AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 12: The Contemporary Era – Separation of Powers/Executive Privilege

*Debra Steidel Wall*, **National Archivist Letter to Former President Trump** (2022)[[1]](#footnote-1)

*When Donald Trump’s term of office as president of the United States expired at noon on January 20, 2021, he moved to his Mar-a-Lago golf resort in Palm Beach, Florida. He had frequently spent time there during his presidency. As the final days of his presidency were winding down, he had numerous items from the White House boxed up and shipped to the golf resort. It soon became evident that many of those items were official presidential documents that by law were owned by the federal government and should have been entrusted to the National Archives. There was also concern that those items included an unknown number of highly classified documents. The National Archives and Records Administration (NARA) attempted to retrieve the documents first by asking for Trump’s voluntary cooperation and then by a court-issued subpoena demanding their return. When the government learned that the Trump still retained numerous classified documents, the Department of Justice got a judicially issued search warrant that authorized investigator to enter the golf resort, search for, and retrieve the missing documents. That search was executed on August 8, 2022. Trump publicly complained about the search, which both brought to public attention the fact that Trump had unlawfully retained government documents and set off an intense political controversy over both Trump’s actions and those of the Department of Justice. During that August search, the FBI seized 26 boxes of materials that included 11 sets of classified documents.*

*On August 22, 2022, a Trump associate publicly released a letter from May 10, 2022 from the Acting Archivist of the United States Debra Steidel Wall to a Trump attorney, Evan Corcoran. Subsequent reporting revealed that Corcoran had drafted a statement for the Federal Bureau of Investigation in June 2022 (falsely) asserting that all classified material had been returned to the government. The letter revealed some of the National Archives’ efforts to retrieve the documents, the former president’s effort to prevent the Archives from giving federal law enforcement officials access to those documents, and the amount of classified information that the Archives had already recovered from the former president as of that point. The letter also responded to Trump’s claim that the documents could not be revealed to law enforcement officials because they were covered by executive privilege. The Office of Legal Counsel in the Department of Justice had informed the archivist that there could be no legitimate claim of executive privilege by a former president against the incumbent president. Executive privilege adhered to the office of the presidency as exercised by the incumbent president and could only be asserted by the executive branch relative to the other two branches of government and not to other members of the executive branch itself.*

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As you are no doubt aware, NARA had ongoing communications with the former President’s representatives throughout 2021 about what appeared to be missing Presidential records, which resulted in the transfer of 15 boxes of records to NARA in January 2022. In its initial review of materials within those boxes, NARA identified items marked as classified national security information, up to the level of Top Secret and including Sensitive Compartmented Information and Special Access Program materials. NARA informed the Department of Justice about that discovery, which prompted the Department to ask the President to request that NARA provide the FBI with access to the boxes at issue so that the FBI and others in the Intelligence Community could examine them. On April 11, 2022, the White House Counsel’s Office—affirming a request from the Department of Justice supported by an FBI letterhead memorandum—formally transmitted a request that NARA provide the FBI access to the 15 boxes for its review within seven days, with the possibility that the FBI might request copies of specific documents following its review of the boxes.

Although the Presidential Records Act (PRA) generally restricts access to Presidential records in NARA’s custody for several years after the conclusion of a President’s tenure in office, the statute further provides that, “subject to any rights, defenses, or privileges which the United States or any agency or person may invoke,” such records “shall be made available . . . to an incumbent President if such records contain information that is needed for the conduct of current business of the incumbent President’s office and that is not otherwise available.” Those conditions are satisfied here. As the Department of Justice’s National Security Division explained to you on April 29, 2022:

There are important national security interests in the FBI and others in the Intelligence Community getting access to these materials. According to NARA, among the materials in the boxes are over 100 documents with classification markings, comprising more than 700 pages. Some include the highest levels of classification, including Special Access Program (SAP) materials. Access to the materials is not only necessary for purposes of our ongoing criminal investigation, but the Executive Branch must also conduct an assessment of the potential damage resulting from the apparent manner in which these materials were stored and transported and take any necessary remedial steps. Accordingly, we are seeking immediate access to these materials so as to facilitate the necessary assessments that need to be conducted within the Executive Branch.

