

*In re Grand Jury Proceedings*¹: The Semantics of “Presumption” and “Need.”

I. INTRODUCTION

Less than one month following the Supreme Court decision in *United States v. Nixon*² and ten days after Richard Nixon’s resignation,³ scholar Alan Westin boldly predicted the obvious: “[the Court’s] definition of executive privilege promises to be a source of fertile legal and political disputes in the future.”⁴ Five presidents and twenty-four years later, the doctrine of executive privilege remains volatile and controversial.⁵ In the midst of the high stakes battle over information between the Clinton administration and the Office of the Independent Counsel,⁶ the judiciary was again drawn into the fray in *In re Grand Jury Proceedings*.⁷

The issue of secrecy⁸ in a president’s execution of Article II duties⁹ dates to the

¹ 5 F. Supp. 2d 21 (D.D.C. May 27, 1998) (Nos. 98-095(NHJ), 98-096(NHJ), 98-097(NHJ)), *rev’d on other grounds, In re Lindsey*, 1998 WL 719542 (D.C.Cir. Jul 27, 1998) (No. 98-3060, 98-3062, 98-3072), *cert. denied by*, Office of the President v. Office of Independent Counsel, 1998 WL 541012 (1998) (No. 98-316).

² 418 U.S. 683 (1974). The Supreme Court ordered President Nixon to produce the infamous White House tape-recordings for *in camera* inspection by the Federal District Court for the District of Columbia, setting the first and only high court precedent relative to executive privilege.

³ President Richard M. Nixon announced his resignation on August 8, 1974, in the midst of the Watergate scandal. The Supreme Court decision in *United States v. Nixon*, 418 U.S. 683 (1974) played a significant role in Nixon’s resignation. Alan Westin, *The Case for America*, in UNITED STATES V. NIXON: THE PRESIDENT BEFORE THE SUPREME COURT at xi (Leon Friedman ed., 1974).

⁴ *Id.* at xi-xii.

⁵ For a comprehensive bibliography of scholarly literature on the topic of executive privilege which was published in the aftermath of the Iran-Contra controversy, see Mark J. Rozell, *Executive Privilege: A Bibliographic Essay*, 4 J.L. & POL. 639 (1988).

⁶ See *infra* notes 55-61 and accompanying text.

⁷ 5 F. Supp. 2d 21 (D.D.C. 1998).

⁸ For discussions on secrecy in government, see A CULTURE OF SECRECY, THE GOVERNMENT VERSUS THE PEOPLE’S RIGHT TO KNOW (Athanasios G. Theoharis ed., University Press of Kansas 1998) (discussing initiatives to ensure that bureaucratic interests in secrecy do not impair historical research endeavors); MORTON H. HALPERIN & DANIEL N. HOFFMAN, TOP SECRET: NATIONAL SECURITY AND THE RIGHT TO KNOW (1977) (arguing that governmental secrecy demands regulation outside the executive branch); JOHN M. ORMAN, PRESIDENTIAL SECRECY AND DECEPTION, BEYOND THE POWER TO PERSUADE (1980) (evaluating presidential uses of secrecy from the Kennedy through the Ford administrations and offering guidelines for democratic accountability through legislation).

⁹ The President’s powers and duties are enumerated in Article II, Sections 2 and 3 of the Constitution:

SECTION 2. The President shall be Commander in Chief of the Army and Navy

infancy of the federal government under the Constitution.¹⁰ Throughout history, presidents periodically have refused to disclose information requested by the Congress and the courts.¹¹ The issue of secrecy in the executive branch came to a head during the Watergate scandal of the Nixon administration.¹² In the immediate aftermath of Watergate, the competing interests of democratic accountability and federal separation of powers provided the framework for arguments over the existence of executive privilege.¹³ Today, those competing interests shape the arguments over the boundaries

of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

SECTION 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

U.S. CONST. art. II, §2, §3.

¹⁰ MARK J. ROZELL, EXECUTIVE PRIVILEGE: THE DILEMMA OF SECRECY AND DEMOCRATIC ACCOUNTABILITY 32-36 (1994). In 1796, George Washington refused to comply with a congressional request for information regarding secret executive communications made in contemplation of the Jay Treaty. *Id.* at 35. Washington discussed withholding information from Congress as early as 1792 in response to a congressional inquiry into the military expeditions of General Arthur St. Clair. *Id.* at 32-34.

¹¹ For a concise history of presidential assertions of executive privilege, see *id.* at 32-48.

¹² For a concise history of the Watergate scandals, see Frank Tuerkheimer, *Watergate as History*, 1990 WIS. L. REV. 1323, 1324-27 (reviewing STANLEY I. KUTLER, THE WARS OF WATERGATE: THE LAST CRISIS OF RICHARD NIXON (1990)).

¹³ See RAOUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH Pg. #1 (1974).

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of executive privilege.¹⁴

*In re Grand Jury Proceedings*¹⁵ provides a glimpse into the doctrine of executive privilege and demonstrates that the doctrine does not exist in a vacuum.¹⁶ Each

Berger argues that the power of the executive branch to withhold information from the coordinate branches of government does not exist by express provision in the Constitution, nor may be it implied from the enumerated powers of Article II. *Id.*; see also Raoul Berger, *Executive Privilege v. Congressional Inquiry*, 12 UCLA L. REV. 1043 (1965); Raoul Berger, *The Incarnation of Executive Privilege*, 22 UCLA L. REV. 4, 29 (1974); DAVID WISE, *THE POLITICS OF LYING: GOVERNMENT DECEPTION, SECRECY, AND POWER* 64 (1973). For pre-Watergate discussions of executive privilege, see Joseph W. Bishop Jr., *The Executive's Right of Privacy: An Unresolved Constitutional Question*, 66 YALE L.J. 477 (1957); Paul Hardin, III, *Executive Privilege in the Federal Courts*, 71 YALE L.J. 879 (1962); Robert Kramer & Herman Marcuse, *Executive Privilege - A Study of the Period 1953-1960*, 29 GEO. WASH. L. REV. 623 (1961).

¹⁴ See generally ROZELL *supra* note 10. Some scholars have argued in favor of legislation fixing the boundaries of executive privilege. See e.g. James Hamilton and John C. Grabow, *A Legislative Proposal for Resolving Executive Privilege Disputes Precipitated by Congressional Subpoenas*, 21 HARV. J. ON LEGIS. 145 (1984). Conversely, Rozell argues that legislative action "is bound to fail given the impossibility of determining all of the circumstances under which executive privilege may be exercised in the future." ROZELL, *supra* note 10, at 147. Moreover, "Congress already has the institutional capability to challenge claims of executive privilege by means other than eliminating the right to withhold information or attaching statutory restrictions on the exercise of that right." *Id.* at 148. Given the Supreme Court's recognition of a qualified executive power to withhold information, any limitation on that power may be unenforceable as a violation of separation of powers. *Id.*; cf. GERALD GUNTHER & KATHLEEN SULLIVAN, *CONSTITUTIONAL LAW* 366 (13th ed. 1997) (questioning whether Congress would have authority under the necessary and proper clause to enact guidelines for the negotiation of executive agreements with foreign nations). For example, if a President exercises his power to withhold certain information in a manner permissible under *United States v. Nixon* but impermissible under a statutory restriction, the President could argue that the statute is unconstitutional "as applied." *Id.* Since the Court held that the Executive's power to withhold certain information is rooted in the President's Article II powers, it is conceivable that Congress lacks the authority to restrict that power. *Id.*

¹⁵ 5 F. Supp. 2d 21 (D.D.C. 1998).

¹⁶ ROZELL, *supra* note 10, at 154. "Two executive privilege claims that, on the surface, appear equally valid may be treated very differently from one another given different circumstances." *Id.*; see also, Westin, *supra* note 3, at xii-xiv.

When the political situation is too dangerous for the Supreme Court (e.g., if a ruling against the President is likely to be disobeyed by him or to produce serious reprisals against the Court's powers or prestige), the Court should find a way to duck the issue or deflect it, leaving its immediate resolution to the larger political process. But if the political situation is favorable (that is, if a ruling against the President will enjoy broad public and Congressional support and virtually compel presidential compliance), then the Court is free (if the case warrants it) to do the two things most

presidential assertion of executive privilege involves unique political circumstances,¹⁷ as well as a specific procedural posture which have profound effects on the balancing of interests in each case.¹⁸ The media and partisan politicians have greeted modern presidential assertions of executive privilege with self-serving comparisons to Watergate,¹⁹ causing more than one president to temper or even disguise the privilege in an effort to avoid negative political ramifications.²⁰

This note analyzes the District Court of the District of Columbia's application of the doctrine of executive privilege in *In re Grand Jury Proceedings*.²¹ Part II provides a

beloved by judges - uphold the 'rule of law' against claims of prerogative or privilege by the executive, and expand still further the discretionary power of the judiciary in the American constitutional system.

