



# Executive Privilege and the January 6 Investigations: The Presidential Records Act and Relevant Judicial Considerations

September 20, 2021

As discussed in this [companion Sidebar](#), a former President retains the right to invoke executive privilege to protect covered communications that were made while in office. The strength of those protections, however, [erode](#) over time and weaken further when not supported by the incumbent President. This Sidebar first discusses how these basic principles are reflected in the [Presidential Records Act](#) (PRA) and its implementing regulations, which set forth rules for the management and disclosure of a former President’s records by the National Archives. The Sidebar then discusses how both the PRA and constitutional considerations could be relevant to a brewing legal dispute between former President Trump and the House Select Committee to Investigate the January 6th Attack on the United States Capitol (Select Committee) over access to the former President’s records.

## The PRA and the Role of the Incumbent President

Both a former President’s authority to invoke the presidential communications privilege and the importance of the incumbent President’s position to that claim are underscored by the [PRA](#). The PRA establishes a statutory framework governing the retention and disclosure of [presidential records](#). [Under the law](#), when any President leaves office his official records remain the property of the federal government and are transferred to the National Archives. The PRA authorizes the outgoing President to [restrict access](#) to various types of documents, including those that involve “confidential communications ... between the President and the President’s advisers,” for up to 12 years after leaving office, at which point the records generally become publicly available. At the expiration of the restricted access period, the law permits former Presidents, as well as the incumbent President, to [invoke](#) the presidential communications privilege to prevent public disclosure.

The PRA establishes different rules for Congress, which is accorded [special access](#) to presidential records held by the National Archives *at any time* after a President leaves office. If any [congressional committee](#) requests presidential records on a “matter within its jurisdiction” that are “needed for the conduct of its business and that is not otherwise available,” the law provides that the National Archives “shall” make the records available. However, the provision also preserves the right of former Presidents to assert privilege

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LSB10643

claims by [providing](#) that disclosure is “subject to any rights, defenses, or privileges which the United States or any agency or person may invoke.”

The language of the PRA was initially unclear on the question of what role an incumbent President plays in a privilege assertion by a former President. As a result, different Presidents adopted different ways of implementing the law through executive order. For example, President George W. Bush [issued an executive order instructing](#) that “the Archivist shall not permit access to the records by a requester unless and until ... the former President and the incumbent President agree to authorize access to the records or until so ordered by a final and nonappealable court order.” President Barack Obama [revoked](#) that order, and instead gave the Archivist discretion to determine whether to uphold a claim of privilege by a former President. Congress eliminated this inconsistent treatment by [amending](#) the law in 2014 to give the incumbent President final say, at least within the executive branch, as to whether the Archivist may disclose the former President’s documents. Specifically, the law [provides](#) that if the incumbent President does not uphold the former President’s privilege claim, the Archivist is directed—subject to a waiting period—to release the record absent a court order directing the Archivist to do otherwise. The required waiting period provides the former President with the opportunity to litigate the issue, and possibly obtain such a court order.

The 2014 statutory alterations appear to apply only to *public* disclosures. The congressional access provision was not amended. However, the National Archives has issued regulations governing congressional requests; the regulations effectively mirror the 2014 changes and provide the incumbent President with control over his Administration’s treatment of a former President’s records. Under the [regulations](#), “[i]f the incumbent President does not uphold the claim asserted by the former President ... the Archivist discloses the presidential record 60 calendar days after the Archivist received notification of the claim ... unless a court order in an action in any Federal court directs the Archivist to withhold the record...” The regulations therefore create a default rule of release when the incumbent President does not support a former President’s privilege claim, but provide the former President with the opportunity to obtain a court order in order to block disclosure.

## Legal and Judicial Considerations Specific to the January 6 Investigations

Although disputes over congressional access to records of former Presidents have arisen in the past, none appear to have required resolution by the judiciary. In one prominent modern example, former President Bill Clinton chose not to assert executive privilege during a House committee investigation into [controversial pardons](#) made at the end of his Administration. The incumbent President, George W. Bush, was less amenable to disclosing the former President Clinton’s internal pardon communications. Although President Bush did not invoke executive privilege, his Administration [withheld documents](#) from the committee, citing harm to the institutional interests of the presidency. Ultimately, further confrontation appears to have been avoided when the National Archives [inadvertently](#) disclosed many of the documents the White House had intended to withhold. The White House asked the committee to return those documents, but that request was denied.

Any dispute involving Congress, President Biden, and former President Trump could be resolved through negotiation and compromise rather than by resorting to litigation. However, as one federal district court judge has expressed, “a former President’s incentives to accommodate Congress are greatly diminished compared to those of an incumbent,” because a former President “no longer needs Congress’s help to fund government or advance his policy priorities.”

