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Presidential Claims of Executive Privilege: History, Law, Practice, and Recent Developments

Todd Garvey

Legislative Attorney

Alissa M. Dolan

Legislative Attorney

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Summary

Presidential claims of a right to preserve the confidentiality of information and documents in the face of legislative demands have figured prominently, though intermittently, in executive-congressional relations since at least 1792. Few such interbranch disputes over access to information have reached the courts for substantive resolution. The vast majority of these disputes are resolved through political negotiation and accommodation. In fact, it was not until the Watergate-related lawsuits in the 1970's seeking access to President Nixon's tapes that the existence of a presidential confidentiality privilege was judicially established as a necessary derivative of the President's status in our constitutional scheme of separated powers. There have been only four cases involving information access disputes between Congress and the executive, and two of these resulted in decisions on the merits. The *Nixon* and post-Watergate cases established the broad contours of the presidential communications privilege. Under those precedents, the privilege, which is constitutionally rooted, could be invoked by the President when asked to produce documents or other materials or information that reflect presidential decision making and deliberations that he believes should remain confidential. If the President asserts the privilege, the materials become presumptively privileged. The privilege, however, is qualified, not absolute, and can be overcome by an adequate showing of need. Finally, while reviewing courts have expressed reluctance in balancing executive privilege claims against a congressional demand for information, they have acknowledged they will do so if the political branches have tried, in good faith, but failed to reach an accommodation.

Until the District of Columbia Circuit's 1997 ruling in *In re Sealed Case (Espy)*, and its 2004 decision in *Judicial Watch v. Department of Justice*, these earlier judicial decisions left considerable gaps in the law of presidential privilege. Among the more significant issues left open included whether the President has to have actually seen or been familiar with the disputed matter; whether the presidential privilege encompasses documents and information developed by, or in the possession of, officers and employees in the departments and agencies of the Executive Branch, outside of the Executive Office of the President; whether the privilege encompasses all communications with respect to which the President may be interested or is confined to presidential decision making and, if so, is limited to a particular type of presidential decision making; and precisely what kind of demonstration of need must be shown to overcome the privilege and compel disclosure of the materials. The unanimous panel in *Espy*, and the subsequent reaffirmation of the *Espy* principles articulated in *Judicial Watch*, addressed each of these issues in a manner that may have drastically altered the future legal playing field in resolving such disputes. A more recent dispute with Congress involving the removal and replacement of nine United States Attorneys drew formal claims of privilege by President George W. Bush. Those privilege claims were challenged in a civil suit brought by the House Judiciary Committee seeking declaratory and injunctive relief with respect to refusals to appear, to testify, and to provide documents by two subpoenaed present and former officials. A district court decision on the merits, upholding the committee's challenge supplements the D.C. Circuit case law on this issue.

President Obama formally invoked executive privilege for the first time on June 20, 2012, over documents sought by the House Committee on Oversight and Government Reform in its ongoing investigation into Operation Fast and Furious.

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Introduction

Presidential claims of a right to preserve the confidentiality of information and documents in the face of legislative demands have figured prominently, though intermittently, in executive-congressional relations since at least 1792, when President Washington discussed with his cabinet how to respond to a congressional inquiry into the military debacle that befell General St. Clair's expedition.¹ Few such interbranch disputes over access to information have reached the courts for substantive resolution; the vast majority achieve resolution through political negotiation and accommodation.² In fact, it was not until the Watergate-related lawsuits in the 1970's seeking access to President Nixon's tapes that the existence of a presidential confidentiality privilege was judicially established as a necessary derivative of the President's status in the U.S. constitutional scheme of separated powers. Litigation over the scope of executive privilege in direct relation to congressional oversight and investigations has also been quite limited. In total, there have been only four cases dealing with executive privilege in the context of information access disputes between Congress and the Executive,³ and only two of those resulted in decisions on the merits.⁴ Indeed, the Supreme Court has never addressed executive privilege in the face of a congressional demand for information.

The Nixon era cases initially established the broad contours of the presidential communications privilege. Under those precedents, the privilege, which is constitutionally rooted, could be invoked by the President when asked to produce documents or other materials or information that reflect presidential decision making and deliberations that he believes should remain confidential. If the President does so, the materials become presumptively privileged. The privilege, however, is qualified, not absolute, and can be overcome by an adequate showing of need. Finally, while reviewing courts have expressed reluctance in balancing executive privilege claims against a congressional demand for information, they have acknowledged they will do so if the political branches have tried in good faith but failed to reach an accommodation.

However, until the District of Columbia Circuit's 1997 ruling in *In re Sealed Case (Espy)*⁵ and its 2004 decision in *Judicial Watch v. Department of Justice*,⁶ existing precedent left important gaps in the law of presidential privilege that have increasingly become focal points, if not the source, of interbranch confrontations. Many significant issues remained unresolved, including whether the President has to have actually seen or been familiar with the disputed matter; whether the presidential privilege encompasses documents and information developed by, or in the possession of, officers and employees in the departments and agencies of the Executive Branch outside the

¹ See Archibald Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383, 1395-1405 (1979). See generally Mark J. Rozell, EXECUTIVE PRIVILEGE: PRESIDENTIAL POWERS, SECRECY, AND ACCOUNTABILITY, (2d ed., rev. 2002) [hereinafter Rozell, PRESIDENTIAL POWERS]; Mark J. Rozell, *Executive Privilege and Modern Presidents: In Nixon's Shadow*, 83 MINN. L. REV. 1069 (1999) [hereinafter Rozell, *Modern Presidents*].

² See Neil Devins, *Congressional-Executive Information Access Disputes: A Modest Proposal-Do Nothing*, 48 ADM. L. REV. 109 (1996).

³ United States v. AT&T, 551 F.2d 384 (D.C. Cir. 1976) [hereinafter *AT&T I*]; Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974) [hereinafter *Senate Select Comm.*]; Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53 (D.D.C. 2008); United States v. House of Representatives, 556 F. Supp. 150 (D.D.C. 1983).

⁴ *Senate Select Comm.*, 498 F.2d 725; *Miers*, 558 F. Supp. 2d 53.

⁵ 121 F.3d 729 (D.C. Cir. 1997).

⁶ 365 F.3d 1108 (D.C. Cir. 2004).

Executive Office of the President; whether the privilege encompasses all communications in which the President may be interested or if it is confined to presidential decision making or a particular type of presidential decision making; and precisely what kind of demonstration of need can justify the release of privileged materials. The unanimous panel in *Espy*, and the subsequent reaffirmation of the *Espy* principles in *Judicial Watch*, addressed each of these issues in a manner that may have drastically altered the future legal playing field in resolving such disputes.⁷

A more recent dispute with Congress involving the removal and replacement of nine United States Attorneys drew formal claims of privilege by President George W. Bush. Those privilege claims were successfully challenged in a civil suit brought by the House Judiciary Committee seeking declaratory and injunctive relief arising from refusals by subpoenaed present and former senior presidential aides to appear, testify, or provide documents.⁸ The district court held that senior presidential advisors do not enjoy absolute immunity from compelled testimony or production of documents pursuant to a congressional subpoena.⁹ Before discussing *Espy* and *Judicial Watch* in detail, it is useful to review and understand the prior case law and how it has affected the positions of the disputants.

The Watergate Cases

In interbranch information disputes since the early 1980's, executive statements and positions taken to justify assertions of executive privilege have frequently rested upon explanations of executive privilege offered by the courts. To better understand the executive's stance in this area, and the potential impact the *Espy* and *Judicial Watch* rulings may have on those positions, this report will chronologically examine the development of the judiciary's approach to executive privilege and describe how the executive has adapted the judicial explanations of the privilege to support its arguments.

In *Nixon v. Sirica*,¹⁰ the first of the Watergate cases, the Court of Appeals for the District of Columbia Circuit rejected President Nixon's claim that he was absolutely immune from all compulsory process whenever he asserted a formal claim of executive privilege. The court held that while presidential conversations are "presumptively privileged,"¹¹ the presumption could be overcome by an appropriate showing of public need by the branch seeking access to the conversations. In *Sirica*, "a uniquely powerful," albeit undefined, showing was deemed to have been made by the Special Prosecutor, who argued that the tapes subpoenaed by the grand jury contained evidence vital to determining whether probable cause existed that those indicted had committed crimes.¹²

The D.C. Circuit next addressed the Senate Watergate Committee's effort to gain access to five presidential tapes in *Senate Select Committee on Presidential Campaign Activities v. Nixon*.¹³ The

⁷ However, it is important to note that these cases did not arise in a congressional-executive dispute context, but rather out of a grand jury subpoena and a FOIA request, respectively.

⁸ See generally *Miers*, 558 F. Supp. 2d 53.

⁹ *Id.* at 100-07.

¹⁰ 487 F.2d 750 (D.C. Cir. 1973).

¹¹ *Id.* at 757.

¹² *Id.*

¹³ 498 F.2d 725 (D.C. Cir. 1974).

appeals court initially determined that “[t]he staged decisional structure established in *Nixon v. Sirica*” was applicable “with at least equal force here.”¹⁴ Thus, in order to overcome the presumptive privilege and require the submission of materials for court review, a strong showing of need had to be established. The appeals court held that the Committee had not met its burden of showing that “the subpoenaed evidence is demonstrably critical to the responsible fulfillment of the Committee’s function.”¹⁵ It elaborated that, in view of the initiation of impeachment proceedings by the House Judiciary Committee, the overlap of the investigative objectives of both committees, and the fact that the impeachment committee already had the tapes sought by the Senate Committee, “the Select Committee’s immediate *oversight* need for the subpoenaed tapes is, from a congressional perspective, merely cumulative.”¹⁶ Nor did the court feel that the Committee had shown that the subpoenaed materials were “critical to the performance of [its] *legislative functions*.”¹⁷ The court could discern “no specific legislative decisions that cannot responsibly be made without access to materials uniquely contained in the tapes or without resolution of the ambiguities that the [presidentially released] transcripts may contain.”¹⁸ The court concluded that the subsequently initiated and nearly completed work of the House Judiciary Committee had in effect preempted the Senate Committee: “More importantly … there is no indication that the findings of the House Committee on the Judiciary and, eventually the House of Representatives itself, are so likely to be inconclusive or long in coming that the Select Committee needs immediate access of its own.”¹⁹

The D.C. Circuit’s view in *Senate Select Committee*, that the Watergate Committee’s oversight need for the requested materials was “merely cumulative” in light of the then concurrent impeachment inquiry, has been utilized by the executive as the basis for arguing that Congress’s interest in executive information is less compelling when a committee’s function is oversight than when it is considering specific legislative proposals.²⁰ This approach, however, arguably misreads the carefully circumscribed holding of the court, and would seem to construe too narrowly the scope of Congress’s investigatory powers.

The *Senate Select Committee* court’s opinion took great pains to underline the unique and limiting nature of the case’s factual and historical context. Thus it emphasized the overriding nature of the “events that have occurred since this litigation was begun and, indeed, since the District Court issued its decision.”²¹ These facts included the commencement of impeachment proceedings by

¹⁴ *Id.* 730-31.

¹⁵ *Id.* at 731.

¹⁶ *Id.* at 732 (emphasis supplied).

¹⁷ *Id.* (emphasis supplied).

¹⁸ *Id.* at 733.

¹⁹ *Senate Select Comm.*, 498 F.2d at 733.

²⁰ This reading of *Senate Select Committee* was a persistent characteristic of the statements of the Reagan, George H.W. Bush and Clinton Administrations. See, e.g., Letter from Attorney General William French Smith to President Reagan, October 31, 1981, reprinted in 5 Op. O.L.C. 27, 30 (1981) [hereinafter Smith Letter/Watt]; Memorandum to General Counsel’s Consultative Group Re: Congressional Requests for Confidential Executive Branch Information, 13 Op. O.L.C. 153, 157 (1989) [hereinafter Barr Memo]; Letter from Attorney General Janet Reno to President Clinton, September 20, 1996, at 2-3 [hereinafter Reno Letter/Haiti]; Letter from Attorney General Janet Reno to President Clinton, September 16, 1999 [hereinafter Reno Letter/FALN]. It is utilized in buttressing President George W. Bush’s June 28, 2007, privilege claim with respect to demands for documents and testimony sought by the House and Senate Judiciary Committees relating to their investigations concerning the dismissal and replacement of nine U.S. Attorneys. See also Appendix, “Bush, George W.”.

²¹ *Senate Select Comm.*, 498 F.2d at 731.

the House Judiciary Committee, a committee with an “express constitutional source” of investigative power, whose “investigative objectives substantially overlap” those of the Senate Committee; the House Committee’s present possession of the very tapes sought by the Select Committee, making the Senate Committee’s need for the tapes “from a congressional perspective, merely cumulative;” the lack of evidence indicating that Congress itself attached any particular value to “having the presidential conversations scrutinized by two committees simultaneously;” that the need to possess the tapes in order to make “legislative judgments has been substantially undermined by subsequent events,” including the public release of the tape transcripts by the President; the transfer of four of five of the original tapes to the district court; and the lack of any “indication that the findings of the House Committee on the Judiciary and, eventually, the House of Representatives itself, are so likely to be inconclusive or long in coming that the Select Committee needs immediate access of its own.”²² The appeals court concluded by reiterating the uniqueness of the case’s facts and temporal circumstances:

We conclude that the need demonstrated by the Select Committee in the peculiar circumstances of this case, including the subsequent and on-going investigation of the House Judiciary Committee, is too attenuated and too tangential to its functions to permit a judicial judgment that the President is required to comply with the Committee’s subpoena.²³

The executive’s position arguably ignores the roots of Congress’s broad investigatory powers, which reach back to the establishment of the Constitution and have been continually reaffirmed by the Supreme Court. As George Mason recognized at the Constitutional Convention, Members of Congress “are not only Legislators but they possess inquisitorial power. They must meet frequently to inspect the Conduct of the public offices.”²⁴ Woodrow Wilson remarked:

Quite as important as legislation is vigilant oversight of administration; and even more important than legislation is the instruction and guidance in political affairs which the people might receive from a body which kept all national concerns suffused in a broad daylight of discussion The informing functions of Congress should be preferred even to its legislative function. The argument is not only that a discussed and interrogated administration is the only pure and efficient administration, but, more than that, that the only really self-governing people is that people which discusses and interrogates its administration.²⁵

The Supreme Court has cited Wilson favorably on this point.²⁶ Moreover, the Court has failed to make any distinction between Congress’s right to executive branch information to use in support of its oversight function versus its responsibility to enact, amend, and repeal laws. In fact, the Court has recognized that Congress’s investigatory power “comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.”²⁷ Thus, to read *Senate Select Committee* as downplaying the status of oversight arguably ignores the court’s very specific reasons for not enforcing the committee’s subpoena under the unique circumstance of

²² *Id.* at 732-33.

²³ *Id.* at 733. It is important to note that the Select Committee was established by Senate Resolution 60 as a special investigation committee with no legislative authority. Its sole mission was to determine the facts about the Watergate break-in and its aftermath and report to the Senate its findings and recommendations. S.Res. 60, 93rd Cong. (1973).

²⁴ 2 The Records of the Constitutional Convention of 1787, at 206 (Max Farrand, ed., 1966).