Id. at xii-xiii.

In other words, the Supreme Court generally tends to be a prudent body; it has had to be for the unique power of judicial review to have survived so long in a majority-rule republic. But when one of the fundamental tenets of the American constitutional system is widely regarded by the public as under assault by one of the elected branches of national government, the Justices can and do unite in defense of such basic values.

Id. at xiv.

¹⁷ R.H. Clark, *Executive Privilege: A Review of Berger*, 8 AKRON L. REV. 324, 327 (1975). Executive privilege claims arise in two distinct circumstances: first, when the executive refuses to disclose information to the legislative branch; and second, when the executive refuses to disclose information to the judicial branch. *Id.* This note deals exclusively with the latter situation.

¹⁸ Westin, *supra* note 3, at xiv.

¹⁹ ROZELL, *supra* note 10, at 62-63. Ironically, the doctrine of Executive Privilege entrenched itself during the 1950's in part as a response to "McCarthyist" congressional investigations. Clark, *supra* note 17, at 325. President Eisenhower used the public's distrust of congressional investigations to justify numerous assertions of executive privilege. *Id.*

²⁰ See generally Randall K. Miller, *Congressional Inquests: Suffocating the Constitutional Prerogative of Executive Privilege*, 81 MINN. L. REV. 631 (1997) (arguing that congressional abuse of investigatory power has weakened the President's constitutional power to withhold information); see also ROZELL, *supra* note 10, at 140-141.

²¹ 5 F. Supp. 2d 21 (D.D.C. 1998). A second issue in *In re Grand Jury Proceedings* was the applicability of government attorney-client privilege and the "work product doctrine." at *Id.* at 30. The district court held that the government attorney-client privilege is a qualified privilege, and found that the Office of the Independent Counsel demonstrated a sufficient showing of need to overcome the privilege. *Id.* at 39. Accordingly, the court compelled the grand jury testimony of White House Counsel Bruce Lindsey. *Id.* at 39. The White House has appealed the district court's decision exclusively challenging the attorney-client privilege and work product rulings. Peter Baker and Ruth Marcus, *Appeals Court Hears Privilege Case*, WASH. POST, June 30, 1998, at A5. On June 4, 1998, the Supreme Court declined a request by the Office of the Independent Counsel for a direct appeal to the high Court, stating

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brief history of executive privilege and discusses precedents that impacted the court's decision.²² Part III indicates the procedural posture of the case and sets forth the substantive facts.²³ Part IV discusses the court's analysis of the executive privilege issue in light of recent District of Columbia Circuit Court decisions.²⁴ Part V concludes that *In re Grand Jury Proceedings* bolstered the notion of a presumption in favor of the privilege, while observing that the sufficiency of the evidence presented to overcome the privilege must be evaluated in retrospect.²⁵

II. BACKGROUND

Executive privilege is fundamentally a product of the doctrine of separation of powers.²⁶ The issue arises when the executive branch refuses to disclose information to a coordinate branch of government.²⁷ While executive privilege issues most commonly develop as conflicts between Congress and the executive branch,²⁸ the judicial branch remains the ultimate arbiter in the context of constitutional inter-branch disputes.²⁹

The judicial branch did not encounter a formal assertion of executive privilege until

“[i]t is assumed that the Court of Appeals will proceed expeditiously to decide this case.” *United States v. Clinton*, 118 S.Ct. 2079, 2080 (1998). The D.C. Circuit heard arguments on June 29, 1998. Peter Baker and Ruth Marcus, *Appeals Court Hears Privilege Case*, WASH. POST, June 30, 1998, at A5. In a later opinion, the D.C. Circuit qualified the district court ruling on attorney-client privilege. *See In re Lindsey*, 1998 WL 719542 (D.C.Cir. Jul 27, 1998) (No. 98-3060, 98-3062, 98-3072). The Supreme Court then denied certiorari letting stand the lower court ruling that White House lawyers cannot refuse to answer a federal grand jury's questions about possible crimes committed by government officials. *Office of the President v. Office of Independent Counsel*, --- S.Ct. ---, 1998 WL 541012 (Nov. 9, 1998) (No. 98-316). However, the executive privilege issue was not the subject of the President's appeal.

²² *See infra* notes 26-53 and accompanying text.

²³ *See infra* notes 54-86 and accompanying text. The court redacted a large portion of the opinion relative to the specific information sought by the Independent Counsel. Thus, the substantive facts surrounding the motion to compel are not entirely clear.

²⁴ *See infra* notes 87-153 and accompanying text

²⁵ *See infra* notes 154-157 and accompanying text.

²⁶ *See, e.g., ROZELL, supra* note 10, at 142.

²⁷ BERGER, *supra* note 13, at 1.

²⁸ Archibald Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383, 1396 (1974).

²⁹ *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Without the authority of Congress, President Truman ordered certain steel mills seized in an effort to end a labor dispute that threatened the American war effort in Korea. *Id.* at 583. The Supreme Court ordered the Secretary of Commerce to return the mills to private ownership despite the President's argument that the threat to national security justified use of inherent executive power. *Id.* at 587.

1807 in *United States v. Burr*.³⁰ The *Burr* court recognized judicial power to require the president to produce evidence,³¹ and it qualified that power by observing that a court is not required “to proceed against the president as against an ordinary individual.”³² While modern practitioners, judges, and scholars have debated the precedent set by *Burr* and other non-judicial “precedents” of executive privilege,³³ the courts did not pass on the issue again until Watergate.³⁴

³⁰ 25 F. Cas. 187 (C.C.D.Va. 1807) (prosecuting Colonel Aaron Burr for treason stemming from his involvement in a secessionist conspiracy). *Id.*; see Paul A. Freund, *The Supreme Court, 1973 Term - Foreword: On Presidential Privilege*, 88 HARV. L. REV. 13, 24-31 (1974). The Supreme Court hinted as to the existence of the privilege four years earlier “where Chief Justice Marshall suggested that for a court to intrude ‘into [the secrets] of the cabinet’ would give the appearance of ‘intermeddl[ing] with the prerogatives of the executive.’ ” *In re Sealed Case*, 121 F.3d 729, 738 (D.C. Cir. 1997) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1807)).

³¹ Cox, *supra* note 28, at 1392.

³² *Burr*, 25 F.Cas. at 192; see also *United States v. Nixon*, 418 U.S. 683, 708. The *Burr* court further noted that the discretion to withhold portions of the disputed letter rested exclusively in the President, and not in other members of his cabinet. *Burr*, 25 F.Cas. at 192. *But cf. In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997) (extending the privilege to communications between advisers). For a discussion of *In re Sealed Case*, see *infra* note 51.

³³ For a concise history of presidential assertions of executive privilege, see ROZELL, *supra* note 10, at 32-48. Rozell argues that the frequent exercise of the power lends legitimacy to the “philosophical and constitutional underpinnings of executive privilege.” *Id.* at 32; see also UNITED STATES V. NIXON: THE PRESIDENT BEFORE THE SUPREME COURT 319-20, 353-62 (Leon Friedman ed., 1974) [hereinafter *The President’s Main Brief*]. In the context of executive usurpation of legislative authority, the Supreme Court recognized implied congressional acquiescence as a justification for actions taken by the Carter administration during the Iranian hostage crisis. See *Dames & Moore v. Regan*, 453 U.S. 654, 678-79 (1981). *But see BERGER, supra* note 13, at 165. (arguing that these “precedents” amount to usurpation of power). “Frequent and uncritical repetition of dubious doctrine transforms it into accepted dogma.” *Id.*

³⁴ In the context of the Watergate scandal, the courts addressed the issue of executive privilege in *In re Subpoena to Nixon*, 360 F. Supp. 1 (D.D.C. 1973); *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973), *modifying* 360 F. Supp. 1 (D.D.C. 1973) (holding that the judicial branch holds the constitutional power to determine applicability of executive privilege and ordering President Nixon to produce the White House tape-recordings for *in camera* inspection); *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 366 F. Supp. 51 (D.D.C. 1973) (holding that a subpoena issued by the committee was unenforceable against President Nixon because the subpoenaed material was not critical to the committee’s performance of its legislative functions); *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974), *aff’g* 366 F. Supp. 51 (D.D.C. 1973); *United States v. Nixon*, 418 U.S. 683 (1974); *Dellums v. Powell*, 561 F.2d 242 (D.C. Cir. 1977) (holding that tape-recordings of White House discussions regarding the 1971 May Day demonstrations were presumptively privileged, but that the plaintiffs demonstrated a specific need for the tapes that overcame the

In *United States v. Nixon*,³⁵ the Supreme Court finally dealt squarely with a presidential assertion of executive privilege. While President Nixon argued for an absolute and unqualified privilege rooted in separation of powers principles,³⁶ the United States argued that an unqualified executive privilege did not exist in any form.³⁷ The unanimous Supreme Court indicated that “[t]he President’s need for complete candor and objectivity from advisers calls for great deference from the courts,”³⁸ and, accordingly, the court recognized the existence of executive privilege.³⁹ However, the Court rejected Nixon’s argument for an absolute privilege,⁴⁰ and it adopted a

privilege); *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977) (upholding legislation preserving presidential documents and tape-recordings and establishing a system of judicial and public access to the materials); and *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (holding that a former president was entitled to absolute immunity from civil liability for his official acts). For a commentary on the impact of the judiciary on the Nixon presidency and a discussion of the Watergate litigation, see HOWARD BALL, *NO PLEDGE OF PRIVACY: THE WATERGATE TAPES LITIGATION* (1977).

