. The President still may only assert the privilege for the public good and not for his own benefit, and the privilege is therefore still, as the Court in *GSA* pointed out, not personal.

Indeed, since the President holds the privilege while in office to protect both his statements and those of his advisers, it seems better to see him as holding the privilege as a trust. The advisers in a way cede to him the right to assert or disclose in the public interest, trusting he will properly take into account their interest in confidentiality. Likewise, he may take into account his own interest in confidentiality, but only in the general sense that it is important to protect the confidences of what Presidents say. The President must act neutrally in deciding what importance he gives to protecting his own confidential statements, a tough balancing that suggests his successor should at least review the assertion.

But one might argue that the attorney–client privilege and the presidential privilege share an important feature—both are justified by the public interest. This is true, but the difference lies in discerning at what point the public-interest consideration is applied. In the case of attorney–client privilege, and other personal privileges, the public interest applies at the outset to require a general rule that certain communications are always and absolutely privileged because such absolute privilege *overall* furthers the public interest, even though it might not further the public interest in every individual case.[230] Thus, the public interest justifies these privileges, but we

227. United States v. Nixon, 418 U.S. 683, 712 (1974).

228. *Id.* at 708.

229. *GSA*, 433 U.S. at 520–25 (Burger, C.J., dissenting); *id.* at 547–48 (Rehnquist, J., dissenting).

230. *See* Swidler & Berlin v. United States, 524 U.S. 399, 408–09 (1998) (rejecting the "use of a balancing test in defining the contours of the [attorney–client] privilege"); Golden Trade, SRL v. Lee Apparel Co., 143 F.R.D. 514, 522 (S.D.N.Y. 1992) ("[T]he attorney–client privilege is absolute in the sense that it cannot be overcome merely by a showing that the information would be

place in each individual a privilege, a benefit personal to her, in order to promote that public interest. The presidential privilege is different because the public interest comes into play for each individual assertion of the privilege. A President asserting the privilege must determine whether the assertion *in this instance* is in the public interest. That distinction means the presidential privilege never confers a right or benefit upon the President individually as other privileges do.

The foregoing discussion also sheds light on two other possible analogies that one might make to argue that former Presidents should retain the right to assert executive privilege: first, to the absolute immunity from civil lawsuits former Presidents enjoy under *Nixon v. Fitzgerald*[231] and second, to the Speech or Debate Clause. I will next take up each of these in turn.

2. Presidential Immunity.—The Court in *Fitzgerald* held that former Presidents retain absolute immunity from civil suit for official acts done during their presidencies.[232] This might lead to the more general proposition that Presidents retain *some* constitutional privileges after they leave office and that former Presidents should likewise continue to enjoy the presidential privilege.

The Court in *Fitzgerald* reasoned that Presidents should enjoy immunity much as judges and prosecutors do because they all undertake delicate tasks likely to make many enemies, and those enemies could sue and paralyze those officials from boldly executing their tasks while in office.[233] The Court did not expressly specify why this principle should apply to former Presidents who no longer carry on presidential functions from which to be distracted or deterred.[234] But it seemed inferable that the prospect of litigation even after he leaves office over unpopular policies would lead a President to hesitate in doing what he thought right while President. Again, the Court never spelled out this deterrence theory nor how strong the prospect would have to be to actually have an effect. The Court instead merely relied upon numerous authorities that provided immunity to judges and legislators, and applied those cases to Presidents.[235]

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extremely helpful to the party seeking disclosure."); *cf.* MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 6 (2008) (stating that in most cases the public interest is best served by strictly preserving the confidentiality of information shared between attorneys and their clients).

231. 457 U.S. 731 (1982).

232. *Id.* at 732.

233. *Id.* at 751.

234. *See id.* (recognizing that "personal vulnerability" may distract the sitting President from the exercise of his public duties, but not addressing the impact on former Presidents).

235. *See id.* at 751–53 (relying, for example, on Pierson v. Ray, 386 U.S. 547 (1967), which recognized the continued validity of the absolute immunity of judges for acts within the judicial role).

This analogy to executive privilege founders on the same shoals as does the analogy to the attorney–client privilege for individuals: the immunity under *Fitzgerald* is personal to the President,[236] whereas the presidential privilege is not. Even while in office, a President may assert the immunity against civil lawsuit based on official acts, and in deciding whether to do so he may look only to his own interests and not take into account the public interest. The immunity benefits him personally and therefore follows him out of office. Again, by contrast, the presidential privilege may not be asserted for self-interest and is not a personal benefit that should follow a President out of office.

This remains true even though the immunity recognized in *Fitzgerald* is also bottomed on the public interest. Just as discussed in connection with the attorney–client privilege, presidential immunity is justified *overall* by the public interest, and we therefore create a personal right for individual Presidents that each may assert absolutely, even in instances in which immunity from suit might not be in the public interest. The presidential privilege, by contrast, can be asserted only in the public interest in each particular situation.

