

Executive Privilege

Roman Mars [00:00:00] Every president has secrets, and that includes Warren G. Harding.

Elizabeth Joh [00:00:05] Harding doesn't rank as one of the most important presidents in American history. In fact, if you know anything about the 29th president, it's probably as an answer to a trivia question, such as "Which president died in office at the Palace Hotel in 1923?" Harding's secret--and it wasn't especially well-kept one--was that he was something of a philanderer. In 1927, Nan Britton published a tell all book that described Harding's extramarital affair with her. And Britton was 31 years younger than Harding at the time. Britton also claimed that Harding was her daughter's father, and DNA tests in 2015 confirm that she was right. Nan Britton wasn't alone either. Harding had another long running extramarital affair with the wife of a friend, Carrie Fulton Phillips. The affair ended before Harding became president. But when Republicans nominated Harding to run for the 1920 election, Phillips threatened to release Harding's love letters he'd written to her. The Republican Party paid Phillips and her husband \$20,000 and sent them on a trip abroad. Harding apparently enjoyed writing letters to his paramours, but the public didn't see them during his presidency. And when a historian tried to publish the letters Harding had written to Phillips, the Harding family sued. That lawsuit was settled, and the Harding family agreed to donate the letters to the Library of Congress on the condition that they would be sealed for 50 years until 2014. Harding's love letters, about 900 pages in all, turn out to be pretty racy. Harding wrote in code in case his letters were ever discovered. He called a certain part of his anatomy "Jerry," as in this love letter Harding wrote to Phillips on August 20th, 1918: "Wish I could take you to Mt. Jerry. Wonderful spot. Not in the geographies, but a heavenly place."

Roman Mars [00:02:09] God.

Elizabeth Joh [00:02:12] Here's another one from Christmas Eve, 1910. "There are no words to say the full extent of my love for you. A mad, tender, devoted, ardent, eager, passion-wild, jealous, reverent, wistful, hungry, happy love. Unspeakably unendingly worshiping, unconsciously exalting, unwillingly, exacting, involuntarily excluding, and everlastingly unforsaken." You can see why his family wanted to keep the letters a secret. The letters would have been scandalous, but they didn't relate to Harding's role as president. Although Nan Britton--that's the other woman--claimed that she and Harding had trysts in a small closet in the West Wing. Many presidents have had secrets like Harding's, but others have had secrets that were more central to their duties as president, like things presidents have said or written down in conversations with senior advisers about decisions that are part of the job. Presidential secrecy becomes a legal and constitutional matter when another branch of government--either the courts or Congress--demands that a president turn over information that might be relevant to a proceeding or an investigation. Who wins in these situations, and what does the Constitution have to say about it? The ability of the president to keep some communications secret is a principle known as "executive privilege." We haven't seen Trump tweet too much about this. It's not a term that lends itself to tweeting, but it may become an important part of the fight to release the entirety of the Mueller report.

Roman Mars [00:03:53] Let's take a look. This is What Trump Can Teach Us About Con Law--an ongoing series of indefinite length and sporadic release where we take the tweets of the 45th President of the United States and his critics and use them to examine our Constitution like we never have before. Our music is from Doontree Records. Our

professor and neighbor is Elizabeth Joe. And I'm your fellow student and host, Roman Mars.