³⁵ 418 U.S. 683 (1974).

³⁶ *The President’s Main Brief*, *supra* note 33, at 350-73. The President argued in the alternative that if the privilege was a qualified privilege, that privilege prevailed over the subpoena duces tecum. *Id.* at 373-79. Ironically, Richard Nixon had spoken out against any constitutional basis for executive privilege while serving as a congressman. Norman Dorsen & John H.F. Shattuck, *Executive Privilege, the Congress and the Courts*, 35 OHIO ST. L.J. 1, 1-2 (1974).

³⁷ UNITED STATES V. NIXON: THE PRESIDENT BEFORE THE SUPREME COURT 210, 262-69 (Leon Friedman ed., 1974) [hereinafter *The United States’ Main Brief*]. Special Prosecutor Leon Jaworski, arguing on behalf of the United States, urged the Court to recognize executive privilege as a qualified evidentiary privilege rather than a constitutionally based privilege. *Id.* Jaworski was appointed Special Prosecutor after President Nixon forced the removal of the first Special Prosecutor, Archibald Cox. See Tuerkheimer, *supra* note 12, at 1325.

³⁸ *Nixon*, 418 U.S. at 706.

³⁹ *Id.* at 708. “The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.” *Id.* Although *Nixon* was a unanimous decision, historical accounts reflect a reluctance on the part of Justices Douglas, Brennan, and White to recognize a constitutional basis for the doctrine of executive privilege. HOWARD BALL, “WE HAVE A DUTY,” THE SUPREME COURT AND THE WATERGATE TAPES LITIGATION 143-44 (1990). Initially, the three Justices believed it was unnecessary to reach the issue of the constitutional basis of the privilege when a common law basis for the privilege existed. *Id.* Ultimately, the three reluctant Justices signed the unanimous opinion. *Id.* at 149. “More than likely they ran out of time and, probably, energy in their efforts to persuade the others that the Court should not be strengthening the presidency through the judicial creation of the inherent power of executive privilege.” *Id.*

⁴⁰ *Nixon*, 418 U.S. at 706.

To read the Art. II powers of the President as providing an absolute privilege as against a subpoena essential to enforcement of criminal statutes on no more than a generalized claim of the public interest in confidentiality of nonmilitary and

presumption in favor of the privilege⁴¹ as a reflection of judicial deference to the executive branch.⁴² In criminal cases, the privilege may be overcome by a sufficient showing of need by the party seeking disclosure.⁴³

While *Nixon*⁴⁴ remains the exclusive Supreme Court authority on executive privilege, the district and circuit courts of the District of Columbia have developed a body of case law expounding on the framework of *Nixon*.⁴⁵ The D.C. Circuit expanded the umbrella of privilege to include not only communications between president and adviser, but also “communications authored or solicited and received by those members of an immediate White House adviser’s staff who have broad and significant responsibility for investigating and formulating the advice to be given to the President on the particular matter to which the communications relate.”⁴⁶ The D.C. Circuit supported its expansion of the privilege to advisers arguing that such confidentiality ensures candid, blunt communication in discussing policy alternatives.⁴⁷ The court recognized that

nondiplomatic discussions would upset the constitutional balance of ‘a workable government’ and gravely impair the role of the courts under Art. III.

Id. at 707.

⁴¹ *Id.* at 708.

The expectation of a President to the confidentiality of his conversations and correspondence . . . has all the values to which we accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications.

Id.

⁴² *Id.* at 708. “[I]n no case of this kind would a court be required to proceed against the president as against an ordinary individual.” *Id.* (quoting *U.S. v. Burr*, 25 F.Cas. 187, 192 (C.C.D.Va. 1807)); *see also* ROZELL, *supra* note 10, at 152.

⁴³ *Nixon*, 418 U.S. at 706; *see also infra* notes 142-151 and accompanying text.

⁴⁴ 418 U.S. 683 (1974).

⁴⁵ *See* *U.S. v. AT&T*, 419 F. Supp. 454 (D.D.C. 1976); *U.S. v. AT&T*, 551 F.2d 384 (D.C. Cir. 1976); *U.S. v. AT&T*, 567 F.2d 121 (D.C. Cir. 1977); *U.S. v. Poindexter*, 727 F. Supp. 1501 (D.D.C. 1989); *U.S. v. Poindexter*, 732 F. Supp. 135 (D.D.C. 1990); *U.S. v. Poindexter*, 732 F. Supp. 142 (D.D.C. 1990); *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997); *In re Sealed Case*, 107 F.3d 46 (D.C. Cir. 1997); *In re Sealed Case*, 124 F.3d 230 (D.C. Cir. 1997), *rev’d sub nom.*; *Swidler & Berlin v. U.S.*, 118 S. Ct. 2081 (1998); *Association of American Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993).

⁴⁶ *In re Sealed Case*, 121 F.3d 729, 752 (D.C. Cir. 1997). The D.C. Circuit has also determined that the First Lady is an “adviser” for purposes of executive privilege. *Association of American Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 904-05 (D.C. Cir. 1993).

⁴⁷ *In re Sealed Case*, 121 F.3d at 750.

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these conversations often take place without the participation of the President, yet they are necessary to ensure that sound, well-reasoned advice ultimately reaches the President.⁴⁸ Although *Nixon*⁴⁹ involved the application of the privilege in the context of a criminal trial,⁵⁰ the D.C. Circuit has held that the standards are equally applicable in the context of grand jury proceedings.⁵¹

Against this backdrop of policy and precedent, the District Court of the District of

⁴⁸ *Id.* The court also outlines the arguments against expanding the privilege to communications between advisers. *Id.* at 748-49. First, the Constitution vests executive power exclusively in the President. *Id.* at 748. “Since the Constitution assigns these responsibilities to the President alone, arguably the privilege of confidentiality that derives from them also should be the President’s alone.” *Id.* The privileges of the President have traditionally expanded beyond those of other executive branch officers. *Id.* While the President enjoys absolute immunity for official acts, other executive branch officers receive only qualified immunity. *Id.* “[F]or purposes of separation of powers, the President stands in an entirely different position than other members of the executive branch.” *Id.* at 749 (quoting *In re Kessler*, 100 F.3d 1015, 1017 (D.C. Cir. 1996)). Second, courts generally adhere to the premise that privileges should be narrowly construed. *In re Sealed Case*, 121 F.3d at 749. “[E]xceptions to the demand for every man’s evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.” *Id.* (quoting *Nixon*, 418 U.S. at 710). Further, the growth of the executive branch in the past few decades arguably justifies a narrow construction of the privilege. *In re Sealed Case*, 121 F.3d at 749. Finally, a privilege which encompasses presidential aides and advisers increases the potential for abuse of the privilege. *Id.*

⁴⁹ 418 U.S. 683 (1974).

⁵⁰ The Court emphasized the “fundamental demands of due process of law in the fair administration of criminal justice” in its decision to order the production of the White House tapes. *Id.* at 713.

