

“Executive Privilege” Should Be Ended, Not Extended

On November 9, DC District Court judge Tanya Chutkan refused former US president Donald Trump’s request, based on “executive privilege,” for a preliminary injunction forbidding the National Archives and Records Administration to release documents to the US House committee grandstanding on ... er, “investigating” ... the January 6 Capitol riot.

If Trump’s name goes down in history for anything of substance rather than mere flash, it should probably be for his bizarre claim that people who aren’t executives anymore retain “executive privilege” over information pertaining to their time in office.

The concept of “executive privilege” appears nowhere in the US Constitution, but instead developed over history in court decisions, culminating in 1974’s *US v. Nixon*.

Nixon lost that case and had to turn over audiotapes of Oval Office conversations as part of the Watergate scandal that led to his resignation, but the Supreme Court did assert a “valid need for protection of communications between high Government officials and those who advise and assist them,” so as to encourage “candor” rather than “a concern for appearances and for their own interests.” Appeals to “national security,” justified or not, also remain a perennial “executive privilege” favorite.

What we haven’t faced before is a legal test of the notion that “executive privilege” inheres in the person rather than the office, remaining a former president’s prerogative after he’s lost his bid for re-election and returned to private life. It’s a silly notion without basis in law, jurisprudence, tradition, or common sense.

The US government’s executive branch records logically fall under the stewardship of that branch and of its current chief executive, not of every Bill, George, Barack, and Donald who may have held the post in the past. And the purpose of that stewardship supposedly answers to claims of “the common good” rather than the comfort of former executives. The current chief executive, President Joe Biden, has directed the National Archives to release the documents requested by Congress, leading to Trump’s challenge.

The bigger question is whether “executive privilege” has any defensible place at all in a government that claims to be a democratic republic made legitimate the consent of the governed. The answer is no.

The purpose of the executive branch is to execute the will of Congress and, by supposed extension, the people. The president isn’t a king and the US government isn’t a company he owns. He’s an employee, a functionary, a gofer. He operates at the direction and behest of Congress. His actions should therefore be subject to its constant examination and evaluation.

Donald Trump isn't even any of those things anymore. He's just a disgruntled former employee who enjoys no plausible "privilege" whatsoever regarding the historical records of his administration and its actions.