



April 16, 2024

The Deliberative Process Privilege in Congress

The executive branch sometimes invokes the *deliberative process privilege* (DPP) in response to requests for information from Congress and the public, both in litigation and, with respect to the former, in the course of congressional investigations. The DPP is recognized primarily as a common-law privilege, although some courts have concluded that in certain circumstances it may contain “constitutional dimension[s].”

The Executive frequently invokes the DPP to limit the disclosure of “documents reflecting advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated.” Put another way, the DPP protects from compulsory disclosure government materials that “would not be available by law to a party other than an agency” during litigation against that agency.

Over time, the Executive has developed a broad view of the DPP through agency practice, executive orders, Department of Justice (DOJ) Office of Legal Counsel opinions, and White House Counsel directives, justifying the privilege as a means of encouraging candor and honest debate during agency decisionmaking.

The Executive often invokes the DPP before Congress, and particularly in congressional oversight investigations, because it gives protection to the very decisionmaking process that Congress is frequently trying to understand. This In Focus discusses three pertinent aspects of the DPP: what it is, what materials it may cover, and how Congress may choose to respond to its invocation.

Elements and Scope of the Privilege

The DPP applies to agency documents and communications that are *predecisional*—that is, created prior to the agency reaching its final decision—and *deliberative*, meaning related to the thought process of executive officials. Predecisional and deliberative materials may include information on how and why an agency adopted a certain policy choice and records that disclose an agency’s thought process, including materials developed in the course of decisionmaking, like leadership and staff recommendations and proposals, draft rules, and internal policy debates.

The Supreme Court has recognized that a record is deliberative if “prepared to help the agency formulate its position.” Only predecisional material can be deliberative. A record reflects a “final decision” and is therefore not predecisional (and thus not protected by the DPP) only where the material reflects “the consummation” of the decisionmaking process and not a “merely tentative” position. A predecisional document is one that leaves decisionmakers “free to change their minds.”

The DPP does not apply to materials that simply state or explain a decision already made, unless that information is inextricably intertwined with the deliberative portions of the materials such that disclosure would effectively reveal executive deliberations. The Supreme Court has clarified that although the DPP does not protect post hoc materials explaining an action already made, the privilege does protect “in-house drafts that proved to be the agencies’ last word” on a particular course of action. Put another way, even if an agency draft turns out to reflect the agency’s final decision, that draft may still be protected from disclosure by the DPP if at the time it was written it was predecisional and deliberative.

The DPP does not protect factual information; agencies generally may not withhold research and data that form the underlying basis for a proposed rule or policy. In addition, the DPP does not protect entire documents. Rather, the executive branch must disclose non-privileged information that can be reasonably segregated from privileged information in the requested materials.

The DPP is not an absolute privilege: even when the privilege applies to a given document or communication, it can be overcome by a sufficient showing of need. Further, the D.C. Circuit has explained that the privilege “disappears altogether when there is any reason to believe government misconduct has occurred,” because using the privilege to shield such information would not serve “the public’s interest in honest, effective government.”

Finally, the DPP does not prevent an agency that chooses not to invoke the privilege from voluntarily disclosing information.

Asserting the Privilege Before Congress

The Executive has invoked the DPP during congressional investigations. These invocations are made both during hearings before congressional committees and in written response to requests or subpoenas. Sometimes the privilege is not expressly invoked, and the Executive may instead cite confidentiality concerns or other interests as a reason for withholding the requested information.

The D.C. Circuit has described the DPP as “primarily a common law privilege,” but has stated that “aspects of the privilege, for example the protection accorded the mental processes of agency officials, . . . have roots in the constitutional separation of powers.” As a matter of practice, Congress has sometimes sought to constrain the invocation of the DPP in congressional investigations, such as through the promulgation of chamber rules. The rules governing several House committees of the 118th Congress provide that claims of common-law privileges, which committees generally view as including the DPP, apply “only at the discretion of the Chair, subject to appeal to the

Committee.” Some committees append instructions to their subpoenas that bar the use of the DPP or impose conditions on its use, such as requiring a privilege log to be furnished.

Responding to the Privilege

Congress has several options to respond to the invocation of the DPP. If it believes invocation of the privilege is unjustified, it can reject the assertion. Congressional committees have previously contended that the DPP is not a valid reason to withhold information and have sought to enforce their investigatory demands in the courts or through criminal contempt of Congress procedures.