⁵¹ *In re Sealed Case*, 121 F.3d at 743 [hereinafter *Espy*]. Secretary of Agriculture Michael Espy was the subject of a grand jury investigation into allegations that Espy “improperly accepted gifts from individuals and organizations with business before the United States Department of Agriculture.” *Id.* at 734. In response to the public accusations of wrongdoing in the Department of Agriculture, President Clinton ordered an internal White House investigation to determine the appropriateness of executive action against Espy. *Id.* at 735. The results of this internal investigation became the subject of a grand jury subpoena. *Id.* When the Clinton administration invoked executive privilege, the unique issue presented to the court was whether the privilege encompassed certain documents comprised of communications between advisers, as opposed to communications between the President and his advisers. *Id.* at 749-50. The D.C. Circuit, in an opinion authored by Judge Wald, vacated and remanded a District Court ruling upholding the White House’s claim of privilege. *Id.* at 762. Although the D.C. Circuit agreed that the communications at issue were presumptively privileged, the court vacated and remanded on grounds that the District Court erred in holding that the Independent Counsel failed to demonstrate a sufficient need for the evidence. *Id.*

Columbia faced yet another assertion of the privilege in *In re Grand Jury Proceedings*.⁵²

As the Independent Counsel's investigation of the Clinton administration trudged forward, the focus of the judicial inquiry shifted away from the communicator of the information, and toward the nature of communication at issue.⁵³

III. STATEMENT OF THE CASE

In January 1994, Attorney General Janet Reno appointed Independent Counsel⁵⁴ Robert B. Fiske to investigate alleged financial improprieties on the part of President Clinton and Hillary Rodham Clinton relative to a failed development project known as "Whitewater."⁵⁵ Kenneth Starr⁵⁶ replaced Fiske on August, 5 1994 when Fiske's term

⁵² 5 F. Supp. 2d 21 (D.D.C. 1998).

⁵³ *Id.* at 26-27; *see also infra* notes 115-122 and accompanying text.

⁵⁴ The statutory authority for appointment of an Independent Counsel is contained in the Ethics in Government Act at 28 U.S.C. §§ 591-599. § 592(c) states:

(1) Application for appointment of independent counsel. The Attorney General shall apply to the division of the court for the appointment of an independent counsel if-

- (A) the Attorney General, upon completion of a preliminary investigation under this chapter, determines that there are reasonable grounds to believe that further investigation is warranted; or
- (B) the 90-day period referred to in subsection (a)(1), and any extension granted under subsection (a)(3), have elapsed and the Attorney General has not filed a notification with the division of the court under subsection (b)(1). In determining under this chapter whether reasonable grounds exist to warrant further investigation, the Attorney General shall comply with the written or other established policies of the Department of Justice with respect to the conduct of criminal investigations.

28 U.S.C. § 592(c).

⁵⁵ Susan Schmidt, *Whitewater Partners Face Fraud Charges; McDougals' Indictment Cites Land Deals*, WASH. POST, August 18, 1995, at A1.

In 1978, then Arkansas Attorney General Bill Clinton and Hillary Clinton joined with Jim and Susan McDougal to borrow over \$200,000 to purchase a tract of land in Ozark Mountains with the intention of developing vacation homes. *Id.* The group organized as the Whitewater Development Corporation. *Id.* When Bill Clinton was elected Governor, he appointed Jim McDougal to the post of Economic Development Director. *Id.* Clinton lost his reelection bid in 1980. *Id.* In 1982, McDougal purchased a small savings and loan, while Clinton was again elected Governor. *Id.*

Federal regulators began questioning the stability of McDougal's savings and loan institution in 1984, and McDougal hired the Rose Law Firm, where Hillary Clinton was a partner, to work for the struggling savings and loan. *Id.* In the fall of 1985, Susan McDougal borrowed \$300,000 from a loan company operated by David Hale, a Democratic municipal judge. *Id.* This loan company was backed by federal funds through the Small Business Administration. *Id.* On her loan application, Susan McDougal indicated the purpose of the

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expired.⁵⁷ A United States Court of Appeals panel of judges⁵⁸ refused to re-appoint Fiske because of a potential conflict of interest.⁵⁹

The Starr probe eventually expanded to encompass allegations of perjury and obstruction of justice involving sexual impropriety on the part of the President.⁶⁰ On

loan was to finance her fledgling marketing company. *Id.* However, the funds were actually plowed back into Jim McDougal's burgeoning real estate corporation and the floundering Whitewater project. *Id.* Hale later claimed that Bill Clinton pressured him into making the loan. *Id.*

Problems at the savings and loan mounted over the late 1980's, and eventually it collapsed in 1989. *Id.* Meanwhile, Susan McDougal claimed she attempted to convince the Clintons to get out of the Whitewater project in 1987, but Hillary Clinton refused. *Id.* For several years in the mid-1980s, the Clintons allegedly took improper tax deductions on the Whitewater property, claiming interest payments actually made by Whitewater Development Corporation. *Id.* Jim McDougal was indicted on federal fraud charges related to activities at the savings and loan, and acquitted in 1990. *Id.* In 1992, a Clinton presidential campaign report claimed losses on the Whitewater property around \$60,000. *Id.* This report became a topic of dispute as Jim McDougal claimed that he heavily subsidized the venture, limiting the Clintons losses. *Id.* Three years of delinquent Whitewater corporate tax returns were filed in June of 1993. *Id.*

Deputy White House Counsel Vince Foster, who worked on the Whitewater problem for the Clintons and was formerly employed by the Rose Law Firm, committed suicide a month later. *See generally* CHRISTOPHER RUDDY, *THE STRANGE DEATH OF VINCENT FOSTER* (1997). Federal investigators were denied access to Foster's office immediately following the discovery of his body, while White House aids entered the office soon thereafter and removed some files. *Id.* at 134. In December of 1993, the White House agreed to turn over the Whitewater documents to the Justice Department, including the files removed from the office of Foster. Ruth Marcus & Michael Isikoff, *Clinton Releases Files on Land Deal; Access to Papers is Limited to Justice Dept.*, WASH. POST, December 24, 1993, at A1. Hale and the McDougals were eventually convicted of fraud in connection with the improper loan to Susan McDougal. *See generally* JIM MCDUGAL & CURTIS WILKIE, *ARKANSAS MISCHIEF* (1998).

⁵⁶ Kenneth Starr served as a law clerk for former Chief Justice Warren E. Berger (1975-1977), Counselor to the attorney general of the United States Department of Justice (1981-1983), judge on the United States Court of Appeals for the D.C. Circuit (1983-1989), and Solicitor General for the Department of Justice (1989-1993) before being named Independent Counsel. *WHO'S WHO IN AMERICA* 4091 (51st ed. 1997).

⁵⁷ Susan Schmidt, *Judges Replace Fiske as Whitewater Counsel; Ex-Solicitor General Starr to Take Over Probe*, WASH. POST, August 6, 1994, at A1.

⁵⁸ This special division of the United States Court of Appeals was created by statute. *See generally* 28 U.S.C. § 49. The panel consists of three judges who are appointed by the Chief Justice of the Supreme Court. 28 U.S.C. § 49(d). One judge must be appointed from the D.C. Circuit, and no count may have more than one judge sitting on the panel. *Id.*

⁵⁹ The conflict of interest arose because Fiske was appointed by Attorney General Janet Reno, who in turn served at the behest of the President. Schmidt, *supra* note 57.

⁶⁰ Pursuant to the Paula Jones litigation, White House intern Monica Lewinsky signed a

February 18, February 19, and March 12, 1998, Deputy White House Counsel Bruce Lindsey testified before the grand jury in Washington D.C., but he refused to answer a number of questions regarding Monica Lewinsky,⁶¹ the civil case *Jones v. Clinton*,⁶² and the Independent Counsel's investigation.⁶³ The White House asserted executive

January 7, 1998 affidavit denying sexual relations with the President. On January 12, 1998, the Independent Counsel received certain "allegations"

(i) that Ms. Lewinsky had had a sexual relationship with President Clinton; (ii) that a friend of the President has advised Ms. Lewinsky on how to respond to her subpoena in the *Jones* case, found an attorney to represent her, and helped her find a new job; and (iii) that Ms. Lewinsky had tried to persuade Linda Tripp, a witness in the *Jones* suit, to commit perjury.