Besides, the Court in *Fitzgerald* was probably wrong to extend presidential immunity to former Presidents. It violates the principles established in Part III of this Article concerning the founders' desire to eliminate all attributes of monarchy from our republic. Moreover, its holding relied almost entirely on reasons that apply to incumbent Presidents. Akil Amar and Neil Katyal have argued that the Court in *Fitzgerald* was wrong to extend immunity to former Presidents and that the historical sources support the opposite proposition: that former Presidents should not enjoy immunity.[237] As they note, the important difference between an incumbent President and a former President was recognized by the framers.[238] If they are right, their argument naturally supports the notion that former Presidents certainly should not enjoy executive privilege.

3. The Speech or Debate Clause.—The Court has assumed that the Speech or Debate Clause protects a member of Congress after she has left office.[239] Thus, one might argue that executive privilege, like the Speech or Debate Clause privilege, must extend after the President has left office.

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236. *See id*. at 757–58 (providing the President an absolute right to assert immunity against allegations of wrongdoing without any showing that the individual assertion is in the public interest).

237. Akil Reed Amar & Neal Kumar Katyal, *Executive Privileges and Immunities: The Nixon and Clinton Cases*, 108 HARV. L. REV. 701, 715–17 (1994).

238. *See id.* at 718–19 (crediting President John Adams and Senator Oliver Ellsworth for suggesting that only former Presidents are subject to process, not sitting Presidents).

239. Nixon v. Adm'r of Gen. Servs. (*GSA*), 433 U.S. 425, 523 (1977) (Burger, C.J., dissenting) (citing United States v. Brewster, 408 U.S. 501 (1972)); *see also* Amar & Katyal, *supra* note 237, at 708 (describing the permanent immunity derived from the Speech or Debate Clause).

Indeed, Chief Justice Burger made precisely this argument in his dissent in *GSA* in arguing that former Presidents retain a greater right to executive privilege than the majority would recognize.[240]

But the analogy fails because unlike executive privilege, the Speech or Debate Clause *does* create a personal right[241] for the same reasons as the individual attorney–client privilege. Like the attorney–client privilege, the Speech or Debate privilege is absolute within its sphere and cannot be balanced away.[242] A member of Congress may assert the privilege at her own discretion without taking into account the public interest and may assert the privilege to shield herself from criminal liability.[243] For example, in *United States v. Swindall*,[244] a former congressman successfully invoked the Speech or Debate Clause to have several counts of a criminal conviction reversed and, on remand, vacated.[245]

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But once we have concluded that the presidential privilege is not personal, what guidance do we have for discerning its application? As shown below, a comparison with the attorney–client privilege for corporations provides this guidance.

4. The Executive Privilege and the Corporate Attorney–Client Privilege.—The presidential privilege bears striking similarities to the attorney–client privilege for corporations, and the comparison furthers my argument both that a President does not retain the privilege after she leaves office and that the sitting President can and should review previous assertions of the privilege by her predecessors. The analogy between executive privilege and the corporate attorney–client privilege makes sense because corporation law in the United States treats corporations as "representative democrac[ies]" in which shareholders do not directly control decisions but may vote in new management when they desire a change.[246] The leading

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240. *GSA*, 433 U.S. at 523 (Burger, C.J., dissenting).

241. The Court in *Brewster* stated that the Speech or Debate Clause is not "simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators." 408 U.S. at 507. Nevertheless, the Clause furthers this ultimate purpose of protecting the legislative process through the *means* of a personal right enforceable in court.

242. *See* Forrester v. White, 484 U.S. 219, 224 (1988) (declaring that the absolute nature of the immunity derived from the Clause is "beyond challenge"); Gravel v. United States, 408 U.S. 606, 624 n.14 (1972) (noting that the Speech or Debate Clause immunity is absolute); *Brewster*, 408 U.S. at 515–16 (stating that the Clause is "limited to an act which was clearly a part of the legislative process").

243. *See Gravel*, 408 U.S. at 615 (affirming that the Speech or Debate Clause shields members of Congress from criminal liability).

244. 971 F.2d 1531 (11th Cir. 1992).

245. *Id.* at 1557.

246. Bebchuk, *supra* note 24, 837 ("The U.S. corporation can be regarded as a 'representative democracy' in which the members of the polity can act only through their representatives and never directly."). In an article addressing governmental attorney–client privilege, Michael Stokes Paulsen

case to consider attorney–client privilege when a corporation gets new management is *Commodity Futures Trading Commission v. Weintraub*.[247] I consider this case in depth because the analogies are so striking.