²⁵ Woodrow Wilson, *Congressional Government* 195, 198 (Meridian Books 1956) (1885).

²⁶ See, e.g., *Hutchinson v. Proxmire*, 443 U.S. 111, 132 (1979).

²⁷ *Watkins v. United States*, 354 U.S. 173, 187 (1957). See also *McGrain v. Daugherty*, 273 U.S. 135, 177 (1926); *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 504 n.15 (1975).

that case and creates a distinction between oversight and legislating that has yet to be embraced by the courts. Moreover, the *Senate Select Committee* panel’s “demonstrably critical” standard for overcoming a president’s presumptive claim of privilege is not reflected in any of the subsequent Supreme Court or appellate court rulings establishing a balancing test for overcoming the qualified presidential privilege.

Two months after the ruling in *Senate Select Committee*, the Supreme Court issued its unanimous ruling in *United States v. Nixon (Nixon I)*,²⁸ which involved a judicial trial subpoena issued to the President at the request of the Watergate Special Prosecutor requesting tape recordings and documents relating to the President’s conversations with close aides and advisors. For the first time, the Court found a constitutional basis for the doctrine of executive privilege in “the supremacy of each branch within its own assigned area of constitutional duties” and in the separation of powers.²⁹ Although it considered a president’s communications with his close advisors to be “presumptively privileged,” the Court rejected the President’s contention that the privilege was absolute and precluded judicial review whenever it is asserted.³⁰ The Court acknowledged the need for confidentiality of high-level communications in the exercise of Article II powers, but stated that “a confrontation with other values arises” when the privilege is asserted based on a broad, undifferentiated claim of public interest in the confidentiality of such communications.³¹ It held that “absent a need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of presidential communications is significantly diminished by production of” materials that are essential to the enforcement of criminal statutes.³²

After concluding that the claim of privilege was qualified, the Court moved on to resolving the “competing interests” at stake: the President’s need for confidentiality versus the judiciary’s need for evidence in a criminal proceeding. Evaluating these interests “in a manner that preserves the essential functions of each branch,”³³ the Court held that the judicial need for the tapes, as shown by a “demonstrated, specific need for evidence in a pending criminal trial,” outweighed the President’s “generalized interest in confidentiality....”³⁴ The Court was careful, however, to limit the scope of its decision, noting that “we are not here concerned with the balance between the President’s generalized interest in confidentiality ... and congressional demands for information.”³⁵

In the last of the Nixon cases, *Nixon v. Administrator of General Services (Nixon II)*,³⁶ the Supreme Court again balanced competing interests in President Nixon’s White House records. The Presidential Recordings and Materials Preservation Act³⁷ granted custody of President Nixon’s presidential records to the Administrator of the General Services Administration who

²⁸ 418 U.S. 683 (1974) [hereinafter *Nixon I*].

²⁹ *Id.* at 705-06, 708, 711.

³⁰ *Id.* at 705-06, 708.

³¹ *Id.* at 706.

³² *Id.*

³³ *Id.* at 707.

³⁴ *Nixon I*, 418 U.S. at 713.

³⁵ *Id.* at 712 n.19.

³⁶ 433 U.S. 425 (1977) [hereinafter *Nixon II*].

³⁷ P.L. 93-526, 88 Stat. 1695 (1974).

would screen them for personal and private materials, to be returned to President Nixon, and preserve the rest for historical and governmental objectives. The Court rejected President Nixon's challenge to the act, which included an argument based on the "presidential privilege of confidentiality."³⁸ Although *Nixon II* did not involve an executive response to a congressional probe, several points emerge from the Court's discussion that bear upon Congress's interest in confidential executive branch information. First, the Court reiterated that the executive privilege it had announced in *Nixon I* was not absolute, but qualified.³⁹ Second, the Court stressed the narrow scope of that executive privilege. "In [*Nixon I*] the Court held that the privilege is limited to communications 'in performance of [a President's] responsibilities ... of his office' ... and made in the process of shaping policies and making decisions."⁴⁰ Third, the Court found that there was a "substantial public interest[]" in preserving these materials so that Congress, pursuant to its "broad investigative power," could examine them to understand the events that led to President Nixon's resignation "in order to gauge the necessity for remedial legislation."⁴¹

Post-Watergate Cases

Two post-Watergate cases, both involving congressional demands for access to executive information, demonstrate both the judiciary's reluctance to get involved in the essentially political confrontations such disputes represent and a willingness to intervene where the political process appears to be failing.

In *United States v. AT&T*,⁴² the D.C. Circuit was unwilling to balance executive privilege claims against a congressional demand for information unless and until the political branches had tried in good faith but failed to reach an accommodation.⁴³ In that case, the Justice Department sought to enjoin AT&T's compliance with a subpoena issued by a House subcommittee. The subcommittee was seeking FBI letters sent to AT&T requesting its assistance with warrantless wiretaps on U.S. citizens allegedly conducted for national security purposes. The Justice Department argued that the executive branch was entitled to sole control over the information because of "its obligation to safeguard the national security."⁴⁴ The House of Representatives, as intervenor, argued that its rights to the information flowed from its constitutionally implied power to investigate whether there had been abuses of the wiretapping power. The House also argued that the court had no jurisdiction over the dispute because of the Speech or Debate Clause.

The court rejected the "conflicting claims of the [Executive and the Congress] to absolute authority."⁴⁵ With regard to the executive's claim, the court noted that there was no absolute claim of executive privilege in response to congressional requests even in the area of national security:

³⁸ *Nixon II*, 433 U.S. at 439.

³⁹ *Id.* at 446.

⁴⁰ *Id.* at 449 (internal citations omitted).

⁴¹ *Id.* at 453.

⁴² 567 F.2d 121 (D.C. Cir. 1977) [hereinafter *AT&T II*].

⁴³ This was the second time the case was before the court. After its initial review it was remanded to the district court to allow the parties further opportunity to negotiate an accommodation. See *AT&T I*, 551 F.2d 384.

⁴⁴ *AT&T II*, 567 F.2d at 127 n.17.

⁴⁵ *Id.* at 128.

The executive would have it that the Constitution confers on the executive absolute discretion in the area of national security. This does not stand up. While the Constitution assigns to the President a number of powers relating to national security, including the function of commander in chief and the power to make treaties and appoint Ambassadors, it confers upon Congress other powers equally inseparable from the national security, such as the powers to declare war, raise and support armed forces and, in the case of the Senate, consent to treaties and the appointment of ambassadors.⁴⁶

Likewise, the court rejected the congressional claim that the Speech or Debate Clause was “intended to immunize congressional investigatory actions from judicial review. Congress’ investigatory power is not, itself, absolute.”⁴⁷

According to the court, judicial intervention in executive privilege disputes between the political branches is improper unless the branches have made a good faith effort at compromise without result.⁴⁸ The court held that there is a constitutional duty for the executive and Congress to attempt to accommodate each other’s needs:

The framers, rather than attempting to define and allocate all governmental power in minute detail, relied, we believe, on the expectation that where conflicts in scope of authority arose between the coordinate branches, a spirit of dynamic compromise would promote resolution of the dispute in the manner most likely to result in efficient and effective functioning of our governmental system. Under this view, the coordinate branches do not exist in an exclusively adversary relationship to one another when a conflict in authority arises. Rather, each branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation.⁴⁹

The court refused to resolve the dispute because the executive and Congress had not yet made that constitutionally mandated effort at accommodation. Instead, the court “encouraged negotiations in order to avoid the problems inherent in [the judiciary] formulating and applying standards for measuring the relative needs of the [executive and legislative branches].”⁵⁰ The court suggested, however, that it would resolve the dispute if the political branches failed to reach an accommodation.⁵¹ The court-encouraged negotiations ultimately led to a compromise. Subcommittee staff were allowed to review unedited memoranda describing the warrantless wiretaps and report orally to subcommittee Members. The Justice Department, however, retained custody of the documents.⁵²

The U.S. District Court for the District of Columbia displayed the same reluctance to intervene in an executive privilege dispute with Congress in *United States v. House of Representatives*.⁵³ There the court dismissed a suit brought by the Justice Department seeking a declaratory judgment that the Administrator of the Environmental Protection Agency (EPA), Anne Gorsuch Burford, “acted

⁴⁶ *Id.*

⁴⁷ *Id.* at 129.

⁴⁸ *Id.* at 127-28.

⁴⁹ *Id.* at 127 (internal citations omitted).

⁵⁰ *AT&T II*, 567 F.2d at 130.

⁵¹ *Id.* at 123, 126.

⁵² *Id.* at 131-32.

⁵³ 556 F. Supp. 150 (D.D.C. 1983).

lawfully in refusing to release certain documents to a congressional subcommittee” at the direction of the President.⁵⁴ The Administrator based her refusal upon President Reagan’s invocation of executive privilege against a House committee probing the EPA’s enforcement of hazardous waste laws. The court dismissed the case, without reaching the executive privilege claim, on the ground that judicial intervention in a dispute “concerning the respective powers of the Legislative and Executive Branches … should be delayed until all possibilities for settlement have been exhausted … Compromise and cooperation, rather than confrontation, should be the aim of the parties.”⁵⁵ As the appeals court had done in *AT&T*, the district court in *United States v. House of Representatives* encouraged the political branches to settle their dispute rather than invite judicial intervention. The court would intervene and resolve the interbranch dispute only if the parties could not agree. Even then, the courts advised, “Judicial resolution of this constitutional claim … will never become necessary unless Administrator Gorsuch [Burford] becomes a defendant in either a criminal contempt proceeding or other legal action taken by Congress.”⁵⁶ Ultimately the branches did reach an agreement, and the court did not need to balance executive and congressional interests.⁵⁷

Executive Branch Positions on the Scope of Executive Privilege

Unsurprisingly, the executive branch has developed an expansive view of executive privilege in relation to congressional investigations, taking maximum advantage of the vague and essentially undefined terrain within the judicially recognized contours of the privilege. Thus, executive branch statements have identified four areas that it believes are presumptively covered by executive privilege: foreign relations and military affairs, two separate topics that are sometimes lumped together as “state secrets;” law enforcement investigations; and confidential information that reveals the executive’s “deliberative process” with respect to policymaking.⁵⁸ Typically, the executive has asserted executive privilege based upon a combination of deliberative process and one or more of the other categories. Consequently, much of the controversy surrounding invocation of executive privilege has centered on the scope of the deliberative process category. The executive has argued that at its core this category protects confidential predecisional deliberative material from disclosure.⁵⁹ Justifications for this exemption often draw upon the language in *Nixon I* that identifies a constitutional value in the President receiving candid advice from his subordinates and awareness that any expectation of subsequent disclosure might temper needed candor.⁶⁰ The result has been a presumption by the executive that its predecisional

⁵⁴ *Id.* at 151.

⁵⁵ *Id.* at 152-53.

⁵⁶ *Id.* at 152, 153.

⁵⁷ See Devins, *supra*, note 2, at 118-20.

⁵⁸ See Memorandum for the Attorney General Re: Confidentiality of the Attorney General’s Communications in Counseling the President, 6 Op. O.L.C. 481, 484-90 (1982) [hereinafter Olson Memo]; Barr Memo, *supra* note 20, at 154.

⁵⁹ See Smith Letter/Watt, *supra* note 20, at 28-31; Barr Memo, *supra* note 20, at 187-90; Reno Letter/FALN, *supra* note 20.

⁶⁰ See, e.g., *Nixon I*, 418 U.S. at 705. See also Smith Letter/Watt, *supra* note 20, at 29; Memorandum for All Executive Department and Agency General Counsel’s Re: Congressional Requests to Departments and Agencies Protected By Executive Privilege, September 28, 1994, at 1, 2 [hereinafter Cutler Memo]; Letter from Jack Quinn to Hon. William A. Zellif, Jr., October 1, 1996, at 1 [hereinafter Quinn Letter/FBI]; Memorandum from President Bush to Secretary of (continued...)

deliberations are beyond the scope of congressional demand. “Congress will have a legitimate need to know the preliminary positions taken by Executive Branch officials during internal deliberations only in the rarest of circumstances.”⁶¹ According to this view, the need for the executive to prevent disclosure of its deliberations is at its apex when Congress attempts to discover information about ongoing policymaking within the executive branch. In that case, the executive has argued, the deliberative process exemption serves as an important boundary marking the separation of powers. When congressional oversight “is used as a means of participating directly in an ongoing process of decisionmaking within the Executive Branch, it oversteps the bounds of the proper legislative function.”⁶²

The executive has also argued that because candor is the principal value served by this category, its protection should extend beyond predecisional deliberations to deliberations involving decisions already made. “Moreover, even if the decision at issue had already been made, disclosure to Congress could still deter the candor of future Executive Branch deliberations.”⁶³ Executives have also taken the position that the privilege covers confidential communications with respect to policymaking well beyond the confines of the White House and the President’s closest advisors. The Eisenhower Administration took the most expansive approach, arguing that

(...continued)

Defense Richard Cheney Re: Congressional Subpoena for an Executive Branch Document, August 8, 1991, at 1 [hereinafter Bush Memo].

⁶¹ Smith Letter/Watt, *supra* note 20, at 31; *accord* Barr Memo, *supra* note 20, at 192 (“Congress will seldom have any legitimate legislative interest in knowing the precise predecisional positions and statements of particular Executive Branch officials.”); Letter from Assistant Attorney General Robert Rabkin, Office of Legislative Affairs, DOJ, to Honorable John Linder, Chairman House Subcommittee on Rules and Organization of the House, Committee on Rules, June 27, 2000 at 5-6 (“[T]he Department has a broad confidentiality interest in matters that reflect its internal deliberative process. In particular, we have sought to ensure that all law enforcement and litigation decisions are products of open, frank, and independent assessments of the law and facts—uninhibited by political and improper influences that may be present outside the department. We have long been concerned about the chilling effect that would ripple throughout government if prosecutors, policy advisors at all levels and line attorneys believed that their honest opinion—be it ‘good’ or ‘bad’—may be the topic of debate in Congressional hearings or floor debates. These include assessments of evidence and law, candid advice on strength and weaknesses of legal arguments, and recommendations to take or not to take legal action against individuals and corporate entities.”) [hereinafter Rabkin Letter]; *see also* Smith Letter/Watt, *supra* note 20, at 30 (“congressional oversight interest will support a demand for predecisional, deliberative documents in the possession of the Executive Branch only in the most unusual circumstances”).

⁶² Smith Letter/Watt, *supra* note 20, at 30; *see also* Statement of Assistant Attorney General William H. Rehnquist, reprinted in Executive Privilege: The Withholding of Information by the Executive: Hearings Before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, 92nd Cong., 1st Sess. 424 (“The notion that the advisors whom he has chosen should bear some sort of a hybrid responsibility to opinion makers outside of the government, which notion in practice would inevitably have the effect of diluting their responsibility to him, is entirely inconsistent with our tripartite systems of government. The President is entitled to undivided and faithful advice from his subordinates, just as Senators and Representatives are entitled to the same sort of advice from their legislative and administrative assistants, and judges to the same sort of advice from their law clerks.”) [hereinafter Rehnquist Statement]; Rabkin Letter, *supra* note 61 (“The foregoing concerns apply with special force to Congressional requests for prosecution and declination memoranda and similar documents. These are extremely sensitive law enforcement materials. The Department’s attorneys are asked to render unbiased, professional judgments about the merits of potential criminal and civil law enforcement cases. If their deliberative documents were made subject to Congressional challenge and scrutiny, we would face a grave danger that they would be chilled from providing the candid and independent analysis essential to just and effective law enforcement or just as troubling, that our assessments of the strengths and weaknesses of evidence of the law, before they are presented in court. That may result in an unfair advantage to those who seek public funds and deprive the taxpayers of confidential representation enjoyed by other litigants.”).