Petition for a Writ of Certiorari Before Judgment, *U.S. v. Clinton*, 118 S.Ct. 2079 (1998) (No. 97-1924), in *Washingtonpost.com Special Report: Clinton Accused* (last modified May 28, 1998) <<http://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/petition052898.htm>>. [hereinafter *OIC's Petition for Writ of Certiorari*]. On January 16, 1998, the Special Division of the United States Court of Appeals conferred jurisdiction on the Office of the Independent Counsel to investigate "whether Monica Lewinsky or others suborned perjury, obstructed justice, intimidated witnesses or otherwise violated federal law." *Id.* President Clinton provided deposition testimony in *Jones v. Clinton*, No. LR-C-94-290 (E.D. Ark.), on January 17, 1998. Memorandum of the White House in Opposition to OIC's Motion to Compel, *In re Grand Jury Proceedings*, Nos. 98-095, 98-096, 98-097, in *Washingtonpost.com Special Report: Clinton Accused* (last modified May 28, 1998) <<http://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/whitehouse052898.htm>> at *4 [hereinafter *Memorandum of the White House*]. The President was asked questions regarding Lewinsky in the course of his deposition testimony. *Id.*

⁶¹ Monica Lewinsky served as a White House intern in the Clinton administration until her removal following the surfacing of allegations of impropriety. Susan Schmidt et al., *Clinton Accused of Urging Aide to Lie; Starr Probes Whether President Told Woman to Deny Alleged Affair to Jones's Lawyers*, WASH. POST, January 21, 1998, at A1. On July 28, 1998, Lewinsky agreed to testify before the grand jury in exchange for immunity. Peter Baker & Susan Schmidt, *Lewinsky Gets Immunity for Her Testimony; Sources say Clinton to Tell of Clinton Bid to Hide Affair*, WASH. POST, July 29, 1998, at A1. The Independent Counsel's subpoena issued to President Clinton on July 17, 1998 was withdrawn after the President agreed to provide videotaped testimony on August 17, 1998 from the White House. Don Balz & Susan Schmidt, *Prosecutor, President Face Off Lewinsky's Immunity Deal Sets Stage for Historic Confrontation*, WASH. POST, August 2, 1998, at A1. On September 9, 1998, the Senate convened a hearing to discuss the legal basis and procedure for impeachment proceedings against the President. George Lardner Jr., *Senate Hearing Debates Impeachment Process*, WASH. POST, September 10, 1998, at A13. For the report of Independent Counsel Kenneth Starr, see *Referral to the United States House of Representatives* (Office Independent Counsel), available in 1998 WL 614815.

⁶² 869 F. Supp 690 (E.D. Ark. 1994), *rev'd in part by*, *Jones v. Clinton* 72 F.3d 1359 (8th Cir. (Ark.) 1996).

⁶³ *OIC's Petition for Writ of Certiorari*, *supra* note 60, at *5.

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privilege and attorney-client privilege on behalf of Lindsey who refused to answer pertinent questions.⁶⁴ On February 26, 1998, presidential assistant Sydney Blumenthal⁶⁵ appeared before the grand jury, and he likewise asserted executive privilege in refusing to answer questions regarding Lewinsky, *Jones*, and the Independent Counsel's investigation.⁶⁶

The Independent Counsel filed motions with the United States District Court for the District of Columbia to compel the testimony of Lindsey, Blumenthal, and a third individual⁶⁷ regarding Lewinsky, *Jones*, and the Independent Counsel's investigation.⁶⁸ The White House responded with a memorandum in opposition to the motions to compel,⁶⁹ and the Independent Counsel followed with a reply memorandum in support of the motion to compel.⁷⁰ The District Court for the District of Columbia held closed hearings on the motions, and, in its opinion and order entered May 4, 1998, granted the motions to compel the testimony of Lindsey and Blumenthal.⁷¹ The White House filed motions for reconsideration which were denied on May 26, 1998,⁷² and the district court released the redacted opinion⁷³ the following day.⁷⁴

In contrast to the lengthy memorandum submitted by the White House, the brief reply memorandum submitted by the Independent Counsel urged the court to adopt a bright line rule for determining whether presidential communications are presumptively privileged.⁷⁵ The Independent Counsel argued that "[e]xecutive privilege is flatly inapplicable to a President's private conduct,"⁷⁶ and he placed the burden of

⁶⁴ *Id.*

⁶⁵ Sydney Blumenthal was a journalist until President Clinton tabbed him as an assistant in July of 1997. Blumenthal worked on the staffs of *New Yorker* magazine, the *Washington Post*, *New Republic*, and *Vanity Fair*. Howard Kurtz, *The Clintons' Pen Pal S.D. Blumenthal Leaving Journalism to work for the White House*, *WASH. POST*, June 16, 1997, at C1.

⁶⁶ *OIC's Petition for Writ of Certiorari*, *supra* note 60, at *5.

⁶⁷ The third unidentified party later withdrew his claims of privilege thereby rendering the motion moot as to his testimony. *In re Grand Jury Proceedings*, 5 F. Supp. 2d 21, 24 (D.D.C. 1998).

⁶⁸ *OIC's Petition for Writ of Certiorari*, *supra* note 60, at *5.

⁶⁹ The memorandum was submitted on behalf of the White House by attorneys W. Neil Eggleston and Timothy K. Armstrong. Memorandum of the White House at *29.

⁷⁰ *OIC's Petition for Writ of Certiorari* at *5.

⁷¹ *Id.*

⁷² *Id.* at *3.

⁷³ The opinion is marked by significant redactions because of the sensitive nature of the information at issue in the case.

⁷⁴ *OIC's Petition for Writ of Certiorari*, *supra* note 60, at *3.

⁷⁵ The "presumption" of executive privilege is discussed *infra* PART IV. A.

⁷⁶ Independent Counsel's Motion to Compel at *2, *In re Grand Jury Proceedings*, Nos. 98-095, 98-096, 98-097, in *Washingtonpost.com Special Report: Clinton Accused* (last modified May 28, 1998) <

demonstrating the official nature of the conduct on the shoulders of the Executive.⁷⁷ In the alternative, the Independent Counsel asserted that the showing of need would be sufficient to overcome the privilege.⁷⁸

Conversely, the White House argued that “[t]he critical question is not the nature of the underlying conduct; it is the purpose of the advice being given.”⁷⁹ From this premise, advice sought “to deal with the threat of impeachment” is “official” advice.⁸⁰

Although the showing of need was sufficient in *Nixon*⁸¹ to overcome the presumption of privilege, the White House reminded the court that the conversations about the break-in at the Democratic National Committee Headquarters were “not about an official function of the President,” but were nonetheless presumptively privileged.⁸²

srv/politics/special/clinton/stories/lindsey052898. htm> [hereinafter, *OIC's Motion to Compel*]; see also Dorsen & Shattuck, *supra* note 36, at 31.

⁷⁷ *OIC's Motion to Compel*, *supra* note 76, at *2.

In trying to bar the testimony of White House aides, the President advances a theory that is breathtaking in scope. Executive privilege applies here, according to the President, because the allegations of purely private matters have had “a demonstrable effect on the operations of the White House as an institution.” Under this reasoning, every potential White House scandal can be shrouded in the Executive privilege. If a President were to murder a political opponent, he could argue that the resulting uproar could impair his legislative program, distract him from his duties, affect his dealings with foreign heads of state, and potentially give rise to impeachment proceedings - the very arguments raised by the White House here.

Id. at *1-2.

⁷⁸ *Id.* at *2.

⁷⁹ *Memorandum of the White House*, *supra* note 60, at *2; see also ADAM CARLYLE BRECKENRIDGE, *THE EXECUTIVE PRIVILEGE, PRESIDENTIAL CONTROL OVER INFORMATION* 109 (1974).

⁸⁰ *Memorandum of the White House*, *supra* note 60, at *2. Some commentators have attempted to distinguish communications which contain “advice” from communications which contain “facts.” See, e.g., Dorsen & Shattuck, *supra* note 36, at 31. Separating “facts” from “advice” is difficult, but not impossible. *Id.* The executive branch engages in this process often under the Freedom of Information Act. *Id.* “Without this separation, the advice privilege invites abuse.” *Id.* Where facts are inextricably intertwined with the policy making process, secrecy should prevail. *Id.* However, “[t]here should be no executive privilege when Congress has already acquired substantial evidence that the information requested concerns wrong-doing by executive officials or presidential aids.” *Id.* The Fifth Amendment privilege against self-incrimination is sufficient protection for executive officials accused of wrong-doing. *Id.*

⁸¹ 418 U.S. 683 (1974). For a discussion of the Supreme Court’s justification for the presumption of privilege, see *supra* note 41 and accompanying text.

⁸² *Memorandum of the White House*, *supra* note 60, at *17.

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The White House rejected any notion that the President bears the burden of establishing the official nature of his conduct to raise a presumption of privilege,⁸³ yet it offered examples of how discussions related to the Lewinsky matter fell within the rubric of the President's Article II duties.⁸⁴ Moreover, the White House concluded that the Independent Counsel could not make a "focused demonstration of need"⁸⁵ sufficient to overcome the presumption in favor of the privilege.⁸⁶

IV. ANALYSIS

The District Court for the District of Columbia⁸⁷ rejected the bright line rule advocated by the Independent Counsel, resolving the "presumption" issue by construing *Nixon*⁸⁸ and *In re Sealed Case*⁸⁹ to impose a duty on the court to treat the communications at issue as presumptively privileged.⁹⁰ However, the rationale supporting the ruling on presumption⁹¹ provides little guidance in discerning the role of the presumption in privilege claims.⁹² The court discussed the scope of the privilege

⁸³ *Id.* at *18.