In *Weintraub*, the bankruptcy court appointed a trustee to manage a bankrupt company, displacing its sole director and officer (he remained "director" in name only).[248] The Commission sought to depose company counsel, who asserted attorney–client privilege on behalf of the company.[249] The trustee wished to waive the company's privilege, but the director (former management) wished to assert the privilege.[250] The question was therefore whether the trustee or the director controlled the assertion or waiver of the company's attorney–client privilege.[251]

In determining the rights of the trustee, the Court first reviewed what happens to the attorney–client privilege when new management takes over outside the context of bankruptcy.[252] The Court noted that corporations, of course, enjoy an attorney–client privilege,[253] and that since a corporation must act through its agents, the decision whether to assert or waive the privilege must be taken by those empowered to act on its behalf.

> [T]he power to waive the corporate attorney-client privilege rests with the corporation's management and is normally exercised by its officers and directors. The managers, of course, must exercise the privilege in a manner consistent with their fiduciary duty to act in the best interests of the corporation and not of themselves as individuals.[254]

When management changes, the new management inherits the right to assert or waive the privilege, and old management loses any say in the matter.

> [W]hen control of a corporation passes to new management, the authority to assert and waive the corporation's attorney-client privilege passes as well. New managers installed as a result of a takeover, merger, loss of confidence by shareholders, or simply

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drew an analogy between that privilege and the corporate attorney–client privilege. Michael Stokes Paulsen, *Who "Owns" the Government's Attorney-Client Privilege?*, 83 MINN. L. REV. 473, 474–75, 479 (1998) (explaining why a special prosecutor may waive the governmental attorney–client privilege and require a President to produce information).

247. 471 U.S. 343 (1985).

248. *Id.* at 345–46.

249. *Id.* at 346.

250. *Id.* at 345–46.

251. *Id.* at 347–48.

252. *Id.* After the Court reviewed the law concerning the rights of new management generally, it ruled that a trustee in bankruptcy enjoys the same rights as new management would and therefore concluded that the trustee controlled the privilege. *Id.* at 358.

253. *Id.* at 348; *see also* Upjohn Co. v. United States, 449 U.S. 383, 390 (1981) (establishing that the Supreme Court has "assumed that the privilege applies when the client is a corporation").

254. *Weintraub*, 471 U.S. at 348–49.

> normal succession, may waive the attorney-client privilege with respect to communications made by former officers and directors.[255]

The Court drew a conclusion particularly applicable to former Presidents: "Displaced managers may not assert the privilege over the wishes of current managers, even as to statements that the former might have made to counsel concerning matters within the scope of their corporate duties."[256]

The director in *Weintraub* argued that such a ruling would chill the candor of officers providing information to corporate counsel since they would fear that new management could arrive and waive the privilege.[257] This argument parallels arguments that former Presidents should retain the privilege because otherwise advisers will not be candid, fearing a new President will waive the privilege. The court in *Weintraub* rejected the director's argument in a manner equally applicable to the presidential privilege:

> Second, respondents argue that giving the trustee control over the attorney-client privilege will have an undesirable chilling effect on attorney-client communications. According to respondents, corporate managers will be wary of speaking freely with corporate counsel if their communications might subsequently be disclosed due to bankruptcy. . . . But the chilling effect is no greater here than in the case of a solvent corporation, where individual officers and directors always run the risk that successor management might waive the corporation's attorney-client privilege with respect to prior management's communications with counsel.[258]

As noted above, a new President needs the unfettered power to disclose secrets of his predecessor, particularly when those secrets are deep secrets, secrets the existence of which are completely unknown to Congress. In such situations, Congress cannot exercise its checking function because it lacks the very information it would need to do so. The Court in *Weintraub* made a strikingly similar point. The director of the company argued that the trustee does not need to control the corporation's attorney–client privilege to ferret out wrongdoing because any wrongdoing would not be shielded by that privilege under the crime–fraud exception.[259] In rejecting this argument, the Court wrote: "The problem, however, is making the threshold showing of fraud necessary to defeat the privilege. . . . Without control over the privilege, the trustee might not be able to discover hidden assets or looting schemes, and therefore might not be able to make the necessary showing."[260]

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255. *Id.* at 349.
256. *Id.*
257. *Id.* at 357.
258. *Id.*
259. *Id.* at 354.
260. *Id.*

The analogy between the corporate attorney–client privilege and executive privilege is clear. When the electorate votes in a new President, or when a Vice President takes office by "normal succession"—as was the case with President Ford—the new President takes control over the right to assert or waive executive privilege, just as new management does with the corporate privilege. And just as new management must exercise the privilege in the interests of the corporation rather than in its own interests to fulfill its fiduciary duty, a new President must likewise exercise executive privilege in the public interest rather than in her administration's interests. Thus, just as former management enjoyed *no* right to assert the corporation's attorney–client privilege in *Weintraub*, a former President should not enjoy a right to assert executive privilege.