⁶³ Smith Letter/Watt, *supra* note 20, at 29.

the privilege applied broadly to advice on official matters among all employees of the executive branch.⁶⁴ The Nixon Administration appears to have taken a similar view, arguing that the privilege applied to decision making at a “high governmental level,” but conceding that the protected communication must be related to presidential decision making.⁶⁵ The Reagan Justice Department appears to have taken a slightly narrower view of the scope of the privilege, requiring that the protected communications have some nexus to the presidential decision-making process.⁶⁶

The George H. W. Bush Administration took the position that recommendations made to senior department officials and communications of senior policymakers throughout the executive branch were protected by executive privilege without regard to whether they involved communications intended to go to the President.⁶⁷ The Clinton Administration took a similarly expansive position that all communications within the White House⁶⁸ or between the White House and any federal department or agency⁶⁹ are presumptively privileged.

The George W. Bush Administration, through presidential signing statements,⁷⁰ executive orders,⁷¹ and opinions of the Department of Justice’s Office of Legal Counsel (OLC) articulated a

⁶⁴ See Rozell, *supra* note 1, at 39-40.

⁶⁵ In his prepared statement to the Subcommittee on Separation of Powers of the Senate Judiciary Committee, Assistant Attorney General Rehnquist distinguished between “those few executive branch witnesses whose sole responsibility is that of advising the President” who “should not be required to appear [before Congress] at all, since all of their official responsibilities would be subject to a claim of privilege” and “the executive branch witness ... whose responsibilities include the administration of departments or agencies established by Congress, and from whom Congress may quite properly require extensive testimony,” subject to “appropriate” claims of privilege. Rehnquist Statement, *supra* note 62, at 427. Moreover, in colloquy with Senator Ervin, Mr. Rehnquist seemed to accept that the privilege protected only communications with some nexus to presidential decision making:

SENATOR ERVIN: As I construe your testimony, the decisionmaking process category would apply to communications between presidential advisers and the President and also to communications made between subordinates of the President when they are engaged in the process of determining what recommendations they should make to the President in respect to matters of policy.

MR. REHNQUIST: It would certainly extend that far, yes.

Id. at 439-40. *See also* Rozell, *supra* note 1, at 65-66.

⁶⁶ See Olson Memo, *supra* note 58, at 489.

⁶⁷ Bush Memo, *supra* note 60, at 1; Letter from General Counsel, DOD, Terrence O’Donnell to Hon. John Conyers, Jr., October 8, 1991, at 5 [hereinafter O’Donnell Letter].

⁶⁸ See, e.g., Cutler Memo, *supra* note 60, at 2.

⁶⁹ See, e.g., *id.* (Communications between White House and departments or agencies, including advice to or from to White House); Reno Letter/FALN, *supra* note 20.

⁷⁰ See CRS Report RL33667, *Presidential Signing Statements: Constitutional and Institutional Implications*, by Todd Garvey.

⁷¹ See, e.g., Executive Order 13233 issued by President Bush on November 1, 2001, which gave current and former Presidents and Vice Presidents broad authority to withhold presidential records and delay their release indefinitely. It vests former Vice Presidents, and the heirs or designees of disabled or deceased presidents the authority to assert executive privilege, and expands the scope of claims of privilege. Hearings held by the House Committee on Government Reform in 2002 raised substantial questions as to the constitutionality of the Order and resulted in the reporting of legislation (H.R. 4187) in the 107th Congress that would have nullified the Order and established new processes for presidential claims of privilege and for congressional and public access to presidential records. H.Rept. 107-790, 107th Cong. 2nd Sess. (2002). Substantially the same legislation (H.R. 1225) passed the House on March 14, 2007. See H.Rept. 110-44, 110th Cong. 1st Sess. (2007), and was reported out of the Senate Committee on Homeland Security and Governmental Affairs on June 20, 2007, without amendment and with no written report. See generally, Jonathan Turley, *Presidential Papers and Popular Government: The Convergence of Constitutional and Property* (continued...)

legal view of the breadth and reach of presidential constitutional prerogatives that would stymie requests for information and documents often sought by congressional committees.⁷² In OLC's view, under the precepts of executive privilege and the unitary executive, Congress may not bypass the procedures the President establishes to authorize disclosure to Congress of classified, privileged, or even non-privileged information by vesting lower-level officers or employees with a right to disclose such information without presidential authorization. Thus, OLC has declared that "right of disclosure" statutes "unconstitutionally limit the ability of the President and his appointees to supervise and control the work of subordinate officers and employees of the Executive Branch."⁷³ The OLC's assertions of these broad notions of presidential prerogatives are unaccompanied by any authoritative judicial citations.

The Obama Administration has only rarely taken formal positions on executive privilege. As such there is limited evidence with which to glean the administration's view of the privilege. On his first day in office President Obama narrowed the scope of executive privilege with respect to former Presidents by revoking and replacing an executive order issued by President George W. Bush relating to a former president's authority to invoke executive privilege over records released under the Presidential Records Act by the Archivist of the United States.⁷⁴ Whereas the Bush executive order required the approval of both the former and current President before release of past presidential documents, the Obama executive order does not require the former president to concur in the final determination of whether the documents may be disclosed, and therefore vests ultimate decision making in the current administration.⁷⁵

Like past administrations, the Obama administration has utilized signing statements to object to various statutory provisions pertaining to Congress's authority to obtain information from the executive branch.⁷⁶ Yet, the Obama signing statements have not referred to "executive privilege" by name as the legal justification for the objection. The context of a number of signing statements, however, indicates that executive privilege is, at least in part, the legal doctrine being asserted.⁷⁷

(...continued)

Theory in Claims of Ownership and Control of Presidential Records, 88 CORNELL L. REV. 651, 666-96 (2003).

⁷² See Letter dated May 21, 2004 to Hon. Alex M. Azar, II, General Counsel, Department of Health and Human Services from Jack L. Goldsmith III, Assistant Attorney General, Office of Legal Counsel, Department of Justice, available at, <http://www.usdoj.gov/olc/crsmemorespese.htm> [hereinafter Azar Letter]. This broad view of presidential privilege was repeated in Attorney General Mukasey's request to the President that he claim executive privilege with respect to a House Committee subpoena for DOJ documents in an investigation by a DOJ Special Counsel in the revelation of a CIA agent's identity. See Letter to the President from Attorney General Mukasey, dated July 15, 2008. See also **Appendix**, "Bush, George W."

⁷³ Azar Letter at 3.

⁷⁴ Exec. Order No. 13489 (Jan. 21, 2009) (revoking Exec. Order No. 13233 (Nov. 1, 2001)).

⁷⁵ *Id.*

⁷⁶ See, CRS Report RL33667, *Presidential Signing Statements: Constitutional and Institutional Implications*, by Todd Garvey.

⁷⁷ See, Statement of President Barack Obama Upon Signing H.R. 1105, March 11, 2009 (objecting to §714(1) and §714(2)); Statement of President Barack Obama Upon Signing S. 386, May 20, 2009 (objecting to §5(d)); Statement of President Barack Obama Upon Signing H.R. 2701, October 7, 2010 (objecting to §331 and §405); Statement of President Barack Obama Upon Signing H.R. 1473, April 15, 2011 (objecting to §2262).

Executive Acknowledged Limits of the Privilege

The executive branch has acknowledged some limits to its use of executive privilege. Thus, Presidents have stated they will not use executive privilege to block congressional inquiries into allegations of fraud, corruption, or other illegal or unethical conduct in the executive branch. The Clinton Administration announced that “[i]n circumstances involving communications relating to investigations of personal wrongdoing by government officials, it is our practice not to assert executive privilege, either in judicial proceedings or in congressional investigations and hearings.”⁷⁸ Similarly, the Reagan Administration policy was to refuse to invoke executive privilege when faced with allegations of illegal or unethical conduct: “[T]he privilege should not be invoked to conceal evidence of wrongdoing or criminality on the part of executive officers.”⁷⁹ A significant application of this policy came in the Iran/Contra investigations when President Reagan did not assert executive privilege and even made “relevant excerpts” of his personal diaries available to congressional investigators.⁸⁰

The executive has often tied its willingness to forgo assertions of executive privilege to the deliberative process exemption from disclosure that it recognizes, stating that it would not seek to protect materials whose disclosure “would not implicate or hinder” the executive decision-making processes.⁸¹ Thus, “factual, nonsensitive materials—communications from the Attorney General [or other executive branch official] which do not contain advice, recommendations, tentative legal judgments, drafts of documents, or other material reflecting deliberative or policymaking processes—do not fall within the scope of materials for which executive privilege may be claimed as a basis of nondisclosure.”⁸²

Accommodations Reached Between the Executive and Congress

Recent administrations have stated that their policy “is to comply with congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch.”⁸³ Therefore, executive privilege will be invoked only after “careful review”⁸⁴ in the “most compelling circumstances,”⁸⁵ and only after the executive has done “the utmost to

⁷⁸ Cutler Memo, *supra* note 59, at 1.

⁷⁹ Congressional Subpoenas of Department of Justice Investigative Files, 8 Op. O.L.C. 315 (1984). *Accord* Assertion of Executive Privilege in Response to Congressional Demands for Law Enforcement Files, 6 Op. O.L.C. 31, 36 (1982) (“These principles will not be employed to shield documents which contain evidence of criminal or unethical conduct by agency officials from proper review.”) [hereinafter Smith Letter/EPA].

⁸⁰ See David Hoffman, *President Offers to Share Iran Sales Notes with Hill; Aides Reversed on Memoir Materials*, WASH. POST, Feb. 3, 1987, at A1.

⁸¹ Olson Memo, *supra* note 58, at 486; Rabkin Letter, *supra* note 61.

⁸² *Id. But see* Smith Letter/EPA, *supra* note 79, at 32 (“policy does not extend to all material contained in investigative files.... The only documents which have been withheld are those which are sensitive memoranda or notes by ... attorneys and investigators reflecting enforcement strategy, legal analysis, lists of potential witnesses, settlement considerations, and similar materials the disclosure of which might adversely affect a pending enforcement action, overall enforcement policy, or the rights of individuals”).

⁸³ Cutler Memo, *supra* note 60, at 1; *accord* Memorandum from President Reagan for the Heads of Executive Departments, and Agencies Re: Procedures for Governing Responses to Congressional Requests for Information, November 4, 1982 [hereinafter Reagan Memo]; Rabkin Letter, *supra* note 61, at 1-2

⁸⁴ Cutler Memo, *supra* note 60, at 1.

⁸⁵ Reagan Memo, *supra* note 83, at 1.

reach an accommodation” with Congress.⁸⁶ The George W. Bush Administration limited the formal claims of executive privilege to those instances where the effort to accommodate had failed and Congress had issued a subpoena.⁸⁷ The duty to seek an accommodation is said to have been the result of the uncertain boundaries between executive and legislative interests.⁸⁸ This uncertainty imposes upon each of the branches an “obligation … to accommodate the legitimate needs of the other,”⁸⁹ and a duty to conduct “good faith” negotiations.⁹⁰ Avoiding the disclosure of embarrassing information is not a sufficient reason to withhold information from Congress.⁹¹ In fact, it has been asserted that invocation of the privilege should not even be considered in the absence of a “demonstrable justification that Executive withholding will further the public interest.”⁹²

Where negotiations have faltered and the President has made a formal claim of executive privilege, the executive will likely argue (as the Clinton Administration did in its invocations of executive privilege)⁹³ that the investigating committee has not made the showing required to overcome the privilege under *Senate Select Committee v. Nixon*: that the subpoenaed evidence is “demonstrably critical to the responsible fulfillment of the Committee’s functions.”⁹⁴ As indicated above, since at least the Reagan Administration, each Administration has argued that Congress’s interest in executive information is less compelling when the Committee is exercising its oversight authority rather than considering specific legislative proposals.

Executive Attempts to Expand Executive Privilege

Merging the Presidential Communications Privilege with the Deliberative Process Privilege

Without further judicial consideration of executive privilege since the Nixon cases, the executive, through presidential signing statements, executive orders, OLC Opinions, and, most recently, White House Counsel directives, has attempted to effect a practical expansion of the scope of the privilege. The key vehicle has been the notion of deliberative process. The idea of the deliberative process privilege was developed under the Freedom of Information Act (FOIA) to provide limited protection for communications and documents evidencing the predecisional considerations of agency officials. Over time, the executive branch has melded this deliberative process idea with the recognized confidentiality interest in the President’s communications with close advisors,

⁸⁶ Barr Memo, *supra* note 20, at 185.

⁸⁷ *Id.* at 185, 186; see Rozell, *supra* note 1, at 106-08.

⁸⁸ Rehnquist Statement, *supra* note 62, at 420.

⁸⁹ Smith Letter/Watt, *supra* note 20, at 31.

⁹⁰ Reagan Memo, *supra* note 83, at 1.

⁹¹ Rehnquist Statement, *supra* note 62, at 422.

⁹² *Id.*

⁹³ Letter from Attorney General Janet Reno to President Clinton, September 20, 1996, at 2-3 [hereinafter Reno Letter/Haiti]; Letter from Attorney General Reno to President Clinton, September 30, 1996, at 2 [hereinafter Reno Letter/FBI]; Letter from Attorney General Reno to President Clinton, September 16, 1999 [hereinafter Reno Letter/FALN]. The Acting Attorney General’s opinion accompanying President George W. Bush’s June 28, 2007, claim of executive privilege, discussed in *infra* at 24-26, relies heavily on the *Senate Select Committee* precedent.

⁹⁴ 498 F.2d at 731.

such that the privilege would extend to any policy deliberations or communications within the executive branch in which the President may have an interest.

For example, the legal justifications asserted by the Obama Administration for withholding documents from Congress during a House probe into “Operation Fast and Furious”⁹⁵ appear to reflect a heavy reliance on the deliberative process privilege. In a letter to the President asking him to invoke executive privilege over the subpoenaed documents, Attorney General Eric Holder noted that “Presidents have repeatedly asserted executive privilege to protect confidential Executive Branch deliberative materials from congressional subpoena.”⁹⁶ The Attorney General went on to argue that “[i]t is well established that ‘the doctrine of executive privilege ... encompasses Executive Branch deliberative communications.’”⁹⁷ The Attorney General’s memorandum made no mention of a distinction between the deliberative process privilege and the presidential communications privilege; nor did the memorandum reference the D.C. Circuit cases of *Espy* and *Judicial Watch*.