⁸⁴ The proffered examples included discussions relating to: the President's State of the Union Address (the President decided not to discuss the matter in his address), *Memorandum of the White House*, *supra* note 60, at *23-24, "matters of foreign policy and military affairs" *Id.* (responding to inquiries from foreign nations regarding the Lewinsky matter and "[d]eliberations within the White House about how to keep the controversy related to the Lewinsky matter from hampering the President's conduct of the nations military and foreign policy. . ."); impeachment, *Id.* at *24-25; allocation of presidential time, *Id.* at *25-26 (how to minimize the interference created by the *Jones* litigation); strategy discussions relating to the Independent Counsel Investigation, *Id.* at *26-27 (" . . . these discussions formed an on-going part of the advisor's function to counsel the President on decisions he must make . . ."); "discussions as to whether to assert executive privilege," *Id.* at *26-27 ("... these discussions occurred while advising the President in connection with a decision only he could make in his official capacity . . ."). The White House offered the examples "solely for illustrative purposes," asserting that "[n]othing in *Nixon* or [*In re*] *Sealed Case* suggests that the question whether a particular issue calls for direct involvement and decisionmaking by the President is amenable to judicial review" or "open to question after the fact by the OIC." *Id.* at *23.

⁸⁵ The phrase "focused demonstration of need" is quoted from *Espy*, 121 F.3d 729, 746. For a discussion of requisite demonstration of need, see *infra* notes 147-153 and accompanying text.

⁸⁶ *Memorandum of the White House*, *supra* note 60, at *29.

⁸⁷ The opinion was authored by Chief United States District Judge Norma Holloway Johnson.

⁸⁸ 418 U.S. 683 (1974).

⁸⁹ *Espy*, 121 F.3d 729 (D.C. Cir. 1997).

⁹⁰ *In re Grand Jury Proceedings*, 5 F. Supp 2d 21, 25 (D.D.C. 1998).

⁹¹ *Id.*

⁹² See *infra* notes 95-136 and accompanying text.

relative to the President's advisers, holding that Blumenthal and Lindsey fell within the rubric of executive privilege.⁹³ The court concluded the analysis of executive privilege by holding that the Independent Counsel demonstrated a specific need for the information in the context of the grand jury investigation which outweighed the interests of the executive in non-disclosure.⁹⁴

A. *The Presumption of Privilege*

Governmental secrecy provides a convenient vehicle for abuse of power.⁹⁵ Abuse of power breeds public distrust of government.⁹⁶ Arguments favoring a narrow construction of the "presumption" reflect a distrust of government rooted in past abuses of power.⁹⁷ In particular, the abuses of the Watergate scandal left many with a jaded view of presidential privilege claims.⁹⁸ The public distrust of government created in the wake of Watergate has fueled arguments in favor of a presumption *against* the privilege.⁹⁹

A second concern voiced in support of a restricted construction of the "presumption" involves accountability in government.¹⁰⁰ Information hidden from the public would not be considered in evaluating the performance of the elected president.¹⁰¹ Thus, when voters cast ballots in ignorance of the truth, the president is effectively "unaccountable" to the electorate.¹⁰² Despite the compelling arguments

⁹³ *In re Grand Jury Proceedings*, 5 F. Supp. 2d at 26-27.

⁹⁴ *Id.* at 28-30.

⁹⁵ See generally WISE, *supra* note 13 (arguing that democracy will work only if those consenting to be governed know what they are consenting to).

⁹⁶ *Id.* at 342. Wise states that a Knight newspaper study in 1970 (three years before the Watergate scandal) reported that a substantial number of Americans did not believe the United States actually landed men on the moon. *Id.* at 341. "Government deception, supported by a pervasive system of official secrecy and an enormous public relations machine, has reaped a harvest of massive public distrust." *Id.* at 342.

⁹⁷ David B. Frohnmayer, *Essays on Executive Privilege*, in SAMUEL POOL WEAVER CONSTITUTIONAL LAW SERIES, NO. 1 (American Bar Foundation 1974). "Modern history demonstrates that the constitutional or legal obligations which presidents have asserted to lie within an 'official capacity' are breathtakingly sweeping in scope." *Id.* at 3.

⁹⁸ ROZELL, *supra* note 10, at 142. "[T]he doctrine of executive privilege has fallen into disrepute because of the [leadership] abuses of one presidency." *Id.*

⁹⁹ HALPERIN & HOFFMAN, *supra* note 8, at 104. "The presumptions must be turned around. Whatever is needed for public debate must be made public. The burden must be on those who would keep a secret." *Id.*

¹⁰⁰ See WISE, *supra* note 13, at 64. "[Secrecy] permits [the President] to control information . . . and to filter the truth before it reaches Congress and the voters." *Id.*

¹⁰¹ ORMAN, *supra* note 8, at 195.

¹⁰² *Cf.*, WISE, *supra* note 13, at 345. "[E]ven if the truth later emerges, it seldom does so in time to influence public opinion or public policy." *Id.*; see also ORMAN, *supra* note 8, at 195.

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favoring a narrow construction of the “presumption,”¹⁰³ courts have systematically interpreted the “presumption” liberally.¹⁰⁴ In delineating the presumption in favor of executive privilege, the Supreme Court did not directly address the concerns of public distrust of government and democratic accountability.¹⁰⁵ Likewise, the D.C. Circuit has refrained from framing its opinions on the presumption in terms of public trust and democratic accountability.¹⁰⁶ *In re Grand Jury Proceedings* follows suit by strictly adhering to precedent in finding the presumption applicable.¹⁰⁷

Judicial indifference to “trust” and “accountability” rationales reflects the role of the courts under separation of powers doctrine.¹⁰⁸ The concerns expressed in favor of a narrow construction of the presumption are legitimate, but courts should view executive privilege with “a dispassionate and thoughtful perspective on the powers and duties of the presidency as an institution, rather than as a reflection of a particular incumbent.”¹⁰⁹ In *Nixon*, the Supreme Court justified the presumption as a guardian of candid advice and creativity in the executive branch.¹¹⁰

In *In re Grand Jury Proceedings*,¹¹¹ the district court adopted the White House

¹⁰³ See *supra* notes 95-102 and accompanying text.

¹⁰⁴ See, e.g., *Espy*, 121 F.3d at 744 “The President can invoke the privilege when asked to produce documents or other materials that reflect presidential decision-making and deliberations and that the President believes should remain confidential. If the President does so, the documents become presumptively privileged.” *Id.*

¹⁰⁵ See *Nixon*, 418 U.S. at 703-713.

¹⁰⁶ See cases cited *supra* notes 34 & 45.

¹⁰⁷ 5 F. Supp. 2d 21, 27 (D.D.C. 1998).

Under *Nixon*, the Court has a duty to treat the subpoenaed testimony as presumptively privileged. In light of this binding precedent, the factual similarities between the *Nixon* cases and the case at hand, and the evidence submitted with respect to the President’s invocation of privilege, this Court finds that it must treat the communications of Lindsey and Blumenthal as presumptively privileged.

Id.

¹⁰⁸ See ROZELL, *supra* note 10, at 142-47. “[O]nly a proper understanding of the separation of powers doctrine can help resolve the inherent conflict between governmental secrecy and the ‘right to know.’” *Id.* at 145.

¹⁰⁹ Ellen M. Stanton, *Executive Privilege: An Institutional Perspective*, in SAMUEL POOL WEAVER CONSTITUTIONAL LAW SERIES, NO. 1, at 19 (American Bar Foundation 1974); see also Cox, *supra* note 28, at 1410-11.

¹¹⁰ *Nixon*, 418 U.S. at 708; see also Cox, *supra* note 28, at 1410. Aside from this “candid interchange” doctrine, national security and foreign affairs matters have traditionally supported executive privilege claims. Colleen B. Grzeskowiak, Note, *Executive Privilege and Non-Presidential Actors: The Distress of “Tidy-Minded Constitutionalists” Continues*, 38 SYRACUSE L. REV. 991, 996-97 (1987).