The analogy between a President and corporate management makes sense because both owe a fiduciary duty to their respective constituents.[261] But more particularly, corporate-governance law in the United States treats a corporation as a "representative democracy."[262] That is, in most states, including Delaware and New York, the board of directors manages the business and affairs of the corporation,[263] and the shareholders may not give the board binding instructions.[264] These powers of the board rest on the premise that the shareholders elect them and can elect new board members to change policy.[265] As one Delaware court wrote, "[t]he shareholder franchise

261. As the Court has said about members of Congress, they hold their power "as a trustee for [their] constituents, not as a prerogative of personal power." Raines v. Byrd, 521 U.S. 811, 821 (1997). In a separate sphere, criminal cases against public officials premised upon "theft of honest services" under the mail and wire fraud statutes make clear that public officials owe a fiduciary duty to their constituents. *See, e.g.*, United States v. Sorich, 523 F.3d 702, 712 (7th Cir. 2008) ("It may well be that merely by virtue of being public officials the defendants inherently owed the public a fiduciary duty to discharge their offices in the public's best interest."). Corporate management likewise owes a fiduciary duty to its constituents. *See, e.g.*, Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985) (declaring that it is a basic principle that "corporate directors have a fiduciary duty to act in the best interests of the corporation's stockholders").

262. *See* Bebchuk, *supra* note 24, at 837 (accepting this premise but arguing that shareholders face too many obstacles to enjoy a real franchise); Martin Lipton & Paul K. Rowe, *Pills, Polls and Professors: A Reply to Professor Gilson*, 27 DEL. J. CORP. L. 1, 28 (2002) (elaborating on the Delaware legislature's decision that Delaware corporations should be representative democracies).

263. DEL. CODE ANN. tit. 8, § 141 (Supp. 2008); N.Y. BUS. CORP. § 701 (McKinney 2003); MODEL BUS. CORP. ACT § 35 (1979); *see also* 5 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 2096 (perm. ed., rev. vol. 2003) (stating that the board of directors has the power to exercise corporate powers in large corporations); Melvin Aron Eisenberg, *Legal Models of Management Structure in the Modern Corporation: Officers, Directors, and Accountants*, 63 CAL. L. REV. 375, 375 (1975) (discussing the fact that most corporate statutes include a provision indicating that the business and affairs of the corporation are managed by the board of directors).

264. Melvin Aron Eisenberg, *The Legal Roles of Shareholders and Management in Modern Corporate Decisionmaking*, 57 CAL. L. REV. 1, 5 (1969).

265. *See Unocal Corp.*, 493 A.2d at 959 (observing that stockholders may elect new directors if the stockholders are displeased by the current board members' actions); Bebchuk, *supra* note 24, at 837 (noting that under the "representative democracy" of corporations, shareholders' right to elect and replace directors is meant to ensure that corporate decisions reflect shareholders' interests).

is the ideological underpinning upon which the legitimacy of directorial power rests."[266] Moreover, courts have made clear in the takeover context that directors have a fiduciary duty to act in the interests of the shareholders and cannot act solely or primarily to entrench themselves.[267]

The attorney–client privilege is one of these powers exercised by management rather than the shareholders.[268] Though *Weintraub* did not make this express, the opinion implicitly contains the following logic based on the above principles of corporate law: The legitimacy of management control over the attorney–client privilege rests upon the premises that it is elected and that shareholders may change management through new elections. Therefore, when shareholders *do* elect new management, this new management must take control of the attorney–client privilege to ensure those elections are meaningful. This premise that the corporation is a representative democracy makes the *Weintraub* holding that only new management controls the privilege equally applicable to a new President vis-à-vis a former President.

But one might argue that the President requires candid advice more than a corporation, or that the types of advice advisers give to the President are far more sensitive than those within a corporation, and that, therefore, the analogy is not sound. This argument has superficial appeal, but there are two problems with it. First, we demand more openness, not less, in government affairs as compared with corporations. Second and more important, the argument does not address the question the analogy answers: *who* between the incumbent and the former President should decide whether the privilege should be asserted or waived; rather, the argument merely shows that the incumbent President, in deciding, should be more careful about disclosures than subsequent management would be in the corporate context.

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As noted above, *GSA* held that former Presidents have a right to assert executive privilege. The opinion failed in its own logic in conflating survival of the privilege with who may assert it. But more significantly, it found that a former President enjoyed a constitutional power without considering the Constitution; without considering the strong bias of the founding generation against monarchy and its chief attribute, perpetual power; and without considering the instantiation of these values in the text and structure of the Constitution. The Court also failed to appraise executive privilege by considering its nature, particularly by comparing it to other privileges. Rather, it appeared to rely implicitly on a comparison between executive

266. Blasius Indus. v. Atlas Corp., 564 A.2d 651, 659 (Del. Ch. 1988); *see also* Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675, 676 (2007) (labeling this decision a "well-known and often-quoted Delaware opinion").

267. *Unocal Corp.*, 493 A.2d at 955.

268. Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 348–49 (1985).

privilege and personal privileges such as the attorney–client privilege, a comparison that, as shown above, fails for several reasons.