. . . .

It has now been four weeks since we first informed you of our intent to provide the FBI access to the boxes so that it and others in the Intelligence Community can conduct their reviews. Notwithstanding the urgency conveyed by the Department of Justice and the reasonable extension afforded to the former President, your April 29 letter asks for additional time for you to review the materials in the boxes “in order to ascertain whether any specific document is subject to privilege,” and then to consult with the former President “so that he may personally make any decision to assert a claim of constitutionally based privilege.” Your April 29 letter further states that in the event we do not afford you further time to review the records before NARA discloses them in response to the request, we should consider your letter to be “a protective assertion of executive privilege made by counsel for the former President.”

. . . .

The Assistant Attorney General has advised me that there is no precedent for an assertion of executive privilege by a former President *against an incumbent President* to prevent the latter from obtaining from NARA Presidential records belonging to the Federal Government where “such records contain information that is needed for the conduct of current business of the incumbent President’s office and that is not otherwise available.”

To the contrary, the Supreme Court’s decision in *Nixon v. Administrator of General Services* (1977) strongly suggests that a former President may not successfully assert executive privilege “against the very Executive Branch in whose name the privilege is invoked.” In *Nixon v. GSA*, the Court rejected former President Nixon’s argument that a statute requiring that Presidential records from his term in office be maintained in the custody of, and screened by, NARA’s predecessor agency—a “very limited intrusion by personnel in the Executive Branch sensitive to executive concerns”—would “impermissibly interfere with candid communication of views by Presidential advisers.” The Court specifically noted that an “incumbent President should not be dependent on happenstance or the whim of a prior President when he seeks access to records of past decisions that define or channel current governmental obligations.” . . .

It is not necessary that I decide whether there might be *any* circumstances in which a former President could successfully assert a claim of executive privilege to prevent an Executive Branch agency from having access to Presidential records for the performance of valid executive functions. The question in this case is not a close one. The Executive Branch here is seeking access to records belonging to, and in the custody of, the Federal Government itself, not only in order to investigate whether those records were handled in an unlawful manner but also, as the National Security Division explained, to “conduct an assessment of the potential damage resulting from the apparent manner in which these materials were stored and transported and take any necessary remedial steps.” These reviews will be conducted by current government personnel who, like the archival officials in *Nixon v. GSA*, are “sensitive to executive concerns.” And on the other side of the balance, there is no reason to believe such reviews could “adversely affect the ability of future Presidents to obtain the candid advice necessary for effective decisionmaking.” To the contrary: Ensuring that classified information is appropriately protected, and taking any necessary remedial action if it was not, are steps essential to preserving the ability of future Presidents to “receive the full and frank submissions of facts and opinions upon which effective discharge of [their] duties depends.”

Because an assertion of executive privilege against the incumbent President under these circumstances would not be viable, it follows that there is no basis for the former President to make a “protective assertion of executive privilege,” which the Assistant Attorney General informs me has never been made outside the context of a congressional demand for information from the Executive Branch. Even assuming for the sake of argument that a former President may under some circumstances make such a “protective assertion of executive privilege” to preclude the Archivist from complying with a disclosure otherwise prescribed by 44 U.S.C. § 2205(2), there is no predicate for such a “protective” assertion here, where there is no realistic basis that the requested delay would result in a viable assertion of executive privilege against the incumbent President that would prevent disclosure of records for the purposes of the reviews described above. Accordingly, the only end that would be served by upholding the “protective” assertion here would be to delay those very important reviews.

I have therefore decided not to honor the former President’s “protective” claim of privilege. *. . .* For the same reasons, I have concluded that there is no reason to grant your request for a further delay before the FBI and others in the Intelligence Community begin their reviews. Accordingly, NARA will provide the FBI access to the records in question as requested by the incumbent President, beginning as early as Thursday, May 12, 2022.

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1. Excerpt taken from Debra Steidel Wall, Letter to Evan Corcoran (May 10, 2022). [↑](#footnote-ref-1)