¹¹¹ 5 F. Supp. 2d 21 (D.D.C. 1998).

argument that “no court had ever declined to treat executive communications as presumptively privileged on grounds that the matters discussed involved private conduct.”¹¹² The focus of the inquiry is not on “the nature of the conduct that the subpoenaed material might reveal,”¹¹³ but rather on the context in which the information is sought and the degree to which the material is necessary to achieve the appropriate goals of the proceeding.¹¹⁴

By shifting the focus toward “the context in which the information is sought” and away from “the nature of the conduct,” the courts maintain flexibility by avoiding a precise boundary for executive privilege.¹¹⁵ The presumption is designed to “confine the inroads upon executive confidentiality so narrowly as to minimize possible injury to the Presidency.”¹¹⁶ In assessing the “context in which the information is sought,” the court drafted a distinction between conversations “involv[ing] private conduct”¹¹⁷ and “purely private conversations.”¹¹⁸ The court found that the former are entitled to a presumption of privilege, while the latter are not.¹¹⁹ Recognizing the need of the President “to address personal matters in the context of his official decisions,”¹²⁰ the court rejected the Independent Counsel’s construction of the presumption of

¹¹² *Id.* at 25. The court went on to acknowledge the White House assertion that *Nixon* recognized a presumption despite the arguably unofficial nature of the Watergate break-in. *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* (citing Senate Select Comm. on Presidential Campaign Activities, 498 F.2d at 730). “In other words, the nature of the presidential conduct at issue, whether it was official or private, appeared not to affect the presumption of privilege or the need stage of the D.C. Circuit’s executive privilege analysis.” *In re Grand Jury Proceedings*, 5 F. Supp. 2d at 26.

¹¹⁵ See ROZELL, *supra* note 10, at 143. “[T]here are no clear, precise constitutional boundaries that determine . . . whether any particular claim of executive privilege is legitimate.” *Id.* “Such a power cannot be subject to precise definition because it is impossible to determine in advance all of the circumstances under which presidents may have to exercise that power.” *Id.*

¹¹⁶ Cox, *supra* note 28, at 1411.

¹¹⁷ *In re Grand Jury Proceedings*, 5 F. Supp. 2d at 25-26.

¹¹⁸ *Id.* (emphasis added). In holding “purely private” conversations are not presumptively privileged, the court relied on *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 449 (1977) (noting that the privilege is “limited to communications ‘in performance of [a President’s] responsibilities,’ ‘of his office,’ and made ‘in the process of shaping policies and making decisions’ “); *Espy*, 121 F.3d at 752 (“Of course, the privilege only applies to communications that these advisers and their staff author or solicit and receive in the course of performing their function of advising the President on official government matters”).

¹¹⁹ 5 F. Supp. 2d at 25-26. The most common justification for the privilege focuses on the need for candor in executive deliberations. See, e.g., Cox, *supra* note 28, at 1410. However, in *Nixon* “the Supreme Court added an interest in privacy - a concern never thought to lessen the duty of an ordinary citizen.” *Id.*

¹²⁰ *In re Grand Jury Proceedings*, 5 F. Supp. 2d at 26.

The court defended its position on the presumption issue by noting that a determination of the “private” or “official” nature of the communications was impossible absent an *in camera* proceeding.¹²³ However, an *in camera* proceeding is not available unless the Independent Counsel demonstrates a sufficient need for the requested evidence to overcome the presumption in favor of the privilege.¹²⁴ In other words, *in camera* review is not available to determine whether the presumption applies, but it is only available to overcome the presumption.¹²⁵ Therefore, the burden of proving a “purely private” conversation fell on the Independent Counsel without the benefit of *in camera* review.¹²⁶

The court distinguished this case from *Espy*¹²⁷ on the grounds that the latter involved a subpoena of documents, while the former involved a subpoena of testimony.¹²⁸ Claiming an inability to review the potential testimony of the witnesses *in camera*, the court reasoned that its “ability to assess whether the subpoenaed materials relate to official decisions is thus greatly hindered.”¹²⁹ Unfortunately, this rationale creates an inference that if the evidence sought by the Independent Counsel existed in the form of documents rather than testimony,¹³⁰ *in camera* inspection would be available to determine whether the communications “related to official decisions.”¹³¹

¹²¹ See *supra* note 77 and accompanying text.

¹²² *In re Grand Jury Proceedings*, 5 F. Supp. 2d at 26-28. The Supreme Court rejected a similar argument in *Nixon*. BRECKENRIDGE, *supra* note 79, at 147. The prosecutor “argued that the President had an enforceable legal duty to comply and under no circumstances could executive privilege be invoked on either the alleged illegal activities or those relating to the political campaign. Campaign activities, he insisted, were not a constitutional duty and thus not protected.” *Id.* at 146-47.

¹²³ *In re Grand Jury Proceedings*, 5 F. Supp. 2d at 26-28. “The Court does not have documents or tapes to review *in camera* that could establish whether the content of the subpoenaed communications relates only to private matters . . . [t]he Court is aware of only the unanswered questions themselves.” *Id.* at 26.

¹²⁴ See, e.g., Senate Select Comm. on Presidential Campaign Activities, 498 F.2d at 730 (stating “[P]residential conversations are ‘presumptively privileged,’ even from the limited intrusion represented by *in camera* examination of the conversations by a court”).

¹²⁵ *Id.*

¹²⁶ Cf., *In re Grand Jury Proceedings*, 5 F. Supp. 2d at 26-28.

¹²⁷ 121 F.3d 729 (D.C. Cir. 1997). For a discussion of *Espy*, see *supra* note 51.

¹²⁸ *In re Grand Jury Proceedings*, 5 F. Supp. 2d at 26.

¹²⁹ *Id.* It is unclear why the court did not recognize its power to compel the *in camera* testimony of the witnesses, just as it may compel the *in camera* inspection of documents. See BRECKENRIDGE, *supra* note 79, at 152-53.

¹³⁰ The evidence at issue in *Espy*, 121 F.3d 729 (D.C. Cir. 1997), consisted strictly of documents.

¹³¹ *In re Grand Jury Proceedings*, 5 F. Supp. 2d at 26-27.

Such an inference would be inconsistent with requiring the party seeking disclosure to demonstrate the “purely private” nature of the communications before an *in camera* inspection.¹³²

The practical result of the court’s holding relative to the presumption is that an invocation of executive privilege by a president will invariably raise a presumption in favor of the privilege.¹³³ It is unlikely that a party seeking disclosure could demonstrate that conversations between the president and an adviser related exclusively to private matters.¹³⁴ Ultimately, the presumption in favor of the privilege reflects the need to protect the institution of the Presidency in the constitutional scheme of separation of powers,¹³⁵ while at the same time retaining the capacity of the courts “to pose as a viable check on executive abuses of the privilege.”¹³⁶

B. The Scope of the Privilege

Executive privilege encompasses not only communications between the president and his advisers,¹³⁷ but also certain communications between advisers pursuant to providing advice to the president.¹³⁸ Certain conversations between Bruce Lindsey

¹³² See *supra* note 118 and accompanying text. “Presidential conversations are ‘presumptively privileged,’ even from the limited intrusion represented by an *in camera* examination of the conversations by a court.” Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 730 (1974).

¹³³ Cf., *In re* Grand Jury Proceedings, 5 F. Supp. 2d at 25-27. The presumption is “sustained by reason and authority.” Cox, *supra* note 28, at 1410; see also *supra* note 104.

¹³⁴ If the party possesses proof of the content of the conversations, they probably fail the “demonstrated specific need portion of the analysis. See *infra* notes 147-53.

¹³⁵ See generally Stanton, *supra* note 109 (arguing that executive privilege is an institutional privilege that preserves federal ideals of separation of powers).

¹³⁶ ROZELL, *supra* note 10, at 152.

¹³⁷ BRECKENRIDGE, *supra* note 79, at 110. “The advice privilege is fundamental to executive privacy and presidents insist that discussions with advisers must be fully protected.” *Id.*

¹³⁸ *Espy*, 121 F.3d at 752. The extension of the privilege to include such communications has been criticized. See Recent Cases, 111 HARV. L. REV. 861 (1998). Critics argue that other privileges such as the deliberative process privilege are sufficient to protect communications between advisers, rendering extension of the presidential communications privilege unnecessary. *Id.* at 861. The deliberative process privilege is a common law privilege that protects “documents and other materials that would reveal ‘advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.’ ” *Id.* at 865-66 (quoting *In re Sealed Case*, 116 F.3d 550, 557 (D.C. Cir. 1997)). “Unlike the presidential communications privilege, which throws a blanket of confidentiality over all communications among officials of a certain level, the deliberative process privilege protects only those communications that relate to executive decisionmaking.” *Id.* at 866.

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and an unnamed third party did not occur “in conjunction with the process of advising the President,” and therefore fell beyond the scope of the privilege.¹³⁹

Thus, Lindsey could not avoid answering questions regarding these particular conversations by asserting the presidential communications privilege.¹⁴⁰ However, conversations between Lindsey and Mrs. Clinton, as well as conversations between Sydney Blumenthal and Mrs. Clinton, were held within the scope of the privilege.¹⁴¹

C. The Independent Counsel’s Showing of Need

In opening its “need” analysis, the Court reiterated the long standing rule that the presumption in favor of executive privilege “may be rebutted by a sufficient showing of need by the Independent Counsel.”¹⁴² The Court carefully points out the vague standard announced in *Nixon* requiring a “demonstrated, specific need” for the evidence sought.¹⁴³ Relying on the *Nixon* line of cases¹⁴⁴ and the *Espy* case,¹⁴⁵ the Court required the Independent Counsel to first show “that each discrete group of the subpoenaed materials likely contains important evidence; and second, that this evidence is not available with due diligence elsewhere.”¹⁴⁶

¹³⁹ *In re Grand Jury Proceedings*, 5 F. Supp. 2d 21, 27 (D.D.C. 1998). The content of these conversations was redacted from the opinion.