Looking forward, there are various ways in which this nascent disagreement over congressional access to Trump Administration records could make its way into court. Given the former President’s statements, perhaps the most likely scenario (and with some resemblance to [Trump v. Mazars](#)) would be if former President Trump sought a court order blocking the disclosure of those records, asserting they are protected

by the presidential communications privilege, or perhaps some other applicable privilege. With respect to presidential records in the possession of the National Archives, the PRA and its [implementing regulations](#) require that a former President assert any “constitutionally based privilege against disclosing” a record within 30 days of being given notice of the congressional request, and then [explicitly](#) provide the federal courts with jurisdiction over an “action initiated by the former President asserting” a violation of “the former President’s rights or privileges.” It is also possible to see litigation initiated by a congressional committee. If, for example, the Select Committee’s requests go unfulfilled, it could choose to issue a subpoena to compel production. If that subpoena goes unanswered, it could then seek authorization from the House to enforce its subpoena in [court](#).

If the dispute reaches the judiciary, a court would likely have to navigate significant threshold questions before reaching the merits. A reviewing court may also have to determine whether the records and communications in question fall within the protective scope of the presidential communications privilege. Do they, for example, relate to the President’s performance of the “responsibilities . . . of his office?” If so, for those documents that are determined to be privileged, the court would likely apply some form of balancing test (as the courts did in the cases discussed in this [companion Sidebar](#)) to determine whether the congressional committee was able to make a sufficient showing of need to overcome the asserted privilege.

In light of the principles discussed above, it appears that an important factor in any such balancing could be whether President Biden supports the former President’s privilege claim. It is therefore significant that President Biden has already [signaled](#) his [reluctance](#) to support the use of executive privilege to inhibit ongoing House and Senate investigations of former President Trump’s attempts to use the Department of Justice (DOJ) to overturn the results of the 2020 election. In [recent letters](#) sent to a number of former Trump Administration officials who were asked to sit for transcribed interviews before House and Senate committees, Attorney General Merrick Garland authorized the officials to “provide unrestricted testimony to the committees, irrespective of potential privilege.” The Attorney General also stated that

President Biden has decided that it would not be appropriate to assert executive privilege with respect to communications with former President Trump and his advisors and staff on matters related to the scope of the Committees’ proposed interview, notwithstanding the view of former President Trump’s counsel that executive privilege should be asserted to prevent testimony regarding these communications.

The letters apply to testimony by the identified former officials and do not address presidential records or the Select Committee’s investigation into the disruption of Congress’s counting of electoral votes on January 6, 2021. The letters do not foreclose President Biden from concluding that executive privilege may be appropriately invoked in other circumstances. Nevertheless, the [letters](#) conclude that the “extraordinary events” running up to January 6—including efforts to “stop Congress’s count of the Electoral College vote”—“constitute exceptional circumstances warranting an accommodation to Congress.” The letters also note that the DOJ had previously authorized the officials to “provide testimony about the Department’s planning or preparations for January 6, and the Department’s response on the day of the attacks.” Given that prior authorization and the overlap between the ongoing 2020 election aftermath investigations and the events of January 6, it is possible, perhaps even likely, that President Biden will extend his determination that it is inappropriate to invoke executive privilege to address requests for information sought by the Select Committee. On the other hand, it is also possible that President Biden (like President George W. Bush before) could determine that the potential harm to the institutional interests of the presidency that may occur as a result of disclosing at least some of the requested documents—for example, the most sensitive documents and testimony relating to internal White House deliberations that directly involve the President—outweigh the Select Committee’s need in a given case.

In a scenario in which President Biden does not support a privilege claim by former President Trump, the balancing that is the hallmark of executive privilege disputes would arguably tilt in Congress's favor. *Nixon v. Administrator of General Services* and *Dellums v. Powell* (discussed [here](#)) suggest that because the incumbent President is "in the best position to assess the present and future needs of the Executive Branch," an assertion of executive privilege by former President Trump that is not supported by President Biden would carry "diminished" weight. A reviewing court would also be faced with a situation in which both Congress and the executive branch agree that the committee's interests in obtaining the requested records are substantial. The Attorney General's [letter](#) dealing with the related investigations into attempts to use the DOJ to overturn the 2020 election recognized that Congress had "compelling legislative interests" and that "it is the Executive Branch's view that the investigations into this presents an exceptional situation in which the congressional need for information outweighs the Executive Branch's interest in maintaining confidentiality." Moreover, with respect to the PRA documents, the Select Committee would be requesting documents pursuant to specific statutory authority that has been "approved through the bicameralism and presentment process"—a factor the DOJ recently gave significance in an [Office of Legal Counsel opinion](#) relating to a congressional committee's request for President Trump's tax returns.

## Conclusion

The Supreme Court has made clear that former Presidents retain authority to invoke the presidential communications privilege to protect covered communications from compelled disclosure. However, the strength of such an assertion "erodes over time" and, in the case of a congressional request for information, must be balanced against Congress's investigative and legislative needs. In weighing the competing interests at play, a privilege claim by a former President takes on a "diminished" character when unsupported by the incumbent President. As a result, President Biden, by either supporting or opposing any claim of executive privilege, may ultimately play an influential role in whether former President Trump is able to prevent Congress from accessing his records related to his communications while in office.

## Author Information

Todd Garvey  
Legislative Attorney

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