Nevertheless, we may discern in the majority's discussion an implicit argument: that for the assurance of confidentiality to have any teeth, it must be the same person who made the promise as who vindicates it later. This argument does not depend upon the nature of privileges, for an incumbent can at least in theory assert the privilege as vigorously as his predecessor;[269] rather, the argument depends upon the nature of human beings and the fear of an adviser that a new President cannot be trusted to assert the privilege—an argument to which I now turn.

IV. Can We Trust the New President?

The main argument against my view is that advisers to a President will be less candid if they believe their boss's successor cannot be trusted to keep the advice secret—particularly when they consider that the new President might be from the opposite party. Those advisers will further fear that the new President will be especially keen to disclose precisely that advice that most requires secrecy—advice that explores potentially unpopular alternatives. One can easily imagine that the advisers who discussed sending elite military units around the globe to assassinate terrorists might prefer to keep that advice confidential.[270] It would be improper to allow a later President to disclose those conversations to embarrass his opponents and to promote his own party's chances in future congressional elections. In his dissent in *GSA*, then-Justice Rehnquist supported the right of a former President to assert the privilege based upon this reasoning:

> [A]dvisers, at the time of the communication, cannot know who the successor will be or what his stance will be regarding seizure by Congress of his predecessor's papers. Since the advisers cannot be sure that the president to whom they are communicating can protect their confidences, communication will be inhibited.[271]

Rehnquist added that history shows that an incoming President might be hostile to his predecessor and cited the transitions between John Adams to

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269. *But see Executive Order 13233 and the Presidential Records Act: Hearings Before the Subcomm. on Gov't Efficiency, Fin. Mgmt. and Intergovernmental Relations and the H. Comm. on Gov't Reform*, 107th Cong. 471–85 (2002) (statement of Todd F. Gaziano, former lawyer in the Office of Legal Counsel under Presidents Reagan, Clinton, and Bush) (arguing that the former President is in the best position to evaluate how sensitive the information is). But under my view, a former President may still advise the incumbent and argue why the information should be withheld based on her expertise; nevertheless, the decision whether to disclose should rest with the incumbent.

270. *See* Thom Shanker & James Risen, *Rumsfeld Weighs New Covert Acts by Military Units*, N.Y. TIMES, Aug. 12, 2002, at A1 (discussing the decision to expand covert operations and offering examples of past presidential authorizations to assassinate terrorist leaders).

271. Nixon v. Adm'r of Gen. Servs. (*GSA*), 433 U.S. 425, 557 (1977) (Rehnquist, J., dissenting).

Jefferson, Buchanan to Lincoln, Hoover to Roosevelt, and Truman to Eisenhower.[272]

Another way of making this same argument, with a constitutional cast, is this: for a sitting President to exercise his Article II powers *now*, he must prospectively be given the power to vindicate the privilege *later*. If his advisers know that he will have the right to assert the privilege in the future, they will provide more candid advice now, while he is the sitting President. This argument also follows from the analogy to attorney–client privilege, that a current client must know he will be able to assert the privilege in the future to give him the assurance to confide now. Chief Justice Burger argued along these lines in his dissent in *GSA*, saying, "[E]very future President is at risk of denial of a large measure of the autonomy and independence contemplated by the Constitution and of the confidentiality attending it."[273]

This argument also bears interesting similarities to arguments about the cross-temporal powers of legislatures.[274] Legislatures in general should not pass statutes binding on their successors: "For example, if today's majority enacts a statute, which by its terms is unrepealable, then it has illegitimately extended its present sovereignty into the future."[275] But this general principle has an exception. That is, if a legislature wishes to enter into a contract with a builder to build a bridge in exchange for a ninety-nine-year monopoly over the bridge tolls, the current legislature, in order to be able to exercise its current power, must be able to bind future legislatures to that monopoly.[276] The Contracts Clause and basic due process concerns protect those people who rely on those legislative actions and vindicate the right of a current legislature to bind the future in this way.[277] Legislatures may thus bind future legislatures if necessary to exercise their current powers, and this happens when others would rely upon the legislation in ordering their affairs—such as building bridges. Similarly, the argument might go, a current President needs the right to assert his presidential privilege in the future to vindicate his current Article II need to receive candid advice.

This trust argument no doubt has force, but it goes too far because it suggests that unless a former President can assert the privilege, the privilege is eviscerated. But the privilege does survive, and in the ordinary course the

272. *Id.*

273. *Id.* at 519 (Burger, C.J., dissenting).

274. *See* Julian N. Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 AM. B. FOUND. RES. J. 379, 381–82 (1987) (explaining the prohibition on one legislature's binding of a subsequent one via the theory that a legislature in the United States is merely an agent of the people); Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 498 (1997) (arguing that "cross-temporal majorities" act in an antimajoritarian manner when they seek to extend their power on future generations).

275. Klarman, *supra* note 274, at 506.

276. *Id.* at 506 n.67 (citing Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420 (1837)).