¹⁴⁰ *Id.* The doctrine of executive privilege encompasses not only a “presidential communications” privilege, but also a “deliberative process” privilege which protects communications made in the executive decisionmaking process. Russell L. Weaver & James T.R. Jones, *The Deliberative Process Privilege*, 54 MO. L. REV. 279, 279 (1989); *see also supra* note 138.

¹⁴¹ *See supra* note 46 and accompanying text.

¹⁴² *In re Grand Jury Proceedings*, 5 F. Supp. 2d at 28 (citing *United States v. Nixon*, 418 U.S. at 713); *Espy*, 121 F.3d at 742; *Dellums v. Powell*, 561 F.2d 242, 249 (D.C. Cir. 1977); *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d at 730.

¹⁴³ *In re Grand Jury Proceedings*, 5 F. Supp. 2d at 28. The “demonstrated, specific need” discussed in *Nixon* reflects the Supreme Court’s recognition of a conflict between coequal branches. Clark, *supra* note 17, at 336. While the President implores secrecy as a necessity to carry out his constitutional responsibilities under Article II, the courts must obtain evidence to discharge its constitutional responsibilities under Article III. *Id.* For a discussion of the imprecision of the *Nixon* standard, see Cox, *supra* note 28, at 1414. One judge has commented that the *Nixon* standard is so vague that “the Court does not appear to have meant anything more than the showing that satisfied [Federal Rule of Criminal Procedure] 17(c).” *United States v. North*, 910 F.2d 843, 952 (D.C. Cir. 1990); *see also infra* note 148.

¹⁴⁴ *See supra* note 34. “[T]hese opinions balance[d] the public interests served by protecting the President’s confidentiality in a particular context with those furthered by requiring disclosure.” *Espy*, 121 F.3d at 753.

¹⁴⁵ 121 F.3d 729.

¹⁴⁶ *In re Grand Jury Proceedings*, 5 F. Supp. 2d at 28 (quoting *Espy*, 121 F.3d at 754). “These elements must be shown ‘with specificity.’ ” *Id.* (quoting *Espy*, 121 F.3d at 756).

This two prong analysis developed as the D.C. Circuit construed the meaning of a “demonstrated, specific need “ over the course of two decades.¹⁴⁷ The first requirement is essentially the equivalent of Federal Rule of Criminal Procedure 17(c),¹⁴⁸ and, therefore, it does not serve as a major obstacle to a sufficient showing of need.¹⁴⁹ The second requirement entails detailed documentation of efforts to obtain the needed information from other sources.¹⁵⁰ If the Independent Counsel satisfies the two prong test, the court orders the subpoenaed party to testify provided the testimony will “produce information relevant to the general subject of the grand jury’s investigation.”¹⁵¹ Upon reviewing the information sought by the Independent Counsel and the explanations of why the inquiries were directed at the White House, the court held that the testimony of Bruce Lindsey and Sydney Blumenthal was “likely to contain relevant evidence that is important to the grand jury’s investigation”¹⁵² and granted the

“The information sought need not be critical to an accurate judicial determination.” *Id.* (quoting *Espy*, 121 F.3d at 754).

¹⁴⁷ See *supra* notes 34 & 45 and accompanying text. “The [*Nixon* cases] employed a balancing methodology in analyzing whether, and in what circumstances, the presidential privilege can be overcome. Under this methodology, these opinions balanced the public interests served by protecting the President’s confidentiality in a particular context with those furthered by requiring disclosure.” *Espy*, 121 F.3d at 753.

¹⁴⁸ FED. R. CRIM. P. 17(c) merely limits a subpoena to relevant information, stating: For Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

Id.

¹⁴⁹ *In re Grand Jury Proceedings*, 5 F. Supp. 2d at 28. *But see Cox, supra* note 28, at 1414-15. Cox points out two additional prerequisites. First, the case must involve “serious criminal charges against high government officials.” *Id.* at 1415. Second, in the criminal context, there is “already an implicit determination, based upon evidence *aliunde*, of probable cause to believe that the officials named as defendants have committed serious crimes.” *Id.*

¹⁵⁰ *In re Grand Jury Proceedings*, 5 F. Supp. 2d at 28. The D.C. Circuit has recognized that in situations where an immediate White House adviser is under investigation for alleged criminal conduct, the second requirement should easily be met. *Id.*

¹⁵¹ *Id.* (quoting *U.S. v. R. Enterprises*, 498 U.S. 292, 300 (1991)). Ordinarily, the initial burden is on the subpoenaed party to demonstrate the unreasonableness of a grand jury subpoena. *R. Enterprises*, 498 U.S. at 301.

¹⁵² *In re Grand Jury Proceedings*, 5 F. Supp. 2d at 29. “The OIC has been authorized to

1999] motion to compel.¹⁵³

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V. CONCLUSION

Executive privilege lies at the crossroads of politics and the law, and it remains one of the murkiest and misunderstood areas of constitutional law.¹⁵⁴ Beyond the lack of recent Supreme Court guidance on the applicable standards regarding executive privilege, the political undercurrents of the day assure the doctrine's volatility.¹⁵⁵ *In re Grand Jury Proceedings* illustrates the dilemma encountered by the courts when faced with balancing the competing interests which arise when a President asserts the privilege.¹⁵⁶

investigate whether Monica Lewinsky 'or others,' including President Clinton, suborned perjury, obstructed justice, or tampered with witnesses." *Id.* "The testimony sought and withheld based on executive privilege is likely to shed light on that inquiry, whether exculpatory or inculpatory." *Id.*

¹⁵³ *Id.* An evaluation of the Court's ruling relative to the Independent Counsel's demonstration of need will only occur in retrospect. This heavily redacted portion of the opinion defies comprehensive analysis. However, the court commented that "if the President disclosed to a senior advisor that he committed perjury, suborned perjury, or obstructed justice, such a disclosure is not only unlikely to be recorded on paper, but it also would constitute some of the most relevant and important evidence to the grand jury investigation."

Id. This tiny portal provides a mere glimpse into the *ex parte* submission of the Independent Counsel.

¹⁵⁴ See ROZELL, *supra* note 10, at 1.

¹⁵⁵ In light of the political ramifications associated with a Presidential claim of privilege, the lower courts may likely continue to shape the law of executive privilege. *Cf.*, ROZELL, *supra* note 10, at 140-141. "No post-Watergate administration has been willing to take an aggressive posture toward executive privilege to reestablish the political viability of that constitutional doctrine. Clearly, each administration has perceived the political costs to be too great." *Id.* at 140. The inevitably partisan nature of the issue promotes uncertainty in determining the applicable standards in individual cases. See Michael Nelson, *Forward to MARK J. ROZELL, EXECUTIVE PRIVILEGE: THE DILEMMA OF SECRECY AND DEMOCRATIC ACCOUNTABILITY* ix, ix-x (1994).

From the 1930s until the 1960s, an era in which the Democrats usually controlled the White House, executive privilege was championed by liberals and opposed by conservatives. During the 1970s and 1980s, when Republican presidents were the norm, conservatives and liberals changed sides on the issue and, often, exchanged arguments: conservatives who had once emphasized the dangers of executive privilege and found no basis for it in the Constitution now saw what liberals had previously seen (but no longer saw) namely, that executive privilege is inherent in the executive power. (Liberals, for their part, found the abandoned conservative arguments suddenly persuasive).

Id.

¹⁵⁶ For a discussion of the competing interests at stake relative to executive privilege, *see*

While representing victory for the Executive in terms of bolstering the presumption in favor of the privilege, the case also represents defeat in terms of the President's quest for confidentiality. Ultimately, executive privilege is a doctrine which safeguards the presidency, but not necessarily the President.¹⁵⁷

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generally Dorsen & Shattuck, *supra* note 36.

¹⁵⁷ Stanton, *supra* note 109, at 31. “[In *In re Grand Jury Proceedings*] it appears the privilege is being used with regard to personal, not governmental matters, to protect Mr. Clinton politically rather than to protect the institution of the presidency.” Marcia Coyle, *Author: Privilege Argument Weak*, NAT’L L.J., May 18, 1998, at A10 (quoting Mark Rozell).