Procedures Employed to Assess Potential Privilege Claims

Under the Reagan Administration, if the head of an agency, with the advice of agency counsel, decided that a congressional information request raised substantial questions, the Attorney General, through the Office of Legal Counsel and the White House Counsel’s Office, was promptly notified and consulted. If one or more of these advisors deemed the issue substantial, the President was informed, made a decision, and the agency head informed Congress of that decision. The Reagan memo pinpointed national security, deliberative communications that form part of the decision-making process, and other information important to the discharge of executive branch constitutional responsibilities as covered by the privilege.⁹⁸ This definition was far narrower than his successors’ understanding of the privilege.

The Clinton Administration sought to expand the doctrine by centralizing scrutiny and control of all potential claims of executive privilege in the White House Counsel’s Office. The White House Counsel instructed all agency heads to notify his office directly of congressional requests for “any document created in the White House ... or in a department or agency, that contains deliberations of, or advice to or from the White House” that may raise privilege issues. The White House Counsel is to seek an accommodation and if unsuccessful, consult with the Attorney General to determine whether to recommend invocation of the privilege to the President. The President then determines whether to claim privilege, which is then communicated to Congress by the White House Counsel.⁹⁹

Establishing the White House Counsel’s Office as a central clearinghouse for presidential privilege claims appears to have had the effect of diminishing the historic role of the Justice Department’s Office of Legal Counsel as the constitutional counselor to the President and limiting agencies’ ability to deal informally with their congressional overseers, which is likely to have been its principal objective. An apparent consequence during the Clinton years was a more

⁹⁵ See, *infra*, “President Obama’s Assertion of Executive Privilege”

⁹⁶ Letter to President Barack Obama, from Eric Holder, Attorney General, June 19, 2012 at 3.

⁹⁷ *Id.*

⁹⁸ Reagan Memo, *supra* note 71, at 2.

⁹⁹ Cutler Memo, *supra* note 20, at 2-3.

rapid escalation of individual interbranch information disputes clashes, a widening and hardening of the differences in the legal positions of the branches on privilege issues, and an increased difficulty in resolving disputes informally and quickly. President Clinton formally asserted executive privilege fourteen times and resolved a number of disputes under the pressure of imminent committee actions on subpoena issuances and contempt citations.¹⁰⁰ In addition, the Clinton Administration litigated, and lost, significant privilege cases in 1997 and 1998.¹⁰¹ The first case, *Espy*, arguably undermines many key executive assumptions about the privilege just detailed and thus may reshape the nature and course of future presidential privilege disputes.

Implications and Potential Impact of D.C. Circuit Precedent on Future Executive Privilege Disputes

Espy

In *Espy*,¹⁰² the appeals court addressed several important issues left unresolved by the Watergate cases: the precise parameters of the presidential executive privilege; how far down the chain of command the privilege reaches; whether the President has to have seen or had knowledge of the existence of the documents for which he claims privilege; and what showing is necessary to overcome a valid claim of privilege.

The case arose out of an Office of Independent Counsel (OIC) investigation of former Agriculture Secretary Mike Espy. When allegations of improprieties against Espy surfaced in March of 1994, President Clinton ordered the White House Counsel's Office to investigate and report to him so he could determine what action, if any, he should undertake. The White House Counsel's Office prepared a report for the President, which was publicly released on October 11, 1994. The *Espy* court noted that the President never saw any of the report's underlying or supporting documents. Espy had announced his resignation on October 3, to be effective on December 31. The Independent Counsel was appointed on September 9 and the grand jury issued a subpoena for all documents that were accumulated or used in preparation of the report on October 14, three days after the report's issuance. The President withheld 84 documents, claiming both types of executive privilege for all documents. A motion to compel was resisted on the basis of the claimed privilege. After *in camera* review, the district court quashed the subpoena, but in its written opinion the court did not discuss the documents in any detail and provided no analysis of the grand jury's need for the documents. The appeals court panel unanimously reversed.

¹⁰⁰ See the **Appendix** of this Report for a compilation of executive privilege claims from the Kennedy through the Obama Administrations.

¹⁰¹ Clinton v. Jones, 520 U.S. 681 (1997) (no temporary presidential immunity from civil suit for unofficial acts); *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997), *cert. denied* 521 U.S. 1105 (1997) (claims of attorney-client and work product privilege denied); *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997) (claims of executive privilege rejected) [hereinafter *Espy*]; *In re Sealed Case*, 124 F.3d 230 (D.C. Cir. 1997) (claims of attorney-client and work product privilege denied); *In re Sealed Case*, 148 F.3d 1073 (D.C. Cir. 1998), *cert. denied* 525 U.S. 990 (1998) (claim of "protective function" privilege denied); *In re Bruce R. Lindsey* (Grand Jury Testimony), 148 F.3d 1100 (D.C. Cir. 1998) (claims of attorney-client and work product privilege denied).

¹⁰² 121 F.3d 729 (D.C. Cir. 1997).

At the outset, the appeals court's opinion carefully distinguished between the "presidential communications privilege" and the "deliberative process privilege." Both, the court observed, are executive privileges designed to protect the confidentiality of executive branch decision making. But the deliberative process privilege, that applies to executive branch officials generally, is a common law privilege which requires a lower threshold of need to be overcome, and "disappears altogether when there is any reason to believe government misconduct has occurred."¹⁰³

On the other hand, the court explained, the presidential communications privilege is rooted in "constitutional separation of powers principles and the President's unique constitutional role" and applies only to "direct decisionmaking by the President."¹⁰⁴ The privilege may be overcome only by a substantial showing that "the subpoenaed materials likely contain[] important evidence" and that "the evidence is not available with due diligence elsewhere."¹⁰⁵ The presidential communications privilege applies to all documents in their entirety,¹⁰⁶ including pre- and post-decisional materials.¹⁰⁷

Turning to the chain of command issue, the court held that the presidential communications privilege covers communications made or received by presidential advisers in the course of preparing advice for the President even if those communications are not made directly to the President. The court rested its conclusion on "the President's dependence on presidential advisers and the inability of the deliberative process privilege to provide advisers with adequate freedom from the public spotlight" and "the need to provide sufficient elbow room for advisers to obtain information from all knowledgeable sources."¹⁰⁸ Thus the privilege will "apply both to communications which these advisers solicited and received from others as well as those they authored themselves. The privilege must also extend to communications authored or received in response to a solicitation by members of a presidential adviser's staff."¹⁰⁹

The court, however, was acutely aware of the dangers of a limitless extension of the privilege to the principles of an open and transparent government. Therefore, it carefully restricted the privilege's reach by explicitly confining it to White House staff that has "operational proximity" to direct presidential decision making. The court held that the privilege did not apply to executive agency staff:

We are aware that such an extension, unless carefully circumscribed to accomplish the purposes of the privilege, could pose a significant risk of expanding to a large swath of the executive branch a privilege that is bottomed on a recognition of the unique role of the President. In order to limit this risk, the presidential communications privilege should be construed as narrowly as is consistent with ensuring that the confidentiality of the President's

¹⁰³ *Id.* at 745-46; *see also id.* at 737-38 ("[W]here there is reason to believe the documents sought may shed light on government misconduct, the [deliberative process] privilege is routinely denied on the grounds that shielding internal government deliberations in this context does not serve 'the public interest in honest, effective government.'").

¹⁰⁴ *Id.* at 745, 752; *see also id.* at 753 ("... these communications nonetheless are ultimately connected with presidential decisionmaking").

¹⁰⁵ *Id.* at 754, 757.

¹⁰⁶ In contrast, the deliberative process privilege does not protect documents that simply state or explain a decision the government has already made or material that is purely factual, unless the material is inextricably intertwined with the deliberative portions of the materials so that disclosure would effectively reveal the deliberations. *Id.* at 737.

¹⁰⁷ *Id.* at 745.

¹⁰⁸ *Id.* at 752.

¹⁰⁹ *Espy*, 121 F.3d at 752.

decisionmaking process is adequately protected. Not every person who plays a role in the development of presidential advice, no matter how remote and removed from the President, can qualify for the privilege. In particular, the privilege should not extend to staff outside the White House in executive branch agencies. Instead, the privilege should apply only to communications authored or solicited and received by those members of an immediate White House advisor's staff who have broad and significant responsibility for investigation and formulating the advice to be given the President on the particular matter to which the communications relate. Only communications at that level are close enough to the President to be revelatory of his deliberations or to pose a risk to the candor of his advisers. *See AAPS*, 997 F.2d at 910 (it is "operational proximity" to the President that matters in determining whether "[t]he President's confidentiality interests" is implicated) (emphasis omitted).

Of course, the privilege only applies to communications that these advisers and their staff author or solicit and receive in the course of performing their function of advising the President on official government matters. This restriction is particularly important in regard to those officials who exercise substantial independent authority or perform other functions in addition to advising the President, and thus are subject to FOIA and other open government statutes. *See Armstrong v. Executive Office of the President*, 90 F.3d 553, 558 (D.C. Cir. 1996), *cert denied*—U.S.—, 117 S.Ct. 1842, 137 L. Ed.2d 1046 (1997). The presidential communications privilege should never serve as a means of shielding information regarding governmental operations that do not call ultimately for direct decisionmaking by the President. If the government seeks to assert the presidential communications privilege in regard to particular communications of these "dual hat" presidential advisers, the government bears the burden of proving that the communications occurred in conjunction with the process of advising the President.¹¹⁰

Because the appeals court limited the presidential communications privilege to "direct decisionmaking by the President," it is important to identify the type of decision making the subpoenaed documents or requested information implicates. Arguably, the opinion restricts the scope of the privilege to encompass only those functions that form the core of presidential authority, involving what the court characterized as "quintessential and non-delegable Presidential power."¹¹¹

In the case before it, the court was specifically addressing the President's Article II appointment and removal power, which was the focus of the advice he sought from the White House Counsel in the Espy matter. However, it seems clear from the context of the opinion that the description was meant to juxtapose non-delegable powers, such as the appointment and removal power, with other presidential powers that "can be exercised or performed without the President's direct involvement, pursuant to a presidential delegation of authority or statutory framework."¹¹² The court illustrated the latter category by pointing to the President's Article II duty "to take care that the laws are faithfully executed." The courts have consistently held that this constitutional instruction is not a source of presidential power, but rather the President's obligation to ensure that the will of Congress is carried out by the executive bureaucracy.¹¹³

¹¹⁰ *Id.* (footnote omitted).

¹¹¹ *Id.* at 752.

¹¹² *Id.* at 752-53.

¹¹³ *See, e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952); *Myers v. United States*, 272 U.S. 52, 177 (1926) (Holmes, J., dissenting); *Kendall ex rel. Stokes v. United States*, 37 U.S. (12 Pet.) 522, 612-13 (1838); *Nat'l Treasury Emps. Union v. Nixon*, 492 F.2d 587, 604 (D.C. Cir. 1974).

Although not expressly and unequivocally establishing such a requirement, it appears that the appeals court may have limited the application of the newly formulated presidential communications privilege to Article II functions that are “quintessential and non-delegable.”¹¹⁴ This category appears to include the appointment and removal powers, the commander-in-chief power, the sole authority to receive ambassadors and other public ministers, the power to negotiate treaties, and the power to grant pardons and reprieves. Decision making vested by statute in the President or agency heads such as rulemaking, environmental policy, consumer protection, workplace safety and labor relations, among others, may not necessarily be covered by the privilege. Of course, the President’s role in supervising and coordinating decision making in the executive branch remains unimpeded, but his communications in furtherance of such activities may not be protected by the constitutional privilege.

Such a reading of this critical passage of the court’s opinion conforms with the court’s view of the source and purpose of the presidential communications privilege and the need to define it narrowly. Relying on *Nixon I*, the *Espy* court identified “the President’s Article II powers and responsibilities as the constitutional basis of the presidential communications privilege ... Since the Constitution assigns these responsibilities to the President alone, arguably the privilege of confidentiality that derives from it also should be the President’s alone.”¹¹⁵ Again relying on *Nixon I*, the court pinpointed the essential purpose of the privilege:

[T]he privilege is rooted in the need for confidentiality to ensure that presidential decisionmaking is of the highest caliber, informed by honest advice and knowledge. Confidentiality is what ensures the expression of ‘candid, objective, and even blunt or harsh opinions’ and the comprehensive exploration of all policy alternatives before a presidential course of action is selected.¹¹⁶

The limiting safeguard appears to be that the privilege will apply in those instances where the Constitution provides that the President alone must make a decision. “The presidential communications privilege should never serve as a means of shielding information regarding governmental operations that do not call ultimately for direct decisionmaking by the President.”¹¹⁷

Executive Branch Interpretation Immediately Following *Espy*

It may be noted that in at least one analogous instance, the White House divulged documents sought by a congressional committee that argued the more limited reading of *Espy*. When *Espy* was decided, the House Resources Committee was in the midst of an inquiry into President Clinton’s use of the Antiquities Act of 1906,¹¹⁸ which authorizes the President, in his discretion, to declare objects of historic or scientific interest on federal land to be national monuments and reserve parcels that “shall be confined to the smallest area compatible with the proper care and

¹¹⁴ See *Espy*, 121 F.3d at 752-53. But cf. *Loving v. Dep’t of Defense*, 550 F.3d 32 (D.C. Cir. 2008) (characterizing the presidential communications privilege as including documents related to “presidential decisionmaking and deliberations,” but never mentioning a requirement that the function being exercised be “quintessential and non-delegable”).

¹¹⁵ *Espy*, 121 F.3d at 748.

¹¹⁶ *Id.* at 750.

¹¹⁷ *Id.* at 752.

¹¹⁸ 34 Stat. 225 (1906) (codified as amended at 16 U.S.C. §§ 431-433 (2006)).

management of the objects to be protected.”¹¹⁹ The act establishes no special procedures for the decision to declare a national monument and contains no provision for judicial review. Shortly before the 1996 presidential election, President Clinton reserved 1.7 million acres in Utah by proclamation. Central to the Committee’s inquiry into the decision-making process that led to the proclamation were the actions of the Council on Environmental Quality (CEQ), an office within the Executive Office of the President with about the same degree of advisory proximity as that of the White House Counsel’s Office. Requests for physical production of documents from CEQ met with limited compliance: an offer to view 16 documents at the White House. The Committee believed that it required physical possession in order to determine the propriety of the process and issued a subpoena that was not complied with on the return date.

During intense negotiations, the White House claimed the documents were covered by the presidential communications privilege, even as defined by *Espy*. In a letter to the Committee, the White House Counsel’s Office argued that the opinion did not confine the privilege just to core Article II powers, but included presidential decision making encompassed within the Article II duty to take care that the laws be faithfully executed. It asserted that since the President had the sole authority to designate a monument by law, that decisional process, including deliberations among and advice of White House advisers, was covered by the privilege. The Committee disagreed, arguing in reply letters that the *Espy* privilege did not encompass decision making based on a statutory delegation of decisional authority. On the eve of a scheduled Committee vote on a resolution of contempt, the White House produced all the documents.¹²⁰

The House Resources Committee’s narrower reading of *Espy* accommodates Congress’s need for flexibility in assigning tasks for the executive to accomplish. It is, of course, the predominant practice of Congress to delegate the execution of laws to the heads of departments and agencies. But there are occasions when the nature of the decision making is deemed so sensitive, important, or unique that direct presidential authority is appropriate. Where the exercise of such authority derives solely from a statutory delegation and does not find its basis in one of the so-called “core” constitutional powers of the President, it is reasonable for Congress to expect to be able to determine whether and how its legislative intent has been carried out, just as it does with its assignments to the departments and agencies. A view that any delegation of decision-making authority directly to the President thereby prevents congressional scrutiny is not only anomalous, but arguably harmful to interbranch coordination, cooperation and comity, as it would discourage such delegations.¹²¹ Of course, further judicial development of the principles enunciated in *Espy*, and later reinforced in *Judicial Watch*, may alter this view of the scope of the privilege.