277. *Id.*

incumbent President can generally be expected to vindicate it for several related reasons: (1) the constitutional presumption that the incumbent will execute the laws faithfully, (2) the incumbent's practical desire to protect the confidentiality of his own advisers by example, (3) institutional loyalty, and (4) a desire to avoid creating more political trouble than it is worth. Finally, advisers should not be expected to rely upon the absolute secrecy of their communications because there are too many potential holes in that secrecy. I elaborate each of these points below.

First, the Constitution requires that we presume a new President will properly assess whether to continue invoking the privilege his predecessor asserted. This follows because the Constitution likewise requires us to presume that the President will invoke the privilege only in the public interest and not in his own interest. Often the facts of abuse by individual Presidents contradict this presumption, but the entire doctrine of executive privilege nevertheless relies upon that presumption. So if the Constitution requires us to presume we can trust the President to invoke the privilege properly as part of the President's Article II powers, it follows that the Constitution similarly requires us to trust his successor in deciding whether to continue his predecessor's assertion of the privilege. The argument that only the President who receives the original advice can be trusted to keep that advice confidential when appropriate lacks this essential symmetry: whoever is in office has the Article II powers and the trust that comes with them. *GSA* made a similar point: "[I]t 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."[278] In carrying out this decision, the incumbent may naturally take advice from his predecessor. Indeed, President Obama's executive order on the privilege for documents maintains a role for former Presidents.[279]

A rule that a former President retains the right to assert the privilege in court over the objections of the incumbent will naturally provide *more* protection for confidences than if only the incumbent may assert the privilege, but the goal is not to provide maximum protection for confidences. The goal is to provide just that protection for confidences that is *appropriate* to ensure that the President will get good advice when weighed against the other needs of the public interest for disclosure. Thus, a new President, in weighing the need for keeping confidences against the public need for disclosure, will provide the protection for candid advice that is appropriate

278. Nixon v. Adm'r of Gen. Servs. (*GSA*), 433 U.S. 425, 449 (1977).

279. Exec. Order No. 13,489, 74 Fed. Reg. 4,669 (Jan. 26, 2009). If the Archivist plans to release material that might involve the privilege, he must notify both the incumbent and former President. *Id.* Even if the incumbent decides not to assert the privilege, the Archivist may still in his judgment defer to the wishes of the former President to assert the privilege unless the incumbent specifically instructs the Archivist to disclose the material. *Id.*

for future Presidents to further their Article II powers and obligations. If the new President provides appropriate protection, then it will not be necessary for his predecessor to retain the privilege. After all, the presidential privilege is an implied power that exists only because it is deemed necessary to the President executing his enumerated powers.[280]

Even putting aside the public interest in disclosure, it is not clear that maximum confidentiality leads to the best decisions.[281] Rather, too much secrecy itself can lead to poor decisions, and a President should create a balance between keeping confidential what his advisers tell him and making public what his advisers tell him so he can hear other points of view. Numerous scholars, in attacking the very premises of executive privilege, have persuasively argued that secrecy leads to decisions that are inferior to those reached in open deliberation.[282] I need not go that far; all I say is that maximum confidentiality is not the goal even if you accept executive privilege, and therefore allowing the incumbent complete control over the confidential communications of his predecessor will provide sufficient protection to ensure what is truly the objective: good decisions.

Second, the new President also has a powerful incentive to keep his predecessor's conversations confidential to show his current advisers that they can trust him to keep *their* advice confidential.[283] Put another way, the new President's disclosure of his predecessor's advisers' comments cannot chill what *they* said because they have already said it. The incumbent's disclosure of previous advice will only have an effect on the candidness of *his* advisers and the advisers of future administrations. He thus has before him *both* sides of the balance: the importance of disclosure *and* the effect disclosure will have on receiving confidential advice. By contrast, a former President has neither before him: he does not have an adviser before him

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280. The Court in *Nixon* did not explain how essential the presidential privilege must be before it was willing to conclude that it was required under the Constitution for the President to fulfill his Article II functions. It noted that to the extent the privilege "related to" the President's Article II powers, it was constitutionally based. United States v. Nixon, 418 U.S. 683, 715 (1974). But surely "related to" is not the standard. The Court did quote from *Marshal v. Gordon*, 243 U.S. 521 (1917), this standard: an implied power flows from the Constitution if it is "reasonably appropriate and relevant" to the enumerated power. *Nixon*, 418 U.S. at 705 (quoting *Marshal*, 243 U.S. at 537). But *Marshal* itself contained a variety of standards: that the incident must be "necessary" to the proper exercise of the branch's function, that it must be "essential," and finally in italics: "*the least possible power adequate to the end proposed*." *Marshal*, 243 U.S. at 450–52.

281. *See* Gia B. Lee, *The President's Secrets*, 76 GEO. WASH. L. REV. 197, 203 (2008) ("[C]onfidentiality interferes with basic commitments to political accountability and the people's checking function.").

