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# What is Executive Privilege? Can Trump Invoke it to Block Bolton's Testimony?

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What is Executive Privilege? Can Trump Invoke it to Block Bolton's Testimony?

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Executive privilege is a privilege inferred from the Constitution by the Supreme Court of the United States.[1] (applewebdata://A4B9CAD7-9EB6-4394-AA09-D65B0FB5A7E6#\_edn1) The Court acknowledge the privilege after President Nixon invoked it in response to a subpoena by a special prosecutor during a criminal trial following the Watergate scandal.[2] (applewebdata://A4B9CAD7-9EB6-4394-AA09-D65B0FB5A7E6#\_edn2) While the United States Constitution has no explicit mention of executive privilege[3] (applewebdata://A4B9CAD7-9EB6-4394-AA09-D65B0FB5A7E6#\_edn3)the Court's ultimate decree was that the President does not have complete unqualified privilege as to subpoena's issued as a part of a criminal matter, but upon invoking executive privilege creates a presumption of privilege.[4] (applewebdata://A4B9CAD7-9EB6-4394-AA09-D65B0FB5A7E6#\_edn4) However, this presumption of privilege can be rebutted by a sufficient showing that the privileged

information is essential to the justice of the criminal case.[5] (applewebdata://A4B9CAD7-9EB6-4394-AA09-D65B0FB5A7E6#\_edn5) The doctrine of executive privilege, due to its novelty and infrequent usage, has been a frequent subject for analysis and debate among legal scholars.[6] (applewebdata://A4B9CAD7-9EB6-4394-AA09-D65B0FB5A7E6#\_edn6)

Although there have been many other notable and highly dramatic events since the beginning of the impeachment proceedings against President Trump, a recent and potentially highly important one is the willingness of John Bolton, the former National Security Advisor, to testify in the Senate trial deliberating Trump's impeachment.[7] (applewebdata://A4B9CAD7-9EB6-4394-AA09-D65B0FB5A7E6#\_edn7) There is rumor now that President Trump may invoke executive privilege in an effort to prevent the testimony.[8] (applewebdata://A4B9CAD7-9EB6-4394-AA09-D65B0FB5A7E6#\_edn8)

It is important to point out some important distinctions between the circumstances under which Nixon invoked executive privilege and those in which Trump may do it. First, Nixon was subpoenaed as part of criminal proceeding in Federal Court, and he invoked the executive privilege to attempt to avoid producing the documents requested by the subpoenas.[9] (applewebdata://A4B9CAD7-9EB6-4394-AA09-D65B0FB5A7E6#\_edn9) If Trump were to attempt to invoke executive privilege in this case, it would be to prevent a witness from given testimony at President Trump's impeachment trial.[10] (applewebdata://A4B9CAD7-9EB6-4394-AA09-D65B0FB5A7E6#\_edn10) Another important distinction is that in President Nixon's case, it was to prevent the production of documents that the president clearly did not want to produce,[11] (applewebdata://A4B9CAD7-9EB6-4394-AA09-D65B0FB5A7E6#\_edn11) in this case, Bolton has expressed his willingness to testify, and so President Trump's attorney's would need to invoke the privilege for someone else who does not have the desire to conceal the information.[12] (applewebdata://A4B9CAD7-9EB6-4394-AA09-D65B0FB5A7E6#\_edn12)

Because of the novelty of the situation, and the ambiguity surrounding the exact limits of a president's executive privilege, we can expect that if the President's lawyers decide to pursue this strategy, it will pose a difficult and potentially appealable question for the courts. Some legal scholars predict that attempts to use Bolton's testimony would fail,[13] (applewebdata://A4B9CAD7-9EB6-4394-AA09-D65B0FB5A7E6#\_edn13) others seem less sure but express hope that the Senate will choose not to bow to such privilege.[14] (applewebdata://A4B9CAD7-9EB6-4394-AA09-D65B0FB5A7E6#\_edn14)

Ultimately, no one can predict exactly what's going to happen if President Trump's attorneys decide to invoke executive privilege.[15] (applewebdata://A4B9CAD7-9EB6-4394-AA09-D65B0FB5A7E6#\_edn15) It will be a novel question of law, whose result could have far reaching implications about the power of the executive. Of course, the question, and this blogpost, may prove moot, depending on the Senate's vote on whether to allow witnesses at all.[16] (applewebdata://A4B9CAD7-9EB6-4394-AA09-D65B0FB5A7E6#\_edn16)

[1] (applewebdata://A4B9CAD7-9EB6-4394-AA09-D65B0FB5A7E6#\_ednref1) *United States v. Nixon*, 418 U.S. 683 (1974) (Whatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Art. II powers, the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings.).