¹¹⁹ 16 U.S.C. § 431 (2006).

¹²⁰ See 143 Cong. Rec. E2259-72 (daily ed. Nov. 9, 1997) (statement of Hon. James V. Hansen presenting staff study of committee actions and documents in regard to the establishment of the Grand Staircase-Escalante National Monument); see also Ruth Larson, *White House Yields Papers on Utah Wilderness Decision*, WASH. TIMES, Oct. 23, 1997, A3. Of course, the White House action cannot be deemed a concession of the legal argument in the absence of an explanation for its decision to disclose the material.

¹²¹ The notion that a congressional delegation of administrative decision-making authority is implicitly a concurrent delegation of authority to the President is effectively countered by Professor Kevin Stack in *The President’s Statutory Power to Administer the Laws*, 106 COLUM. L. REV. 263 (2006).

Judicial Watch

The District of Columbia Circuit's 2004 decision in *Judicial Watch, Inc. v. Department of Justice*¹²² appears to lend substantial support to the interpretation of *Espy* discussed above. *Judicial Watch* involved requests for documents concerning pardon applications and pardon grants reviewed by the Justice Department's Office of the Pardon Attorney and the Deputy Attorney General for consideration by President Clinton.¹²³ Some 4,300 documents were withheld from a FOIA disclosure on the grounds that they were protected by the presidential communications and deliberative process privileges. The district court held that because the materials sought had been produced for the sole purpose of advising the President on a "quintessential and non-delegable Presidential power"—the exercise of the President's constitutional pardon authority—the presidential communications privilege extended to internal Justice Department documents which had not been "solicited and received" by the President or the Office of the President.¹²⁴ The appeals court reversed, concluding that "internal agency documents that are not 'solicited and received' by the President or his Office are instead protected against disclosure, if at all, by the deliberative process privilege."¹²⁵

Guided by the *Espy* ruling, the majority emphasized that the "solicited and received" requirement "is necessitated by the principles underlying the presidential communications privilege, and a recognition of the dangers of expanding it too far."¹²⁶ *Espy* held, the court explained, that the privilege may be invoked only when documents or communications are authored or solicited and received by the President himself or by presidential advisers in close proximity to the President who have significant responsibility for advising him on matters requiring presidential decision making. In rejecting the government's argument that the privilege should apply to all departmental and agency communications related to the Deputy Attorney General's pardon recommendations for the President, the panel majority held that:

Such a bright-line rule is inconsistent with the nature and principles of the presidential communications privilege, as well as the goal of serving the public interest Communications never received by the President or his Office are unlikely to "be revelatory of his deliberations ... nor is there any reason to fear that the Deputy Attorney General's candor or the quality of the Deputy's pardon recommendations would be sacrificed if the presidential communications privilege did not apply to internal documents Any pardon documents, reports or recommendations that the Deputy Attorney General submits to the Office of the President, and any direct communications the Deputy or the Pardon Attorney may have with the White House Counsel or other immediate Presidential advisers will remain protected It is only those documents and recommendations of Department staff that are not submitted by the Deputy Attorney General for the President and are not otherwise received by the Office of the President, that do not fall under the presidential communications privilege.¹²⁷

¹²² 365 F.3d 1108 (D.C. Cir. 2004). The panel split 2-1, with Judge Rogers writing for the majority and Judge Randolph dissenting.

¹²³ The President has delegated the formal process of review and recommendation of his pardon authority to the Attorney General who, in turn, has delegated it to the Deputy Attorney General. The Deputy Attorney General oversees the work of the Office of the Pardon Attorney.

¹²⁴ *Judicial Watch*, 365 F.3d at 1109-12.

¹²⁵ *Id.* at 1112.

¹²⁶ *Id.* at 1114.

¹²⁷ *Id.* at 1117.

Indeed, the *Judicial Watch* panel makes it clear that the *Espy* analysis precludes cabinet department heads from being treated as part of the President's immediate personal staff or as part of the Office of the President:

Extension of the presidential communications privilege to the Attorney General's delegatee, the Deputy Attorney General, and his staff, on down to the Pardon Attorney and his staff, with the attendant implication for expansion to other Cabinet officers and their staffs, would, as the court pointed out in [*Espy*], pose a significant risk of expanding to a large swatch of the executive branch a privilege that is bottomed on a recognition of the unique role of the President.¹²⁸

The *Judicial Watch* majority took great pains to explain why *Espy* and the case before it differed from the post-Watergate Nixon cases. According to the court, “[u]ntil [*Espy*], the privilege had been tied specifically to direct communications of the President with his immediate White House advisors.”¹²⁹ The *Espy* court, it explained, was confronted for the first time with the question of whether communications made by the President's closest advisors while preparing advice for the President that the President never sees should also be protected by the presidential privilege. The *Espy* court's answer was to “espouse[] a ‘limited extension’ of the privilege” ‘down the chain of command’ beyond the President to his immediate White House advisors only,” recognizing:

the need to ensure that the President would receive full and frank advice with regard to his non-delegable appointment and removal powers, but was also wary of undermining countervailing considerations such as openness in government Hence, the [*Espy*] court determined that while ‘communications authored or solicited and received’ by immediate White House advisors in the Office of the President could qualify under the privilege, communications of staff outside the White House in executive branch agencies that were not solicited and received by such White House advisors could not.¹³⁰

The facts before the *Judicial Watch* court tested the *Espy* principles. While the exercise of the President's pardon power was certainly a non-delegable, core presidential function, the officials involved, the Deputy Attorney General and the Pardon Attorney, were deemed to be too removed from the President and his senior White House advisors to be protected by the privilege. The court conceded that functionally those officials were performing a task directly related to the pardon decision, but concluded that an organizational test was more appropriate than a functional test, since the latter could potentially significantly broaden the scope of the privilege. Where the presidential communications privilege did not apply, as here, the lesser protections of the deliberative process privilege would have to suffice.¹³¹ The majority found that privilege insufficient and ordered the disclosure of the 4,300 withheld documents.

Committee on the Judiciary v. Miers

The important 2008 district court opinion in *Committee on the Judiciary v. Miers* has also played a role in defining the outer contours of executive privilege. In early 2007, the House Judiciary Committee and its Subcommittee on Commercial and Administrative Law commenced an inquiry

¹²⁸ *Id.* at 1121-22.

¹²⁹ *Judicial Watch*, 365 F.3d at 1116.

¹³⁰ *Id.* at 1116-17.

¹³¹ *Id.* at 1118-24.

into the termination and replacement of a number of United States Attorneys. Six hearings and numerous interviews were conducted by the committees between March and June 2007, focusing on the actions of present and former Department of Justice (DOJ) officials and employees as well as related DOJ documents. On March 21, 2007, the House Subcommittee authorized Chairman John Conyers, Jr. to issue subpoenas to a number of present and former White House officials for documents and testimony. On June 13, 2007, Chairman Conyers issued subpoenas to White House Chief of Staff Joshua Bolten, in his role as custodian of White House documents, and to former White House Counsel Harriet Miers.

On June 27, 2007, White House Counsel Fred F. Fielding, at the direction of President Bush, wrote to the Chairmen of the House and Senate Judiciary Committees regarding the document subpoenas issued to Mr. Bolten and Ms. Miers. Fielding notified the committees that the President was asserting executive privilege and had instructed the subpoena recipients not to produce any documents. Additionally, the Fielding letter noted that the testimony sought from Ms. Miers was also subject to a “valid claim of Executive Privilege,” and would be asserted if the matter could not be resolved before the scheduled appearance date.¹³²

Accompanying the Fielding letter was a legal memorandum prepared by Acting Attorney General Paul D. Clement, for the President, detailing the legal basis for a claim of executive privilege.¹³³ The memo identified three categories of documents being sought by the committee: (1) internal White House communications; (2) communications by White House officials with individuals outside the executive branch, including individuals in the Legislative Branch; and (3) communications between White House and Justice Department officials.¹³⁴ Internal White House communications included discussions of “the wisdom” of removal and replacement proposals, which U.S. Attorneys should be removed, and possible responses to Congressional and media inquiries. The memo claimed these discussions were the “types of internal deliberations among White House officials [that] fall squarely within the scope of executive privilege” since their non-disclosure “promote[s] sound decisionmaking by ensuring that senior Government officials and their advisors may speak frankly and candidly during the decisionmaking process.”¹³⁵ Furthermore, the memo argued that the President’s protected confidentiality interests “are particularly” strong in this instance because the presidential power to appoint and remove officers of the United States is a “quintessential and nondelegable Presidential power.”¹³⁶ As a consequence, an inquiring committee would have to meet the standard established by the *Senate Select Committee* decision, showing that the documents and information are “demonstrably critical to the responsible fulfillment of the Committee’s function,” to overcome the privilege and achieve disclosure.¹³⁷

On June 29, 2007, Chairman Conyers and Senate Judiciary Committee Chairman Patrick Leahy jointly responded to the Fielding letter and Clement memo. Characterizing the White House

¹³² Letter dated June 28, 2007 to Chairman Conyers and Leahy from Fred F. Fielding, Counsel to the President, available at <http://www.judiciary.senate.gov/resources/documents/upload/110thCongress-2007Documents.pdf>.

¹³³ Memorandum, dated June 27, 2007, for the President from Paul D. Clement, Solicitor General and Acting Attorney General, available at <http://www.judiciary.senate.gov/resources/documents/upload/110thCongress-2007Documents.pdf> [hereinafter Clement Memo].

¹³⁴ *Id.* at 1.

¹³⁵ *Id.* at 2 (citing *Nixon I*, 418 U.S. at 708).

¹³⁶ *Id.* (citing *Espy*, 121 F.3d at 752).

¹³⁷ *Id.*

stance as “based on blanket executive privilege claims,” which makes it difficult for the Committees “to determine where privilege truly does and does not apply,” the Committees demanded that they be provided with a detailed privilege log. The log was to include the following information for each document withheld: a description of the nature, source, subject matter and date of the document; the name and address of each recipient of an original or copy of the document and the date received; the name and address of each additional person to whom any of the contents of the document was disclosed, along with the date and manner of disclosure; and the specific basis for the assertion of privilege. A deadline for receipt of the privilege log was set for July 9, 2007.

On July 9, 2007, the White House Counsel refused to comply. On that same date, counsel to Ms. Miers informed Chairman Conyers that, pursuant to letters received from the White House Counsel, Miers would not answer questions or produce documents. The next day Ms. Miers’ counsel announced that she would not appear at all. Also on July 10, the DOJ Office of Legal Counsel (OLC) issued an opinion stating that “Ms. Miers is [absolutely] immune from compulsion to testify before the Committee on this matter and therefore is not required to appear to testify about the subject.”¹³⁸ Citing previous OLC opinions, the opinion asserted that since the President is the head of one of the independent branches of the federal government, “If a congressional committee could force the President’s appearance, fundamental separation of powers principles—including the President’s independence and autonomy from Congress—would be threatened.”¹³⁹ Consequently, “[t]he same separation of powers principles that protect a President from compelled congressional testimony also apply to senior presidential advisors” because such appearances would be tantamount to the President himself appearing.¹⁴⁰ The fact that Ms. Miers was a former counsel to the President would not alter the analysis since, in OLC’s view, “a presidential advisor’s immunity is derivative of the President’s.” Neither Ms. Miers nor Mr. Bolten complied with the subpoenas by the return dates.

On July 12 and July 19 the House Subcommittee met and Chairman Sánchez issued a ruling rejecting both Ms. Miers’ and Mr. Bolton’s privilege claims. On July 25, the full Judiciary Committee voted, 21-17, to issue a report to the House recommending that a resolution of contempt of Congress against Ms. Miers and Mr. Bolten be approved. Thereafter, the White House announced that it would order the U.S. Attorney for the District of Columbia not to present the contempt of Congress citation for grand jury consideration.¹⁴¹

The Judiciary Committee filed its report formally reporting a contempt violation to the House in November 2007.¹⁴² After further attempts at accommodation failed, the matter was brought to the

¹³⁸ Memorandum for the Counsel to the President Re: Immunity of Former Counsel to the President from Compelled Congressional Testimony from Principal Deputy Assistant Attorney General, Office Legal Counsel, DOJ, dated July 10, 2007, available at <http://www.justice.gov/olc/2007/miers-immunity-Opinion071007.pdf> [hereinafter OLC Immunity Opinion].

¹³⁹ *Id.* at 1.

¹⁴⁰ *Id.* at 2.

¹⁴¹ See 2 U.S.C. §§ 192, 194 (stating that the President of the Senate or Speaker of the House shall certify the citation to the U.S. Attorney, “whose duty it shall be to bring the matter before the grand jury for its action”). For detailed information about the criminal contempt statutes, see CRS Report RL34097, *Congress’s Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure*, by Todd Garvey and Alissa M. Dolan.

¹⁴² H.Rept. 110-423 110th Cong., 1st Sess. (2007).

floor of the House on February 14, 2008. The House voted 223 to 32¹⁴³ in favor of two resolutions.¹⁴⁴ House Resolution 979 directed the Speaker to certify the Judiciary Committee report, detailing Ms. Miers' refusal to appear, testify, or produce documents for the Committee and Mr. Bolten's refusal to produce documents, in violation of the subpoenas, to the U.S. Attorney for the District of Columbia for presentation to a grand jury pursuant to 2 U.S.C. §§ 192 and 194.¹⁴⁵ House Resolution 980 was passed in apparent anticipation that the U.S. Attorney would not present the criminal contempt citation to the grand jury. The resolution authorized the Chairman of the Judiciary Committee to initiate civil judicial proceedings in federal court to seek a declaratory judgment affirming the duty of any individual to comply with any subpoena that is the subject of House Resolution 979 and to issue appropriate injunctions to achieve compliance. The resolution also authorized the House General Counsel to represent the Committee in any such litigation.