282. *See id.* at 234–35 ("[C]onfidentiality, and the expectation thereof, can . . . encourage deliberations that are substantially less thorough or complete."); *cf.* IRVING L. JANIS, GROUPTHINK 172 (2d ed. 1982) (arguing that groupthink tendencies can be counteracted by encouraging group members to give a high priority to the open discussion of objections).

283. The Court in *GSA* echoed this view: "And an incumbent may be inhibited in disclosing confidences of a predecessor when he believes that the effect may be to discourage candid presentation of views by his contemporary advisers." 433 U.S. at 448.

whose candidness he seeks to encourage, and he is not in a position to know the importance of disclosure in the current circumstances.

Third is institutional loyalty. History shows that Presidents, once they become Presidents, generally protect the power of the presidency. For example, Jefferson excoriated the secrecy of the Constitutional Convention[284] but then practically invented executive privilege both as Secretary of State for Washington and in his own aggressive assertions as President, when he claimed that the President "must be the sole judge of which of [these documents] the public interest will permit publication."[285] Nixon, too, deeply criticized executive privilege when in Congress,[286] and yet when President he sought the broadest application possible—though Nixon's assertion related more to his cover-up than institutional loyalty. President Bush's Administration asserted executive privilege in court to resist disclosure of Clinton-era documents concerning controversial pardons.[287] And President Obama's Administration continued to assert in court an executive privilege first asserted by his predecessor in order to keep secret Vice President Cheney's FBI interview on the Valerie Plame disclosure.[288]

Fourth is political trouble. Undertaking a review of predecessors' assertions of privilege will encumber the President in old battles, distracting him from his own agenda. This might be an argument against rigorous review by the new President, but it is also an argument that he should have the power since he will be deterred from using it except in important cases such as abuse. In addition, if the public learns the new President has undertaken to review previous assertions, he will put himself in a difficult position. If he discloses documents, those loyal to the old President will castigate him; if he decides to affirm the privilege and withhold documents, many will accuse him of undue secrecy and business as usual. A President

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284. CHARLES WARREN, THE MAKING OF THE CONSTITUTION 137 (1928) (quoting Letter from Thomas Jefferson to John Adams (Aug. 30, 1787)).

285. 2 IMWINKELRIED, *supra* note 205, § 7.6.1, at 1083.

286. *See* ROZELL, *supra* note 32, at 55 ("Although President Nixon is remembered for his unremitting defense of an absolute executive privilege power during Watergate, he did not always hold such a view.").

287. Judicial Watch, Inc. v. Dep't of Justice, 365 F.3d 1108, 1110 (D.C. Cir. 2004). On the other hand, the Bush Administration did release separate transcripts not involved in the lawsuit to Congress of embarrassing and presumably confidential conversations President Clinton had with Israeli Prime Minister Barak concerning a pardon for Marc Rich. Michael Isikoff, *Exclusive: A Pardon Overheard*, NEWSWEEK, Aug. 27, 2001, at 26, 26 ("[C]ongressional investigators probing the Rich pardon received access to National Security Council-prepared transcripts of three Clinton–Barak conversations that dealt with the Rich pardon.").

288. Brief of Defendant at 8–9, Citizens for Responsibility and Ethics in Wash. v. U.S. Dep't of Justice, No. 08-01468 (D.D.C. July 17, 2009) (discussing the law-enforcement and deliberate-process privileges). The court upheld the Obama Administration's continued assertion of the presidential-communications privilege and the deliberative-process privilege—two key strands of executive privilege—but rejected its assertion of the law-enforcement privilege and ordered that redacted documents be produced accordingly. Citizens for Responsibility and Ethics in Wash. v. U.S. Dep't of Justice, No. 08-01468, 2009 WL 3150770, at *14–15 (D.D.C. Oct. 1, 2009).

will therefore seek to avoid these entanglements by reviewing and overruling his predecessor only in the clearest cases. Both the prospect of distraction and of political trouble will reinforce the inertia that previous decisions enjoy, and this too will make reckless displacement of previous assertions of the privilege unlikely.

Finally, the argument that a later President cannot be trusted relies in part upon the notion that the original President's assurance of confidentiality was absolute or at least could be safely relied upon in most circumstances. But there are too many holes in the privilege without considering a subsequent President's disclosure; these holes mean that review by a new President will have only a marginal effect upon the calculation advisers make in deciding how candid to be. These holes are (1) the original President discloses in the public interest, (2) the original President discloses for his own interest, such as to shift blame to the adviser, (3) another adviser discloses in a tell-all book, (4) the President discloses in a tell-all book, or (5) a court requires disclosure over the President's objection in a criminal case or for Congress.

