

# EXECUTIVE PRIVILEGE

A number of people have pointed to Charlie Savage's great article on the responses of Presidential candidates to a bunch of questions about executive power. I'm really glad Savage asked these questions, as I've presented forms of these questions (specifically as it related to the underpinnings of Bush's illegal wiretap program, which was put into place under Bill Clinton) to Hillary's campaign and gotten no response.

That said, most of the questions either explicitly or implicitly ask candidates whether they repudiate certain of Bush's acts, so I'm not sure they help Democratic voters distinguish between primary candidates. The exception is the question on Executive Privilege. Here are the Democrats' answers on the the question addressing executive privilege.

Does executive privilege cover testimony or documents about decision-making within the executive branch not involving confidential advice communicated to the president himself?

## **Obama**

With respect to the "core" of executive privilege, the Supreme Court has not resolved this question, and reasonable people have debated it. My view is that executive privilege generally depends on the involvement of the President and the White House.

## **Hillary**

I fundamentally believe that our constitutional system depends upon each branch striving to accommodate the interests of the other, and the President should seek to accommodate legitimate congressional requests for information. I also believe in an open transparent government that fulfills its

obligation to share as much information as possible with the public. But it is settled law that certain limited "communications made by presidential advisors in the course of preparing advice for the President, come under the presidential communications privilege, even when these communications are not made directly to the President."

**Edwards**

I support the constitutional separation of powers and the doctrine of executive privilege, as guided by judicial review. Unlike the current president, however, I will not invoke executive privilege merely to advance partisan ends.

**Richardson**

Privilege may extend to the Senior Staff in rare cases where frank and open discussion happens prior to advising the President. Other than that-no.

**Dodd**

No.

**Biden**

No. The Executive Privilege only covers communications between the President and his advisors. Even when the privilege does apply, it is not absolute; it may be outweighed by the public's interest in the fair administration of justice.

Kudos to Dodd for his brevity.

I find this question really telling because it gets candidates on the record on an issue that speaks not only to Presidential privilege, but to openness more generally. To some degree, Hillary is bound by the positions adopted by her husband while he was President—and I suspect that's one of the reasons Hillary holds that "it is settled law that ... communications made by

presidential advisors ... come under the presidential communications privilege, even when these communications are not made directly to the President." Compare that to Obama's statement, which argues that SCOTUS "has not resolved this question." Or the more exact statements of Biden and Richardson, which reflect the pre-Bush reality of a limited executive privilege that was being pushed to include senior advisors.

In any case, I think the answers delineate a clear distinction among the top three candidates. Edwards makes what I believe to be a dangerous argument, that the President can choose to invoke Executive Privilege for partisan ends; if he were elected, we'd basically be relying on his judgment to determine what constituted a partisan end of executive privilege and what did not. Hillary claims to support openness, but at the same time makes a firm stand in favor of the legal authority to exercise broad privilege. Whereas Obama admits a legal dispute, but chooses to go on the record in favor of a more narrow definition than legal debates might allow.