Litigation was the route taken by the House Oversight Committee during conflicts with federal agencies involving the DPP in 2012 and 2019. In the former example, a federal district court in *Committee on Oversight and Government Reform v. Holder* concluded that the committee was entitled to contested information it sought that was not deliberative. The court reached this conclusion only after it first reiterated the D.C. Circuit’s holding that, as a matter of principle, the DPP may be invoked by federal agencies during a congressional investigation because “some aspects” of the privilege “have roots in the constitutional separation of powers.” In 2019, the Committee sued then-Attorney General William Barr and then-Secretary of Commerce Wilbur Ross after the two Cabinet members invoked the DPP in response to subpoenas the committee issued seeking documents regarding the agencies’ decisions to add a question pertaining to citizenship to the 2020 Census. The parties then agreed to terms of compliance with the subpoenas after the change in presidential Administration and jointly stipulated to dismiss the case.

Short of simply rejecting the privilege, a committee or Member may opt to respond in several ways. If the political branches disagree on the applicability of the privilege, they could negotiate its scope or even agree to limit the audience to which the requested materials are made available.

Recent practice illustrates some of the other options at Congress’s disposal for responding to an assertion of the DPP. This includes making a procedural objection, challenging the breadth or scope of the invocation, or overcoming the privilege by a showing of need.

Procedural Challenge

Congress may object to the form or process by which the executive asserts the DPP. At common law, for example, the DPP must be asserted in writing and only by the head of the agency invoking the privilege.

The House Judiciary Committee’s Subcommittee on Responsiveness and Accountability to Oversight held two hearings in March 2023 in which representatives of various executive agencies, including the Department of Education, were called to testify about what the subcommittee’s majority had characterized as the agencies’ deficient compliance with congressional requests for records. When Assistant Secretary of Education Roberto Rodriguez surmised that the department’s withholding of certain records may be due to protections afforded to it by the DPP, one subcommittee member stated his objection to the form offered by the department. He stated that the department

had not invoked the DPP except “in the Committee room,” which he claimed was “not the appropriate place.” He cautioned that the privilege could be asserted only in writing, before the subpoena deadline.

Scope Challenge

If Congress does not challenge invocation of the DPP outright, it might instead assert that the Executive applied the privilege too expansively. The DPP protects material that is predecisional and deliberative, and even then, it does not protect entire documents. The Executive must disclose non-privileged information that it can reasonably segregate from privileged information. If the Executive does not appear to conform to this requirement, Congress could challenge the scope of the material withheld.

In the March 2023 hearings before the Subcommittee on Responsiveness and Accountability to Oversight, the same member who challenged the form of the assertion of the DPP noted that, although the subcommittee had requested that 26 sets of documents be prioritized for production in unredacted form, the Department of Education had produced only 2 such sets. Though the member stopped short of categorically asserting that the department inappropriately applied the DPP to the remaining 24 sets (and Secretary Rodriguez did not confirm with certainty that the remaining sets were indeed being held back for privilege purposes), the member urged the Secretary to review the common-law elements of the privilege, including the requirements that the material be predecisional and deliberative, to ensure it was being used “in good faith.”

Showing of Need

Courts have recognized that the DPP is supposed to give way where Congress has an adequate oversight interest. When a committee is investigating “allegations of misconduct,” the DPP may “disappear altogether.” Who determines when the oversight interest is “adequate” and whether “allegations of misconduct” are credible are matters that will continue to be debated and, at times, litigated.

In the 118th Congress, the House Judiciary, Ways and Means, and Oversight Committees published a report asserting that invocation of the DPP by DOJ during the committees’ investigations into the Hunter Biden prosecution “lack[ed] merit,” because the DPP’s protections “disappear[] altogether when there is any reason to believe government misconduct occurred.”

Congress may urge the Executive to produce documents it withholds under the DPP, but whether the Executive complies—and what Congress can do if the Executive does not—will vary. Ultimately Congress may choose to litigate in an attempt to compel compliance; it could also leverage its institutional powers over the executive such as through the appropriations process; or, it may vote to hold a subpoena recipient in contempt.

Clay Wild, Legislative Attorney

Disclaimer

This document was prepared by the Congressional Research Service (CRS). CRS serves as nonpartisan shared staff to congressional committees and Members of Congress. It operates solely at the behest of and under the direction of Congress. Information in a CRS Report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to Members of Congress in connection with CRS's institutional role. CRS Reports, as a work of the United States Government, are not subject to copyright protection in the United States. Any CRS Report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS Report may include copyrighted images or material from a third party, you may need to obtain the permission of the copyright holder if you wish to copy or otherwise use copyrighted material.