Most of these holes are sufficiently prevalent that we need not survey them, but a recent example should suffice to make clear how little confidence an adviser should have in confidences even during a given President's term. Before the United States invaded Iraq, George Tenet reportedly told President Bush that finding weapons of mass destruction in Iraq would be a "slam dunk."[289] After the United States invaded and found no such weapons, Bob Woodward reported in his book *Plan of Attack* that George Tenet had made this remark to Bush.[290] Vice President Dick Cheney repeated the story that Tenet had assured the White House that finding weapons of mass destruction would be a "slam dunk."[291] Tenet was furious and charged that the Administration was seeking to shift the blame for the war to him; he also said he meant something else by the remark.[292] In any event, the remark appears to be precisely the "blunt" advice envisioned in *United States v. Nixon* that must be kept confidential to ensure good decision making, and yet the President himself or another adviser disclosed this confidence—possibly, as Tenet charged, to shift blame.

In the end, there are more reasons to believe successor Presidents will err on the side of secrecy rather than exposure. This institutional tendency to

289. BOB WOODWARD, PLAN OF ATTACK 249 (2004).

290. *Id.*

291. *See* GEORGE TENET WITH BILL HARLOW, AT THE CENTER OF THE STORM: MY YEARS AT THE CIA 365 (2007) (describing Vice President Cheney's September 10, 2006, *Meet the Press* interview in which he referenced the "slam dunk" episode twice).

292. *See id.* at 364–67 (describing how the Bush Administration used Tenet's "slam dunk" comment to shift responsibility for the Iraq invasion to Tenet and the CIA); *id.* at 362 (defending his advice to President Bush at the December 21, 2002, briefing, and explaining that he intended to convey only that "strengthening the public presentation [on the evidence for Iraqi weapons of mass destruction] was a 'slam dunk'").

secrecy provides ample support for my argument that a succeeding President can be trusted to appropriately maintain the secrets of his predecessor. But new Presidents ought to take a more aggressive approach to past secrets than they have, at least in order to turn deep secrets into shallow secrets. As discussed above, by revealing to Congress not the secrets themselves but their existence, a new President can restore a proper checking function for Congress without disclosing individual confidences.[293] The more aggressive approach I have in mind will not be reckless or heedless to the confidentiality concerns of previous or current advisers and therefore should not undermine the argument that the succeeding Presidents can be trusted to disclose appropriately.

V. Conclusion

During the eight years of the Bush Administration, executive officials widely invoked executive privilege to shield information from Congress, the courts, and the public concerning secret surveillance programs, the firing of nine U.S. Attorneys, the leaking of the identity of CIA agent Valerie Plame, the rendition of persons from U.S. soil to foreign countries, and its policy regarding the environment, among other things. Over the next several years as Congress, possibly prosecutors, and the public seek access to this information, former President Bush and former Vice President Cheney are likely to continue to assert the privilege in accordance with the views reflected in Bush's revoked Executive Order 13,233—that the President, the Vice President, and their heirs retain the right to assert the privilege after they have left office, indefinitely.

Congress has made clear its intention to continue investigations into many of these matters, either through traditional congressional committees and subpoenas or through a congressionally created truth commission. In addition, the new Administration may at least investigate certain past practices to determine whether anyone committed crimes. On March 2, 2009, Senator Patrick Leahy wrote in *Time* magazine that the continuing congressional investigations "will stretch out for some time, as would prosecutions—taking even a decade or longer"—an argument, in his view, for a truth commission.[294] Creation of such a commission, he says, would involve working through issues of executive privilege; that process would presumably include determining the rights, if any, of the former President.

This Article has shown that if former President Bush does assert executive privilege, he will not be the first former President to do so. Most notably, Nixon asserted the privilege in court, after he had resigned, and the Court in *GSA* recognized a right of former Presidents to assert executive privilege as it relates to confidential communications. This Article has

293. *See supra* section III(B)(4).
294. Leahy, *supra* note 15, at 25.

shown why *GSA* came to an erroneous conclusion, not only because its internal logic failed but also because it failed to appreciate the strong antimonarchical bias of the founding generation, manifested in both the text and the structure of the Constitution.

GSA also failed to consider the nature of executive privilege by failing to compare it to other privileges. This Article undertook such a comparison and showed that executive privilege differs in fundamental ways from other personal privileges such as the attorney–client privilege. In particular, an individual client may assert the attorney–client privilege purely in self-interest, even to cover up past crimes, whereas a President may only assert executive privilege in the public interest and never in self-interest—especially not to cover up crimes. This means executive privilege is not personal to a President, confers no benefit upon him, and therefore cannot travel with a President when he leaves office. Rather, like the corporate attorney–client privilege, it shifts entirely to the new Administration.

These issues are likely to recur not only in the near future but beyond. In twelve years, Bush and Cheney may well seek to extend the statutory period preventing the release of documents protected by their assertions of executive privilege. Beyond that, future Presidents will always face temptation to assert the privilege, and a legal landscape that allows former Presidents to assert the privilege will only increase that temptation. For a President to enjoy any constitutional powers after he leaves office violates the bedrock premises of the Constitution and its turn away from monarchy. For a former President to continue to enjoy executive privilege in particular inflicts special injury on a representative democracy because secrecy, especially deep, perpetual secrecy, subverts its open processes.