Elizabeth Joh [00:04:44] The idea behind executive privilege is that a president is saying something like, "You can't force me to disclose this information because doing so will interfere with my presidential duties." The specific term "executive privilege" was coined during Eisenhower's administration. But presidents going back to Washington have said they needed to keep some information secret. For instance, in 1792, George Washington refused to give Congress information about the negotiation of the Jay Treaty. Congress protested formally, but they took no further action. So why does this secrecy exist at all? There are good reasons on both sides to preserve and to fight this kind of presidential secrecy. The anti-secrecy view is that in a democracy, we need to have open government, and that includes the White House. The pro-secrecy view argues that presidents need to keep some things confidential in order to perform their constitutional duties. There are different types of privilege that different White Houses have claimed over time. But the one that's relevant here is the one that relates to confidential communications between the president and his advisers over presidential decisions. And presidents tend to care about this a lot. When he was president, Eisenhower said, "Any man who testifies as to the advice he gave me won't be working for me that night." You can see this tension raised repeatedly throughout American presidential history. If executive privilege is so important to the president and so controversial, what does federal law say about it? Nothing. No federal statute defines the extent of executive privilege. What about the Constitution? Nothing there either. And in fact, secrecy is mentioned in the Constitution, but it's actually a reference to Congress. Article I--the part that refers to Congress--says that "Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy." It took until the 1970s for the Supreme Court to say anything definitive about executive privilege. Most people know that the Watergate scandal led to the downfall of Nixon's presidency. Many people may not know that a fight over executive privilege was at the center of it. So, here's a refresher. On June 17th, 1972, five men were arrested for burglarizing the offices of the Democratic National headquarters inside the Watergate complex in Washington, D.C. It was quickly discovered later that the burglars were connected to Nixon's reelection campaign. Because there were suspicions that the president might have known about the break in and might have been involved in a cover up, there was intense pressure to find out more. This included the claim that there was a secret taping system in the Oval Office. A special counsel was appointed--Archibald Cox. In 1973, the special counsel asked a federal court for a subpoena--that's an order for evidence--demanding Nixon turn over any tapes related to Watergate. Nixon's response was to fire the special counsel. By 1974, there was mounting pressure on Nixon. In March of that year, a grand jury indicted seven people, all of whom were connected to Nixon in one way or another, on charges related to Watergate. Nixon himself wasn't charged, but rather he was named as an "unindicted coconspirator." Remember, it's not totally clear whether you can indict a sitting president. Another special counsel was appointed, Leon Jaworski, and he asked the Court to order Nixon to turn over the Watergate tapes. Why? Because these would be relevant to the criminal proceedings. This time, Nixon refused and said he didn't have to do so because of executive privilege. Because the case and the party involved were so important, the Supreme Court quickly took up the case and decided it on August 6th, 1974. You're probably familiar with the outcome. Nixon had to turn over the tapes. The tapes, released just a few weeks after the Supreme Court decision, were pretty damning. The president had obstructed justice by ordering the FBI not to investigate the Watergate scandal. Three days after that, Nixon resigned. So, what does the Supreme Court say about executive privilege in the case of *United States versus Nixon*? Well, most importantly, the Supreme Court says that

executive privilege--the power of the president to keep some communications secret--was based in the Constitution, even if the Constitution says nothing about it. The Court said that the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. The idea here is that this secrecy is necessary for the president to carry out his responsibilities under the Constitution. But that power, according to the Supreme Court, is an absolute. In other words, it wasn't enough for Nixon to scream, "Executive privilege," and refuse to comply with the Court order. The Supreme Court said that executive privilege sometimes could be overcome when there were more important interests at stake. In this case, the proceedings were relevant to a federal criminal proceeding, and the interest in resolving that outweighed any need for Nixon to keep these tapes secret.

Roman Mars [00:10:19] So basically, it took until the 1970s for the Supreme Court to recognize that executive privilege exists and that it's based in the Constitution. Even then, that recognition wasn't enough to save Nixon from resigning in disgrace.

Elizabeth Joh [00:10:33] So does the Nixon case settle executive privilege? Hardly. There haven't been that many court cases on executive privilege. These disputes tend to be played out as a political, not a legal matter. And the Nixon case involved executive privilege and a criminal case, not, for example, a request by a congressional committee. And the Nixon case also just involves one kind of privilege that might fall under this concept. So, the best we can say is that the whole topic remains pretty murky.

Roman Mars [00:11:05] Now, let's get to Trump.

Elizabeth Joh [00:11:06] On March 22nd, Special Counsel Robert Mueller submitted his long-awaited report to Attorney General William Barr. Now, remember, Mueller's task was to investigate the extent of Russian interference in the 2016 election and any possible interference with that investigation by President Trump. Remember how Trump felt about it. What was that phrase he used?

Roman Mars [00:11:31] "Witch hunt."

Elizabeth Joh [00:11:31] Right. He tweeted out that phrase more than 80 times, at least by my count. So, on March 24th, just two days--

Roman Mars [00:11:40] I'm so sorry you had to count.

Elizabeth Joh [00:11:43] That's what I do. On March 24th, just two days after Mueller submitted his report, the attorney general sent a publicly released letter to the chairman and ranking members of the House and Senate committees on the Judiciary. The letter was four pages long. In it, Barr said that he was writing to let Congress know about what he called the "principal conclusions" of the Mueller report. He didn't send the full report. First, about Russian interference. The attorney general's letter quotes the Mueller report as saying, quote, "The investigation did not establish that members of the Trump campaign conspired or coordinated with the Russian government in its election interference activities." Again, Barr here is quoting Mueller's report. The second part of the four-page letter is more ambiguous. Barr says that Mueller didn't act like an ordinary prosecutor and draw a conclusion about whether Trump might have engaged in obstruction. Instead, we're told that Mueller set up the evidence and left the legal conclusion unresolved. If there's an explanation by Mueller why he did this, Barr doesn't tell us in the letter. Then we get to the most interesting and controversial part of the letter. Barr says that he, as attorney general,