On February 28, 2008, the Speaker certified the Committee's Report to the U.S. Attorney. The next day, however, Attorney General Mukasey advised the Speaker that "the Department will not bring the congressional contempt citations before a grand jury or take any other action to prosecute Mr. Bolten or Ms. Miers."¹⁴⁶

On March 10, 2008, the House General Counsel filed a civil action for declaratory judgment and injunctive relief against Ms. Miers and Mr. Bolten.¹⁴⁷ The suit sought an order directing Ms. Miers to appear before the Committee, respond to questions, and only invoke executive privilege if appropriate. Additionally, the Committee requested that Ms. Miers and Mr. Bolten provide detailed privilege logs for the documents claimed to be privileged and produce all other documents subject to the subpoenas.¹⁴⁸ Shortly after filing the case, the House General Counsel filed a Motion for Partial Summary Judgment seeking a declaration that (1) Ms. Miers failure to appear at all in response to the Committee's subpoena was without legal justification; (2) that she must appear before the Committee and can assert privilege claims in response to questions, as appropriate, but must testify about subjects not covered by privilege; (3) that the failure of both Ms. Miers and Mr. Bolten to supply privilege logs with respect to withheld documents is legally unjustified; and (4) that both be ordered to provide detailed privilege logs with respect to documents claimed to be privileged and to produce all relevant non-privileged documents.¹⁴⁹ In opposition, the Executive argued that the suit should be dismissed because the Committee lacked standing and a cause of action.¹⁵⁰ Furthermore, it argued that the court should not involve itself in

¹⁴³ H.Res. 982, 110th Cong. (Feb. 14, 2008). The vote total is low because 173 Members did not vote. According to the Washington Post, "Republicans walked off the floor and refused to cast a final vote." Paul Kane, *West Wing Aides Cited for Contempt*, WASH. POST, Feb. 15, 2008, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/02/14/AR2008021402415.html>.

¹⁴⁴ The House only voted on one resolution, H.Res. 982. However, the text of this resolution stated, "*Resolved*, That House Resolution 979 and House Resolution 980 are hereby adopted." Therefore, the House only recorded one vote, but voted in favor of passing two resolutions.

¹⁴⁵ H.Res. 979, 110th Cong. (Feb. 14, 2008).

¹⁴⁶ Letter from Attorney General Michael Mukasey to Speaker of the House Nancy Pelosi, Feb. 29, 2008 (on file with the authors).

¹⁴⁷ Complaint for Declaratory and Injunctive Relief, Comm. on the Judiciary, U.S. House of Representative v. Miers, 558 F. Supp. 2d 53 (D.D.C. 2008) (No. 08-0409).

¹⁴⁸ *Id.* at 10-11.

¹⁴⁹ Plaintiff's Motion for Partial Summary Judgment at 1-2, Comm. on the Judiciary, U.S. House of Representative v. Miers, 558 F. Supp. 2d 53 (D.D.C. 2008) (No. 08-0409).

¹⁵⁰ Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss and in Opposition to (continued...)

disputes between the political branches that have traditionally been resolved through direct negotiation.¹⁵¹

On July 31, 2008, the district court essentially granted the Committee's motion for partial summary judgment in its entirety.¹⁵² In its lengthy opinion, the court rejected the executive's justiciability claims, finding both standing and an implied cause of action in the Constitution's institutional commitment to Congress in Article I of "the power of inquiry." It noted that the Supreme Court has consistently recognized that this power carries with it an enforcement mechanism, which is "an essential and appropriate auxiliary to the legislative function."¹⁵³ Furthermore, the court stated that "issuance of a subpoena pursuant to an authorized investigation is ... an indispensable ingredient of law making."¹⁵⁴ In rejecting the suggestion that the court exercise its equitable discretion not to adjudicate an inter-branch political dispute, the court observed that many courts since the initial Watergate rulings deemed it appropriate to attempt to resolve subpoena disputes. These disputes, both civil and criminal, involved privilege claims in circumstances where it appeared only judicial intervention could "prevent a stalemate ... that could result in a paralysis of government operations."¹⁵⁵ The court noted that both parties conceded that they were at an impasse and observed:

Although the identity of the litigants in this case necessitates that the Court proceed with caution, that is not a convincing reason to decline to decide a case that presents important legal questions. Rather than running roughshod over separation of powers principles, the Court believes that entertaining this case will reinforce them. Two parties cannot negotiate in good faith when one side asserts legal privileges but insists that they cannot be tested in court in the traditional manner. That is true whether the negotiating parties are private firms or the political branches of the federal government. Accordingly, the Court will deny the Executive's motion to dismiss.¹⁵⁶

(...continued)

Plaintiff's Motion for Partial Summary Judgment on Counts I and II at 5-8, U.S. House of Representative v. Miers, 558 F. Supp. 2d 53 (D.D.C. 2008) (No. 08-0409).

¹⁵¹ *Id.* at 8-9.

¹⁵² The court declined to order Ms. Miers and Mr. Bolten to provide detailed privilege logs for documents claimed to be covered by executive privilege, holding that while such logs "have great practical utility," there is no applicable statute or controlling case law that would provide "a ready ground by which to force the Executive to make such a production strictly in response to a congressional subpoena." *Miers*, 558 F. Supp. 2d at 107 (emphasis in original). The court warned, however, that both the court "and the parties will need some way to evaluate privilege assertions going forward in the context of this litigation." *Id.* The court particularly noted that if it has to decide the merits of a privilege claim, the government "will need a better description of the documents than the one found in Mr. Clement's letter of June 27, 2007." See Clement Memo, *supra* notes 127-37 and accompanying text. With this admonition, the court ordered that the defendants "shall provide to the plaintiff a specific description of any documents withheld from production on the basis of executive privilege consistent with the terms of the Memorandum Opinion issued on this date." Order at 1-2, Comm. on the Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53 (D.D.C. 2008).

¹⁵³ *Miers*, 558 F. Supp. 2d at 75 (citing *McGrain*, 273 U.S. at 174).

¹⁵⁴ *Id.* (citing *Eastland*, 421 U.S. at 505).

¹⁵⁵ *Id.* at 99 (citing Response to Congressional Requests for Information Regarding Decisions Made Under the Independent Counsel Act, 10 Op. O.L.C. 68 (1986) [hereinafter Cooper Memo]).

¹⁵⁶ *Id.* For an in-depth discussion of the implications and importance of the court's justiciability rulings, see CRS Report RL34097, *Congress's Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure*, by Todd Garvey and Alissa M. Dolan.

Turning to the executive’s claim that present and past senior advisers to the President are absolutely immune from compelled congressional process, the court rejected the executive’s position:

The Executive cannot identify a single judicial opinion that recognizes absolute immunity for senior presidential advisors in this or any other context. That simple yet critical fact bears repeating: the asserted absolute immunity claim here is entirely unsupported by existing case law. In fact, there is Supreme Court authority that is all but conclusive on this question and that powerfully suggests that such advisors do not enjoy absolute immunity. The Court therefore rejects the Executive’s claim of absolute immunity for senior presidential aides.¹⁵⁷

At the outset, the court noted that the 1950 Supreme Court ruling in *United States v. Bryan*¹⁵⁸ established that if a congressional subpoena requirement is ignored, “the great power of testimonial compulsion, so necessary to the effective functioning of courts and legislatures, would be a nullity.”¹⁵⁹ In attempting to explain why it should not have to comply here, the executive argued that since the President is absolutely immune to compelled congressional testimony, close advisers to the President must be regarded as his “alter ego” and, therefore, be entitled to the same absolute immunity. The court responded that the same line of argument was rejected by the Supreme Court in *Harlow v. Fitzgerald*,¹⁶⁰ a suit for damages against senior White House aides arising out of the defendants’ official actions. The aides claimed they were “entitled to a blanket protection of absolute immunity as an incident of their offices as Presidential aides.”¹⁶¹ Recognizing that absolute immunity had been extended to legislators, judges, prosecutors, and the President himself, the Supreme Court rejected extending such immunity further, emphasizing that “[f]or executive officials in general, however, our cases make plain that qualified immunity represents the norm.”¹⁶² The Court rejected the argument that it had accorded derivative immunity to legislative aides in Speech or Debate cases as “sweep[ing] too far,” noting that even cabinet members “are not entitled to absolute immunity.”¹⁶³ The *Harlow* Court did concede that a presidential aide could have absolute immunity if the responsibilities of his office included a sensitive function, such as foreign policy or national security, and he was discharging the protected functions when performing the act for which liability is asserted.¹⁶⁴ The *Miers* district court concluded that in this matter, since there was no involvement of national security or foreign policy concerns, neither Ms. Miers’ nor Mr. Bolten’s close proximity to the President was sufficient under *Harlow* to provide either absolute or qualified immunity.¹⁶⁵

In response to the Executive’s claim that without absolute immunity there would be a “chilling effect” on the candid and frank advice advisers would provide a Chief Executive, the court stated:

The prospect of being hauled in front of Congress – daunting as it may be – would not necessarily trigger the chilling effect that the Executive predicts. Senior executive officials

¹⁵⁷ *Miers*, 558 F. Supp. 2d at 99.

¹⁵⁸ 339 U.S. 323 (1950).

¹⁵⁹ *Id.* at 331.

¹⁶⁰ 457 U.S. 800 (1982).

¹⁶¹ *Id.* at 808.

¹⁶² *Id.* at 807.

¹⁶³ *Id.* at 810.

¹⁶⁴ *Id.* at 812-13.

¹⁶⁵ *Miers*, 558 F. Supp. 2d at 100-01, 104-05.

often testify before Congress as a normal part of their jobs, and forced testimony before Congress does not implicate the same concern regarding *personal* financial exposure as does a damages suit. Significantly, the Committee concedes that an executive branch official may assert executive privilege on a question-by-question basis as appropriate. That should serve as an effective check against public disclosure of truly privileged communications, thereby mitigating any adverse impact on the quality of advice that the President receives . . . In any event, the historical record produced by the Committee reveals that senior advisors to the President have often testified before Congress subject to various subpoenas dating back to 1973. Thus, it would hardly be unprecedented for Ms. Miers to appear before Congress to testify and assert executive privilege where appropriate. Still, it is noteworthy that in an environment where there is *no* judicial support whatsoever for the Executive's claim of absolute immunity, the historical record also does not reflect the wholesale compulsion by Congress of testimony from senior presidential advisors that the Executive fears.¹⁶⁶

Next, the district court rejected the claim that *Nixon I* established that a president's immunity is qualified, and not absolute, only when judicial resolution of a criminal justice matter was at stake.¹⁶⁷ The executive argued that this case involved only a "peripheral" exercise of Congress's power, not a core function of another branch. The court responded:

Congress's power of inquiry is as broad as its power to legislate and lies at the very heart of Congress's constitutional role. Indeed, the former is necessary to the proper exercise of the latter: according to the Supreme Court, the ability to compel testimony is "*necessary to the effective functioning of courts and legislatures.*" *Bryan* 339 U.S. at 331 (emphasis added). Thus, Congress's use of (and need for vindication of) its subpoena power in this case is not less legitimate or important than was the grand jury's in *United States v. Nixon*. Both involve core functions of a co-equal branch of the federal government, and for the reasons identified in *Nixon*, the President may only be entitled to a presumptive, rather than absolute, privilege here. And it is certainly the case that if the President is entitled only to a presumptive privilege, his close advisors cannot hold the superior card of absolute immunity... [A] claim of absolute immunity from compulsory process cannot be erected by the Executive as a surrogate for the claim of absolute privilege already firmly rejected by the courts. Presidential autonomy, such as it is, cannot mean that the Executive's actions are totally insulated from scrutiny by Congress. That would eviscerate the Congress's oversight functions.¹⁶⁸

The court recognized that claiming that close presidential advisors were entitled to absolute privilege made the President the judge of the parameters of his own privilege. The court concluded that such a power "would impermissibly transform the presumptive privilege into an absolute one, yet that is what the Executive seeks through its assertion of Ms. Miers absolute immunity from compulsory process. That proposition is untenable and cannot be justified by appeals to Presidential autonomy."¹⁶⁹

Finally, the district court rejected the Executive's fall-back position: that even if Ms. Miers is not entitled to absolute immunity, she should be accorded qualified immunity. The court dismissed the argument, relying on the analysis established by *Harlow*:

¹⁶⁶ *Id.* at 102 (emphasis in original) (internal citations omitted).

¹⁶⁷ *Nixon I*, 418 U.S. at 707-08.

¹⁶⁸ *Miers*, 558 F. Supp. 2d at 102-03.

¹⁶⁹ *Id.* at 103-04.

[T]his inquiry does not involve sensitive topics of national security or foreign affairs. Congress, moreover, is acting pursuant to a legitimate use of its investigative authority. Notwithstanding its best efforts, the Committee has been unable to discover the underlying causes of the forced terminations of the U.S. Attorneys. The Committee has legitimate reasons to believe that Ms. Miers's testimony can remedy that deficiency. There is no evidence that the Committee is merely seeing to harass Ms. Miers by calling her to testify. Importantly, moreover, Ms. Miers remains able to assert privilege in response to any specific question or subject matter. For its part, the Executive has not offered any independent reasons that Ms. Miers should be relieved from compelled congressional testimony beyond its blanket assertion of absolute immunity. The Executive's showing, then, does not support either absolute or qualified immunity in this case.¹⁷⁰

The Administration appealed the district court decision and asked the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) to stay the district court order pending an expedited final decision by that court. On September 16, 2008 the D.C. Circuit granted the stay, but denied the Administration's request for an expedited schedule.¹⁷¹ The appeals court had concluded that "even if expedited, this controversy will not be fully and finally resolved by the Judicial Branch ... before the 110th Congress ends on January 3, 2009. At that time, the 110th House of Representatives will cease to exist as a legal entity, and the subpoenas it has issued will expire."¹⁷² Accordingly, because the Committee's subpoenas were likely to expire before the dispute could be resolved, the court saw no reason to expedite the case.¹⁷³

On January 13, 2009—with the *Miers* case still on appeal before the D.C. Circuit, the 110th Congress having reached its conclusion, and all presidential records set to transfer into the custody of the Archivist of the United States¹⁷⁴ at the end of President Bush's second term on January 20th—the district court issued a second order to preserve the availability of documents covered by the Committee subpoenas.¹⁷⁵ The order required the Administration to make copies of all materials responsive to the subpoenas for storage at the White House until the conclusion of the litigation.

In March of 2009, after the arrival of a newly elected Congress and presidential administration, the parties reached a settlement in which some, but not all, of the requested documents would be provided to the Committee. In addition, Ms. Miers would be permitted to testify, under oath, in a closed, but transcribed hearing.¹⁷⁶ Accordingly, the D.C. Circuit dismissed *Miers* on October 14, 2009, pursuant to a motion for voluntary dismissal.¹⁷⁷ Thus, the *Miers* litigation ended more than a year and a half after the Committee first filed its suit to enforce the subpoenas. Ultimately,

¹⁷⁰ *Id.* at 105.

¹⁷¹ Committee on the Judiciary v. Miers, 542 F.3d 909 (D.C. Cir. 2008) [hereinafter *Miers II*].

¹⁷² *Id.* at 911. The authority underlying a House subpoena or contempt citation has traditionally been considered to expire at the termination of the Congress in which it was authorized.

¹⁷³ The concurring opinion appeared to disagree with the majority on this point, arguing that "the successor Congress can assert the prior Committee's investigatory interest..." Committee on the Judiciary v. Miers, 542 F.3d 909, 912 (D.C. Cir. 2008) (Tatel, Judge, concurring) (citing United States v. AT&T Co., 567 F.2d 121 (D.C. Cir. 1977)).

¹⁷⁴ Presidential Records Act, 44 U.S.C. §§2201-2207.