[2] (applewebdata://A4B9CAD7-9EB6-4394-AA09-D65B0FB5A7E6#\_ednref2) *Id.* at 687-88.

[3] (applewebdata://A4B9CAD7-9EB6-4394-AA09-D65B0FB5A7E6#\_ednref3) U.S. Const.

[4] (applewebdata://A4B9CAD7-9EB6-4394-AA09-D65B0FB5A7E6#\_ednref4) *Nixon*, 418 U.S. at 713.

[5] (applewebdata://A4B9CAD7-9EB6-4394-AA09-D65B0FB5A7E6#\_ednref5) *Id.* at 713-14.

[6] (applewebdata://A4B9CAD7-9EB6-4394-AA09-D65B0FB5A7E6#\_ednref6) See, e.g., Keith Borman, *Policing the Executive Privilege*, 5 U. Mich. J.L. (1972); Archibald Cox, *Executive Privilege*, 122 U. Pa. L. Rev. 1383 (1974); Sam Ervin Jr., *Controlling "Executive Privilege"*, 20 Loy. L. Rev. (1974).

[7] (applewebdata://A4B9CAD7-9EB6-4394-AA09-D65B0FB5A7E6#\_ednref7) Nicholas Fandos & Michael Schmidt, *Bolton Is Willing to Testify in Trump Impeachment Trial, Raising Pressure for Witnesses*, N.Y. Times, Jan. 7, 2020, at A1.

[8] (applewebdata://A4B9CAD7-9EB6-4394-AA09-D65B0FB5A7E6#\_ednref8) David Savage, *Trump's Attorneys Talking Up Executive Privilege*, L.A. Times, Jan. 28, 2020, at A10.

[9] (applewebdata://A4B9CAD7-9EB6-4394-AA09-D65B0FB5A7E6#\_ednref9) *Nixon*, 418 U.S. at 687-88.

[10] (applewebdata://A4B9CAD7-9EB6-4394-AA09-D65B0FB5A7E6#\_ednref10) Savage, *supra* note 8.

[11] (applewebdata://A4B9CAD7-9EB6-4394-AA09-D65B0FB5A7E6#\_ednref11) *Nixon*, 418 U.S. at 687-88.

[12] (applewebdata://A4B9CAD7-9EB6-4394-AA09-D65B0FB5A7E6#\_ednref12) Fandos & Schmidt, *supra* note 7.

[13] (applewebdata://A4B9CAD7-9EB6-4394-AA09-D65B0FB5A7E6#\_ednref13) See, e.g., Harold Hoh, Rosa Hayes, Annie Himes, Dana Khabbaz, Micheal Loughlin & Mark Stevens, *Executive Privilege Cannot Block Bolton's Testimony*, Just Security (Jan. 27, 2020), <https://www.justsecurity.org/68288/executive-privilege-cannot-block-boltons-testimony/>.

[14] (applewebdata://A4B9CAD7-9EB6-4394-AA09-D65B0FB5A7E6#\_ednref14) See, e.g., Jonathan Shaub, *Executive Privilege Is No Reason for the Senate to Ignore John Bolton*, LawFare (Jan. 27, 2020 12:45pm), <https://www.lawfareblog.com/executive-privilege-no-reason-senate-ignore-john-bolton>.

[15] (applewebdata://A4B9CAD7-9EB6-4394-AA09-D65B0FB5A7E6#\_ednref15) *Id.*

[16] (applewebdata://A4B9CAD7-9EB6-4394-AA09-D65B0FB5A7E6#\_ednref16) Bob Fredericks, Steven Nelson & Ebony Bowden, *Senate Expected to Block New Witnesses in Friday Impeachment Session*, N.Y. Post (Jan. 31, 2020 12:39pm), <https://nypost.com/2020/01/31/senate-expected-to-block-new-witnesses-in-friday-impeachment-session/>.

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