concluded, along with Deputy Attorney General Rod Rosenstein, that there wasn't enough evidence to conclude that Trump committed the crime of obstruction of justice. This has nothing to do with impeachment, mind you, just whether anything Trump did constitutes a crime. Barr tells us that he and Rosenstein did not reach their conclusion because of any constitutional questions about whether you can indict a sitting president. If you read the attorney general's letter, you'll notice that it only quotes the Mueller report a couple of times. Barr says his letter gives the principal conclusions of the report. It's not the actual report. And it's been reported that the Mueller report is somewhere between 304 hundred pages. And Barr and Rosenstein tell Congress that they have concluded that there isn't enough evidence that Trump committed obstruction. The letter does quote the Mueller report for this interesting observation: "While this report does not conclude that the president committed a crime, it also does not exonerate him." At 1:42 that afternoon, Trump tweeted, "No collusion. No obstruction. Complete and total exoneration. Keep America great." The problem with Barr's letter, which became increasingly clear in the days that followed, was: Well, what about the report? What does the Mueller report actually say? And who is going to be able to read that report? The day after the attorney general's letter was released, six chairs of important House committees demanded that Barr release the entire Mueller report by April 2nd. Barr responded with his own letter. The gist of it? No, he wasn't going to release the entire report. Congress would receive a report but a redacted one. In other words, a report with parts blacked out. In his letter, Barr tells us the reasons why some parts will be redacted, including because some of the information might be related to secret grand jury information. Democrats in the House were unhappy with this response. And on April 3rd, the House Judiciary Committee authorized its chairman, Jerry Nadler, to subpoena the Mueller report. This means that the chairman would order the report to be issued to the committee. At the moment, Nadler hasn't issued any subpoenas, and the Justice Department plans to release a redacted version of the Mueller report on April 18th. And this is where executive privilege comes in. House Democrats have made it clear that they want to see the whole thing. And it doesn't look like Barr is going to be giving them the full report. If the House Judiciary Committee were to demand the entire report, Trump might assert executive privilege and claim that parts of the report must remain secret for that reason. At a hearing on Capitol Hill on April 9th, the attorney general said he had no plans to assert executive privilege on behalf of Trump. It's not entirely clear what that means, and it's certainly not a promise that Trump won't assert the privilege. Trump's own views on the subject of change, too. In March, he said he was looking forward to the release of the report. He told journalists, "Let it come out. Let the people see it. That's up to the attorney general." But once House Democrats began to demand its full release, Trump changed his tune. On April 4th, he tweeted, "There is nothing we can ever give to the Democrats that will make them happy. This is the highest level of presidential harassment in the history of our country." And four days later, he tweeted, "The Democrats will never be satisfied, no matter what they get, how much they get, or how many pages they get. It will never end. But that's the way life goes." A subpoena for the Mueller report would likely lead to a court battle. And the issue might be whether Trump has the ability to keep parts of the Mueller report secret because of executive privilege. And remember, that doesn't mean he has an absolute right to secrecy. It would be up to the court to decide. And clashes over executive privilege are not likely to end with the Mueller report. The Democratic majority in the House of Representatives has made it clear it intends to investigate Trump in a lot of areas, including things like Trump's tax returns and any inappropriate influence in foreign policy decisions. Remember, being in the majority means that the Democrats are in charge of House committees that are supposed to exercise oversight over the executive branch, and the White House is preparing for the fight. Pat Cipollone is the White House counsel, and he's already hired more than a dozen lawyers to work on potential assertions of executive privilege. On April

15th--that's just a couple of days before the Mueller report is scheduled to be released--Trump tweeted, "The Mueller report, which was written by 18 angry Democrats who also happened to be Trump haters and Clinton supporters, should have focused on the people who spied on my 2016 campaign and others who fabricated the whole Russia hoax. That is, never forget the crime. Since there was no collusion, why was there any investigation in the first place? Answer: Dirty Cops, Dems, and Crooked Hillary." One thing you can say about Harding--although Harding ranks pretty low among presidents--we can give him some credit for self-knowledge. He once wrote, "I am not fit for this office and should never have been here."

Roman Mars [00:18:51] It is fascinating to me that executive privilege is used as a term as if it means something in the Constitution when it is really just a thing that is surmised by looking at parts of the Constitution.