¹⁷⁵ Committee on the Judiciary v. Miers, 2009 U.S. Dist. LEXIS 2326 (D.D.C. 2009).

¹⁷⁶ David Johnston, *Top Bush Aides to Testify in Attorneys' Firings*, N.Y. TIMES, March. 4, 2009. The settlement also permitted Karl Rove to testify under the same conditions.

¹⁷⁷ Committee on the Judiciary v. Miers, 2009 U.S. App. LEXIS 29374 (D.C. Cir. 2009).

however, the Committee was able to gain access to much of the information it had been seeking.¹⁷⁸

Although the district court opinion in *Miers* is perhaps best characterized as a vindication of congressional oversight prerogatives, or at least a clear limitation on the scope of executive privilege in the face of a congressional investigation, the ultimate impact of the case is unclear. The reasoning adopted by the court may have significant influence in that it so clearly repudiated the executive's claim of absolute immunity for presidential advisors, while reaffirming Congress's essential role in conducting oversight and enforcing its own subpoenas. However, the impact of the ruling may also be limited by the fact that, as a district court decision, it carries only the precedential weight that its reasoning may bear. Moreover, the case did not provide any discussion of the merits of Miers' specific claims of executive privilege, but rather held that although not enjoying absolute immunity from congressionally compelled testimony, Ms. Miers was still free to assert executive privilege "in response to any specific questions posed by the Committee."¹⁷⁹ Thus, Ms. Miers could still assert the protections of executive privilege during her testimony depending on the substance of any individual question posed by a Member of the Committee. Finally, the court also suggested, without further explanation, that Congress may lack authority to compel testimony where such testimony related to national security, foreign affairs, or another "particularly sensitive function" of the executive branch.¹⁸⁰

Loving v. Department of Defense

In *Loving v. Department of Defense*, the D.C. Circuit reaffirmed the distinction between the deliberative process privilege and the presidential communications privilege that had been carefully explained in *Espy* and *Judicial Watch*.¹⁸¹ The *Loving* court held that the presidential communications privilege applies only where documents or communications "directly involve the President" or were "solicited and received" by White House advisors.¹⁸² The case was precipitated by a FOIA request filed by army private Dwight Loving seeking disclosure of various documents, including a Department of Defense memorandum containing recommendations to the President about Loving's murder conviction by a military tribunal and subsequent death sentence. After noting the two distinct versions of executive privilege,¹⁸³ the appeals court determined that the documents in question were indeed protected from disclosure as they fell "squarely within the presidential communications privilege because they 'directly involve' the President."¹⁸⁴ The court also clarified that communications that "directly involve" the President, need not actually be "solicited and received" by him. The mere fact that the documents were viewed by the President was sufficient to bring them within the privilege.¹⁸⁵ It is important to note that in its relatively

¹⁷⁸ The testimony and documents are available at http://judiciary.house.gov/issues/issues_WHInterviews.html; http://judiciary.house.gov/issues/issues_WHInterviews.html.

¹⁷⁹ *Miers*, 558 F. Supp. 2d. at 105.

¹⁸⁰ *Id.* at 101, 106.

¹⁸¹ 550 F.3d 32 (D.C. Cir. 2008).

¹⁸² *Id.* at 37.

¹⁸³ *Id.* ("[T]wo executive privileges [] are relevant here: the presidential communications privilege and the deliberative process privilege.").

¹⁸⁴ *Id.* at 39.

¹⁸⁵ *Id.* at 40 ("Nothing in *Judicial Watch* disturbs the established principle that communications 'directly involving' the President ...are entitled to the privilege, regardless of whether the President solicited them."). In addition, the *Loving* opinion reaffirmed that the presidential communications privilege "is more difficult to surmount" than the deliberative (continued...)

brief discussion of the presidential communications privilege, the *Loving* court did not reference the discussion of “non-delegable presidential duties” that was included in *Espy* and *Judicial Watch*.

President Obama’s Assertion of Executive Privilege

On June 20, 2012, Deputy Attorney General James Cole alerted the House Committee on Oversight and Government Reform that President Obama was asserting executive privilege over documents subpoenaed by the committee during its ongoing investigation of Operation Fast and Furious. This assertion appears to be the first time President Obama has formally invoked executive privilege.

Operation Fast and Furious Investigation

In January 2011, the Senate Judiciary Committee began investigating the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) and DOJ regarding Operation Fast and Furious,¹⁸⁶ an ATF operation based in the Phoenix, Arizona field office. ATF whistleblowers alleged that suspected straw purchasers¹⁸⁷ were allowed to amass large quantities of firearms as part of long-term gun trafficking investigations.¹⁸⁸ As a consequence, some of these firearms were allegedly “walked,”¹⁸⁹ or trafficked, to gunrunners and other criminals, and some were smuggled into Mexico.¹⁹⁰ In December 2010, two of these firearms were reportedly found at the scene of a shootout, near the U.S.-Mexico border, where U.S. Border Patrol Agent Brian Terry was shot to death.¹⁹¹ Following public reports of the Operation and Agent Terry’s death, Attorney General Eric Holder instructed the DOJ Office of Inspector General to review ATF’s gun trafficking investigations.¹⁹²

On February 4, 2011, Assistant Attorney General Ronald Weich sent a letter to Senator Grassley, ranking Member of the Senate Judiciary Committee, denying that the ATF had sanctioned or knew of the sale of weapons to straw purchasers who then transported them into Mexico.¹⁹³ In

(...continued)

process privilege, and that the presidential communications privilege protects a documents in its entirety, whereas under the deliberative process privilege the government must “segregate and disclose non-privileged factual information within a document.” *Id.* at 38-40.

¹⁸⁶ For a detailed discussion of Operation Fast and Furious, see CRS Report RL32842, *Gun Control Legislation*, by William J. Krouse.

¹⁸⁷ A “straw purchase” occurs when an individual poses as the actual transferee, but he is actually acquiring the firearm for another person. In effect, he serves as an illegal middleman.

¹⁸⁸ James V. Grimaldi and Sari Horwitz, *ATF Probe Strategy is Questioned*, WASH. POST, Feb. 2, 2011, at A4.

¹⁸⁹ “Gun walking” refers to guns that were trafficked to gunrunners and other criminals before ATF moved to arrest the suspects and seize all of their contraband firearms. *See id.*

¹⁹⁰ Grimaldi and Horwitz, *supra* note 188, at A4.

¹⁹¹ John Solomon, David Heath, and Gordon Witkin, “ATF Let Hundred of U.S. Weapons Fall into Hands of Suspected Mexican Gun Runners: Whistleblower Says Agents Strongly Objected to Risky Strategy,” *Center for Public Integrity*, available at <http://www.iwatchnews.org/2011/03/03/2095/atf-let-hundreds-us-weapons-fall-hands-suspected-mexican-gunrunners>.

¹⁹² Pete Yost, *Justice IG to Look into Anti-Gun Efforts on Border*, ASSOCIATED PRESS ONLINE, March 4, 2011.

¹⁹³ Letter from Assistant Attorney General Ronald Weich to Ranking Member Charles Grassley, February 4, 2011, (continued...)

March 2011, the House Committee on Oversight and Government Reform began their own investigation of Operation Fast and Furious. Representative Darrell Issa, Chairman of the Oversight Committee, requested documents and information about the Operation from then-Acting ATF Director Kenneth E. Melson. The Department of Justice responded to the request but, according to the committee, “did not provide any documents or information to the Committee by the March 30, 2011 deadline.”¹⁹⁴ The following day, the committee issued a subpoena to DOJ and ATF.¹⁹⁵ Over the next year, the Oversight and Government Reform Committee held several hearings regarding Operation Fast and Furious,¹⁹⁶ and Attorney General Holder testified before that Committee as well as the House and Senate Judiciary and Appropriations Committees. On October 12, 2011, the Oversight and Government Reform Committee issued a second subpoena to Attorney General Holder, after the DOJ informed the committee that it was done producing documents in response to the first subpoena. This subpoena requested all departmental communications and documents “referring or related to Operation Fast and Furious....” At a November 8, 2011 Senate Judiciary Committee hearing, Attorney General Holder conceded that the February 4, 2011 letter from DOJ to Congress contained “inaccurate” information about the depth of knowledge DOJ officials had regarding ATF’s “gun walking” methods.¹⁹⁷ The next month, the DOJ formally withdrew the February 4 letter and acknowledged that Operation Fast and Furious was “fundamentally flawed.”¹⁹⁸ The letter was accompanied by nearly 1,400 pages of documents and communications that addressed how inaccurate information had been included in the February 4 letter.¹⁹⁹

This disclosure deviated from the DOJ’s general position that requests like this Committee’s, “seeking information about the Executive Branch’s deliberations ... implicate significant confidentiality interests grounded in the separation of powers under the U.S. Constitution.”²⁰⁰ Throughout the Committee’s investigation into the scope of DOJ’s knowledge of Operation Fast and Furious, each party has had different opinions about the nature and extent of DOJ’s cooperation in producing subpoenaed documents and communications. The DOJ maintained that it made “extraordinary accommodations,”²⁰¹ in responding to requests about the drafting of the February 4 letter. Furthermore, it stated:

(...continued)

available at <http://oversight.house.gov/wp-content/uploads/2012/06/Feb-4-Dec-2-letters.pdf>.

¹⁹⁴ Report of the Committee on Oversight and Government Reform U.S. House of Representatives, “Report Recommending that the House of Representatives Find Eric H. Holder, Jr., Attorney General, U.S. Department of Justice in Contempt of Congress for Refusal to Comply With a Subpoena Duly Issued by the Committee on Oversight and Government Reform, June 20, 2012, p. 4 [hereinafter Contempt Committee Report].

¹⁹⁵ Press Release, “Chairman Issa Subpoenas ATF for ‘Project Gunrunner’ Documents,” April 1, 2011.

¹⁹⁶ The Committee hearings included: June 13, 2011; “Obstruction of Justice: Does the Justice Department Have to Respond to a Lawfully Issued and Valid Congressional Subpoena?”; June 15, 2011; “Operation Fast and Furious: Reckless Decisions, Tragic Outcomes”; July 26, 2011; “Operation Fast and Furious: The Other Side of the Border”; February 2, 2012; “Fast and Furious: Management Failures at the Department of Justice” (Attorney General Holder testified); June 20, 2012; “Full Committee Business Meeting” (voting on citation to hold Attorney General Holder in contempt).

¹⁹⁷ Jerry Jarkon, *Holder Amends Remarks on Gun Sting: Attorney General Heard of ‘Fast and Furious’ Earlier Than He First Said*, WASH. POST, Nov. 9, 2011, at A2.

¹⁹⁸ Letter from Deputy Attorney General James Cole to Chairman Darrell Issa and Ranking Member Charles Grassley, December 2, 2011, available at <http://oversight.house.gov/wp-content/uploads/2012/06/Feb-4-Dec-2-letters.pdf>.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ Letter from Deputy Attorney General James Cole to Chairman Darrell Issa, June 20, 2012, available at (continued...)

The Department has substantially complied with the outstanding subpoenas. The documents responsive to the remaining subpoena items pertain to sensitive law enforcement activities, including ongoing criminal investigations and prosecutions, or were generated by Department officials in the course of responding to congressional investigations or media inquiries about this matter that are generally not appropriate for disclosure.²⁰²

However, the Committee maintains that despite its flexibility and it being “unfailingly patient,”²⁰³ “the Department has refused to produce certain documents”²⁰⁴ and “has fought this committee’s investigation every step of the way.”²⁰⁵ During a committee hearing, Chairman Issa remarked that the Attorney General specifically has “refused to cooperate, offering to provide subpoenaed documents only if the committee agrees in advance to close the investigation. No investigator would ever agree to that.”²⁰⁶ In its contempt committee report, it stated that the DOJ’s refusal to cooperate with congressional investigators was “inexcusable and cannot stand.”²⁰⁷

The Committee’s continued dissatisfaction with the DOJ’s refusal to comply fully with the subpoenas led it to schedule a vote to hold Attorney General Holder in contempt of Congress. While the Attorney General and Chairman Issa met the night before the scheduled vote, they were unable to reach an acceptable accommodation with regard to document disclosure. On the morning of the vote, President Obama formally invoked executive privilege “over the relevant post-February 4, 2011, documents.”²⁰⁸ In defending this assertion, the DOJ noted that:

the compelled production to Congress of these internal Executive Branch documents generated in the course of the deliberative process concerning the Department’s response to congressional oversight and related media inquiries would have significant, damaging consequences ... it would inhibit the candor of such Executive Branch deliberations in the future and significantly impair the Executive Branch’s ability to respond independently and effectively to congressional oversight. Such compelled disclosure would be inconsistent with the separation of powers established in the Constitution and would potentially create an imbalance in the relationship between these co-equal branches of the Government.²⁰⁹

In its contempt citation, the Oversight and Government Reform Committee rejected the President’s assertion of executive privilege, calling it “transparently invalid” due to the timing and blanket application of the privilege to all withheld documents.²¹⁰ The Committee voted 23 to 17 to hold Attorney General Holder in contempt of Congress.²¹¹ On June 28, 2012, the full House voted to hold him in contempt of Congress, by a vote of 255 to 67.²¹²

(...continued)

http://i2.cdn.turner.com/cnn/2012/images/06/20/letter_to_issa.pdf [hereinafter June 20 Letter]

²⁰² *Id.*

²⁰³ Contempt Committee Report, p. 22.

²⁰⁴ *Id.* at 4.

²⁰⁵ Congressional Quarterly Hearing Transcript: “House Oversight and Government Reform Committee Holds Markup on a Contempt of Congress Citation for U.S. Attorney General Holder,” available at <http://www.cq.com/doc/congressionaltranscripts-4110610> [hereinafter Hearing Transcript].

²⁰⁶ *Id.*

²⁰⁷ Contempt Committee Report, p. i.

²⁰⁸ June 20 Letter.

²⁰⁹ *Id.*

²¹⁰ Contempt Committee Report, p. 42 (as stated in Representative Gowdy’s amendment, approved by a 23 to 17 vote).

²¹¹ Ed O’Keefe and Sari Horwitz, *Fast and Furious: House Committee Votes 23-17 to Hold Attorney General Eric* (continued...)

Concluding Observations

As indicated in the above discussion, recent appellate court rulings cast considerable doubt on the broad claims of privilege posited by the executive branch in the past. Taken together, *Espy* and *Judicial Watch* arguably have affected important qualifications and restraints on the nature, scope and reach of the presidential communications privilege. As established by those cases, and until reviewed by the Supreme Court, the following elements should be considered in determining when the privilege can be invoked properly:

1. The communication must be authored or “solicited and received” by a close White House advisor or the President. The judicial test requires that an advisor be in “operational proximity” to the President. This effectively means that the scope of the presidential communications privilege can extend only to the administrative boundaries of the Executive Office of the President and the White House. It appears not to apply to communications or documents wholly produced within an executive department or agency.
2. The presidential communications privilege may be limited to communications relating to a “quintessential and non-delegable presidential power.” *Espy* and *Judicial Watch* involved the appointment and removal and the pardon powers, respectively. Other core, direct presidential decision-making powers include the Commander-in-Chief power, the sole authority to receive ambassadors and other public ministers, and the power to negotiate treaties. However, neither case explicitly stated that the presidential communications privilege could only apply to communications and documents relating to “quintessential and non-delegable presidential power[s].”
3. The presidential communications privilege remains a qualified privilege that may be overcome by a showing that the information sought “likely contains important evidence” and cannot be obtained from other sources. The *Espy* court found an adequate showing of need by the Independent Counsel that overcame the privilege. In *Judicial Watch*, the court found the presidential communications privilege did not apply, and remanded to the district court to determine if the deliberative process privilege would apply to specific documents.

Definitively applying the teachings of *Espy* and *Judicial Watch* to current information access disputes between Congress and the executive may be premature because these cases were decided in the context of judicial and FOIA requests for information from the executive branch. In the congressional-executive conflict context, it is clear that the *Miers* court unequivocally rejected the claim of absolute witness immunity and adopted the Committee’s argument that the Supreme Court’s ruling in *Nixon I* allows only a qualified constitutional privilege that may be overcome by a proper showing of need. Furthermore, the court recognized that subsequent Supreme Court and

(...continued)

Holder in Contempt of Congress, WASH. POST, June 20, 2011, available at http://www.washingtonpost.com/blogs/2chambers/post/live-fast-and-furious-hearing-to-discuss-contempt-of-congress-charge-against-eric-holder/2012/06/20/gJQAzQKHqV_blog.html.

²¹² See H.Res. 711 (roll call vote available at <http://cq.com/doc/floorvote-236138000>). For detailed information on the contempt process, see CRS Report RL34097, *Congress’s Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure*, by Todd Garvey and Alissa M. Dolan.

appellate court rulings have reiterated the qualified nature of the privilege.²¹³ However, outside of the district court opinion in *Miers*, there is no other post-Watergate case law addressing executive privilege in the congressional-executive dispute context. Indeed, the *Espy* court specifically noted that its narrow holding was limited to the confines of judicial requests for information:

Finally, we underscore our opinion should not be read as in any way affecting the scope of the privilege in the congressional-executive context, the arena where conflict over the privilege of confidentiality arises most frequently. The President's ability to withhold information from Congress implicates different constitutional considerations than the President's ability to withhold evidence in judicial proceedings. Our determination of how far down into the executive branch the presidential communications privilege goes is limited to the context before us, namely where information generated by close presidential advisers is sought for use in a judicial proceedings, and we take no position on how the institutional needs of Congress and the President should be balanced.²¹⁴

In the continuing absence of a post-Nixon Supreme Court decision and since *Miers* never proceeded to a decision on the merits in the appeals court, there is continuing uncertainty as to how executive privilege claims should be analyzed when asserted in response to congressional requests for information.

²¹³ *Miers*, 558 F. Supp. 2d at 103.

²¹⁴ *Espy*, 121 F.3d at 753.

Appendix. Presidential Claims of Executive Privilege From the Kennedy Administration Through the Obama Administration

The following is a brief summary of assertions of presidential claims of executive privilege from the Kennedy Administration through the Obama Administration.

1. Kennedy

President Kennedy established the policy that he, and he alone, would invoke the privilege. Kennedy appears to have utilized the privilege twice with respect to information requests by congressional committees. In 1962, the President directed the Secretary of Defense not to supply the names of individuals who wrote or edited speeches in response to a request by a Senate subcommittee investigating military Cold War education and speech review policies. The chairman of the subcommittee acquiesced to the assertion. The President also directed his military adviser, General Maxwell Taylor, to refuse to testify before a congressional committee examining the Bay of Pigs affair. *See* Rozell, *supra* note 1, at 40-41.

2. Johnson

Although he announced that he would follow the Kennedy policy of personal assertion of executive privilege, President Johnson did not follow the practice. Rozell, *supra* note 1, at 41-42, catalogues three instances in which executive officials refused to comply with congressional committee requests for information or testimony that involved presidential actions. These executive officials did not claim that the President directed them to assert the privilege.

3. Nixon

President Nixon asserted executive privilege six times. He directed Attorney General Mitchell to withhold FBI reports from a congressional committee in 1970. In 1971, at the President's direction, Secretary of State Rogers asserted privilege and withheld information from Congress about military assistance programs. A claim of privilege was asserted at the direction of the President to prevent a White House advisor from testifying on the International Telephone and Telegraph (ITT) settlement during the Senate Judiciary Committee's consideration of the Richard Kleindienst nomination for Attorney General in 1972. Finally, President Nixon claimed executive privilege three times with respect to subpoenas for White House tapes relating to the Watergate affair: one subpoena from the Senate Select Committee; one grand jury subpoena for the same tapes issued by Special Prosecutor Archibald Cox; and one jury trial subpoena for 64 additional tapes issued by Special Prosecutor Leon Jaworski. Rozell, *supra* note 1, at 57-62.

4. Ford and Carter

President Ford directed Secretary of State Henry Kissinger to withhold documents during a congressional committee investigation of State Department recommendations to the National Security Council to conduct covert activities in 1975. President Carter directed Energy Secretary Charles Duncan to claim executive privilege when a committee demanded documents relating to

the development and implementation of a policy to impose a petroleum import fee. Rozell, *supra* note 1, at 77-82, 87-91.

5. Reagan

President Reagan directed the assertion of executive privilege before congressional committees three times: by Secretary of the Interior James Watt with respect to an investigation of Canadian oil leases (1981-82); by EPA Administrator Anne Gorsuch Burford with respect to Superfund enforcement practices (1982-83); and by Justice William Rehnquist during his nomination proceedings for Chief Justice with respect to memos he wrote when he was Assistant Attorney General for the DOJ Office of Legal Counsel (1986). Rozell, *supra* note 1, at 98-105.

6. Bush, George H. W.

President Bush asserted privilege only once, in 1991, when he ordered Defense Secretary Dick Cheney not to comply with a congressional subpoena for a document related to a subcommittee's investigation of cost overruns in, and cancellation of, a Navy aircraft program. Rozell, *supra* note 1, at 108-19.

7. Clinton

President Clinton apparently discontinued the policy of issuing *written* directives to subordinate officials to exercise executive privilege. Thus, in some instances, it is not completely clear when a subordinate's privilege claim was orally directed by the President, even if it was quickly withdrawn. The following documented assertions may arguably be deemed formal invocations of the privilege. Four of these assertions occurred during grand jury proceedings.

- a. Kennedy Notes (1995) (executive privilege initially raised but never formally asserted) (Senate Whitewater investigation). S.Rept. 104-191, 104th Cong., 1st Sess. (1995).
- b. White House Counsel Jack Quinn/Travelgate Investigations (1996) (House Government Reform). H.Rept. 104-598, 104th Cong., 2d Sess. (1996).
- c. FBI-DEA Drug Enforcement Memo (1996) (House Judiciary).
- d. Haiti/Political Assassinations Documents (1996) (House International Relations).
- e. *In re Grand Jury Subpoena Duces Tecum*, 112 F. 3d 910 (8th Cir. 1997) (executive privilege claimed and then withdrawn in the district court. Appeals court rejected applicability of common interest doctrine to communications with White House Counsel's Office attorneys and private attorneys for the First Lady).
- f. *In re Sealed Case (Espy)*, 121 F. 3d 729 (D.C. Cir. 1997) (executive privilege asserted but held overcome with respect to documents revealing false statements).
- g. *In re Grand Jury Proceedings*, 5 F. Supp. 2d 21 (D.D.C. 1998) (executive privilege claimed but held overcome because testimony of close advisors was relevant and necessary to grand jury investigation of Lewinski matter and was unavailable elsewhere).

The September 9, 1998, Referral to the House of Representatives by Independent Counsel Kenneth Starr detailed the following previously undisclosed presidential claims of executive privilege (viii - xiii) before grand juries, which occurred during the Independent Counsel's investigations of the Hubbell and Lewinski matters:

- h. Thomas "Mack" McLarty (1997) (claimed at direction of President during Hubbell investigation, but withdrawn prior to filing of a motion to compel).
- i. Nancy Hernreich (claimed at direction of President, but withdrawn prior to March 20, 1998 hearing to compel).
- j. Sidney Blumenthal (claim rejected by district court, *In re Grand Jury Proceedings*, 5 F. Supp. 2d 21 (D.D.C. 1998), and dropped on appeal).
- k. Cheryl Mills (claimed on August 11, 1998).
- l. Lanny Breuer (claimed on August 4, 1998 and denied by Judge Johnson on August 11). *In re Grand Jury Proceeding*. Unpublished Order (Under Seal) (August 11, 1998).
- m. Bruce Lindsey (claimed on August 28, 1998). H.Doc. 105-310, 105th Cong, 2d Sess. 206-09 (1998).
- n. FALN Clemency (claimed at direction of President by Deputy Counsel to the President Cheryl Mills on September 16, 1999 in response to subpoenas by House Committee on Government Reform).

8. Bush, George W.

President Bush asserted executive privilege six times, using both written and oral directives to subordinate executive officials to claim the privilege.

- 1. On December 12, 2001, President Bush ordered Attorney General John Ashcroft not to comply with a congressional subpoena for documents related to a House Committee's investigation of corruption in the FBI's Boston regional office. The documents were ultimately released shortly after the Committee held oversight hearings. H.Rept. 108-414, 108th Cong., 1st Sess. (2004).
- 2. *Judicial Watch Inc. v. Dep't of Justice*, 365 F.3d. 1108 (D.C. Cir. 2004) (rejecting the claimed applicability of the presidential communications privilege to pardon documents sought under FOIA from DOJ's Office of the Pardon Attorney).
- 3. Removal and Replacement of U.S. Attorneys (2007). At the direction of the President, on June 28, 2007, the White House Counsel advised the House and Senate Judiciary Committees that subpoenas issued to former White House Counsel Harriet Miers and Chief of Staff Joshua B. Bolten for documents and testimony relating to the firing of U.S. Attorneys were subject to a claim of executive privilege. Additionally, these present and former White House officials were ordered not to comply with document demands or appear at a hearing. The House passed contempt resolutions against Miers and Bolten on February 14, 2008. On February 28, the Speaker transmitted the contempt citation to the U.S. Attorney for the District of Columbia for presentation to the grand jury. The

Attorney General directed the U.S. Attorney not to present the citation. On March 10, 2008, the House Judiciary Committee initiated a civil suit seeking declaratory and injunctive relief to enforce the subpoenas. *See Comm. on the Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008). On July 31, 2008, the district court ruled that “The Executive’s current claim of absolute immunity from compelled congressional process for senior presidential aides is without any support in the case law.” *Id.* at 56. The court declared that Ms. Miers was legally required to testify after being issued a valid congressional subpoena and ordered Ms. Miers and Mr. Bolten to produce all subpoenaed non-privileged documents. Additionally, while stopping short of ordering production of a full privilege log, the court did require the executive to provide more detailed descriptions of all documents withheld on the basis of executive privilege. *Id.* at 107. The appeals court stayed the district court order pending appeal, but the appeals court never issued a ruling on the merits because an accommodation was reached before it could take up the case. Following the expiration of the 110th Congress and the arrival of a new administration, the parties reached an agreement in March 2009. The executive provided some of the requested documents to the committee and Ms. Miers was permitted to testify, under oath, in a closed, but transcribed hearing.

4. On April 9, and May 5, 2008, the House Oversight and Government Reform Committee issued three subpoenas total to the Administrator of the Environmental Protection Agency (EPA) and the Office of Information and Regulatory Affairs of the Office of Management and Budget (OIRA). The subpoenas sought documents related to EPA’s promulgation of regulations serving national ambient air quality standards for ozone on March 12, 2008. Another subpoena requested communications between the EPA and OIRA concerning the agency’s decision to deny a petition by California for a waiver from federal preemption to enable the state to regulate greenhouse gas emissions from motor vehicles. On June 19, 2008, the Attorney General advised the President that 25 of the documents covered by the subpoena would be properly covered by an assertion of executive privilege. On June 20, 2008, the EPA Administrator advised the Chairman of the Committee that he had been directed by the President to assert executive privilege with respect to the withheld documents. The committee did not pursue a contempt action.
5. Removal and Replacement of U.S. Attorneys (2008). On July 10, 2008, Karl Rove, a former White House Deputy Chief of Staff, refused to comply with a subpoena requiring his appearance before the House Judiciary Committee’s Subcommittee on Commercial and Administrative Law, claiming absolute immunity on the basis of White House and DOJ opinions and directions. By a vote of 7-1, the Subcommittee rejected his claims of privilege. On July 30, 2008, the full Judiciary Committee approved a report recommending that Mr. Rove be cited for contempt by the House. The full House never voted on the contempt citation. Mr. Rove was permitted to testify as part of the accommodation reached between the executive and the House at the conclusion of the Miers/Bolten dispute discussed above.
6. Special Counsel’s Investigation of Revelations of CIA Agent’s Identity. On July 16, 2008, the President directed the Attorney General (at the behest of the Attorney General) to assert executive privilege with respect to a House Oversight and Government Reform Committee subpoena to the DOJ. The subpoena concerned DOJ’s investigation by a Special Counsel of the public revelation of Valerie Plame Wilson’s identity as an employee of the Central Intelligence Agency. The documents sought and withheld included FBI reports of the Special Counsel’s interviews with the Vice President and

senior White House staff, handwritten notes taken by the Deputy National Security Advisor during conversations with the Vice President and senior White House officials, and other documents provided by the White House during the course of the investigation. The Attorney General requested that the President formally assert the privilege after the Committee scheduled a meeting to consider a resolution citing him for contempt of Congress. The Chairman of the Oversight Committee delayed a scheduled committee vote on contempt to allow Members to assess the executive privilege assertion. The Committee later requested a privilege log but neither the DOJ nor the White House responded to that request.

9. Obama

President Obama has only formally invoked executive privilege once, in relation to a congressional investigation of Operation Fast and Furious. At the direction of the President, on June 20, 2012, Deputy Attorney General James Cole informed the House Committee on Oversight and Government Reform that the President was formally asserting executive privilege over documents requested pursuant to a subpoena issued as part of the Committee's investigation of Operation Fast and Furious. A letter from the Attorney General to the President, dated June 19, 2012, laid out the executive's legal argument for asserting the privilege. The Attorney General argued that the documents withheld included internal executive branch communications generated in the course of deliberative process concerning responses to congressional oversight. Furthermore, he stated that executive privilege encompasses executive branch deliberative communications and that disclosing such documents would "inhibit the candor of such Executive Branch deliberations ... " Letter to the President from Attorney General Eric Holder, June 19, 2012. On June 20, 2012, the Committee voted to hold Attorney General Eric Holder, the subject of the subpoena as custodian of DOJ documents, in contempt of Congress. The full House voted in favor of a criminal contempt citation on June 28, 2012. The House Committee on Oversight and Government Reform filed a civil lawsuit in the U.S. District Court for the District of Columbia on August 13, 2012, seeking to enforce the subpoena and compel disclosure of the documents being withheld due to the assertion of executive privilege.

Author Contact Information

Todd Garvey
Legislative Attorney
tgarvey@crs.loc.gov, 7-0174

Alissa M. Dolan
Legislative Attorney
adolan@crs.loc.gov, 7-8433

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