Elizabeth Joh [00:19:06] Right. And that's something that happens in constitutional law all the time. So, you know, one of the ironies about a lot of constitutional law is you can't actually find it by looking at the text of the Constitution. It depends on court interpretation. And the court's basic idea here is that, you know, if the president's going to carry out the duties that are spelled out in the text of the Constitution, there are some things that we have to assume are necessary to carry out those duties. And, you know, you can disagree with this, but the court has said part of that includes being able to keep some things confidential. And the basic idea here is that if you have an advisor to the president, that advisor may be fearful of being totally frank and honest with the president if they know that they're going to have to testify about, you know, whatever they said. There's some controversial aspect in how they made a particular policy decision. So, remember, I mean, one of the things that, again, we don't know what the contours are of executive privilege exactly because so much of this has been played out as a political matter not a legal matter. But it's pretty clear personal things the president wants to keep secret--those aren't part of executive privilege. Executive privilege has been claimed more broadly by different administrations than, for example, Congress has recognized. And you might ask yourself, "Well, how can that be? How can all of this be left kind of up in the air and murky?" And it's because a lot of times this is part of a back and forth between, let's say, Congress and the White House as they give us this material. And there's often a negotiation process here. I think what seems to raise the stakes here is that it has this kind of Nixonian context. You know, did the president actually engage in any activities that might constitute the very same crime that led to Nixon's downfall--obstruction of justice? And, you know, we don't really have anything at the moment. The public doesn't have anything, and Congress doesn't have anything other than the attorney general--President Trump's own handpicked attorney general--his say so. "Nope, we saw it. Trust us, there's nothing there."

Roman Mars [00:21:11] Yeah. Can Attorney General Barr redact things without invoking executive privilege, or is that the authority by which he can redact things?

Elizabeth Joh [00:21:20] No. So, he has spelled out a couple of different categories of things he's going to redact. One of them might be based on executive privilege. Others may be things that have nothing to do with executive privilege--for example, secret grand jury proceedings, right? So, there is a dispute between the House Judiciary Committee and the Department of Justice about whether or not Congress can see that. Maybe Congress could see it and the public can't see it. That's one way to resolve that. He's also put it under another category, which was, like, protecting the privacy interests of kind of tangential persons. That's not executive privilege. Wasn't clear exactly what he meant in the letter when he said that. So, he already has stated a couple of bases other than

executive privilege. But I think the kind of interesting constitutional question that's going to come up with the Mueller report will be: Well, so far, they haven't said anything about executive privilege, but when the report is issued--presumably on April 18th--will that be one of the categories?

Roman Mars [00:22:20] Will it be annotated in such a way that it is redacted for these reasons?

Elizabeth Joh [00:22:33] Presumably. Yes.

Roman Mars [00:22:34] Yeah. So, it would just say, "This is redacted due to executive privilege." That'll be interesting to see what happens. So, I should specify at this point--we're recording this on Monday. The report is supposed to be released--whatever version of the report--on Thursday.

Elizabeth Joh [00:22:52] And if you go on Amazon, apparently, you can already buy it.

Roman Mars [00:22:55] You can preorder it. It can show up at your doorstep at midnight like Harry Potter. So, we do not know right now the attorney general's summary. They're not really dealing with executive privilege. And the redactions could or could not deal with executive privilege, although we expect it to in some capacity.

Elizabeth Joh [00:23:15] Let's think of it this way. The House Judiciary Committee has already asked for a full report. So, by sending a redacted report, in essence, the attorney general is not doing what the committee has asked for. And so, the only way presumably to say, "Well, why aren't you giving us a full report?" would be to say, "Not only can I not give you these other parts because they're related to secret grand jury proceedings but also executive privilege. The president--not me--has invoked executive privilege over these communications. And since these parts of the report deal with, you know, these communications that people have had with the president, we're not going to release them."

Roman Mars [00:23:53] Can you give me an example of another power like executive privilege that is not explicitly in the Constitution but is interpreted as such because of other parts of the Constitution?

Elizabeth Joh [00:24:04] The House has a subpoena power, right? Why do they have the subpoena power? They have subpoena power because there's just a well-recognized case law--court decision making--on, well, if the House is going to exercise its constitutional duties, it's got to have the subpoena power.

Roman Mars [00:24:21] But there's nothing in a constitution that says Congress has subpoena power. Okay. Well, there you go. That's an example. Oh, it's so fascinating.

Elizabeth Joh [00:24:29] The whole structure of our understanding of how the process works is not just the text. It's just, like, our entire lived experience with our institutions, what the courts have said about the law, the way institutions should run together--work together--and that's why the institutions matter.

Roman Mars [00:24:48] If somebody comes on Twitter--you know, kind of halfcocked--and says, "Executive privilege isn't even in the Constitution!" And you go, "Well, actually subpoena power isn't in the Constitution either." I mean, like, either side of this fight--this particular fight--it's super constitutional in some way or whatever it is.

Elizabeth Joh [00:25:06] There are implied readings of the Constitution.

Roman Mars [00:25:09] Well, cool. I like that. Cool! Well, thanks.

Elizabeth Joh [00:25:13] Thanks.

Roman Mars [00:25:13] Welcome back. This show is produced by Elizabeth Joh and me, Roman Mars. You can find us online at trumpconlaw.com. All the music in Trump Con Law is provided by Doomtree Records, the Midwest Hip Hop Collective. You can find out more about Doomtree Records, get merch, and learn about current tours at doomtree.net. We are a proud member of Radiotopia from PRX, supported by listeners just like you.