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

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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 1970s 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.

Supreme Court decisions have left considerable gaps in the law of presidential privilege. Among the more significant issues left open include whether the President must 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, whether it 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 District of Columbia Circuit's 1997 ruling in *In re Sealed Case (Espy)*, and its 2004 decision in *Judicial Watch v. Department of Justice*, addressed many of these questions in a manner that may alter the future legal playing field in resolving such disputes. Moreover, two recent disputes between the executive branch and Congress over the removal of U.S. Attorneys during the George W. Bush Administration and the Department of Justice's response to a congressional investigation into Operation Fast and Furious may provide further insight into the scope of executive privilege in the congressional oversight context.

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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 1970s 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, existing precedent left important gaps in the law of presidential privilege that have increasingly become focal points, if not the source, of interbranch confrontations. The unanimous panel in *In re Sealed Case (Espy)*,⁵ and the subsequent reaffirmation of the *Espy* principles in *Judicial Watch v. Department of Justice*,⁶ addressed many of these unresolved questions, albeit in a noncongressional context, in a manner that may alter the future legal playing field in resolving such disputes.⁷

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).

⁷ 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.

Two recent disputes between Congress and the executive branch relate directly to the application of executive privilege in the congressional oversight context. In 2007, an investigation into the removal 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, in which a federal district court held that senior presidential advisers do not enjoy absolute immunity from compelled testimony or production of documents pursuant to a congressional subpoena.⁸ In 2012, President Obama invoked executive privilege in response to a subpoena from the House Committee on Oversight and Government Reform that sought information from the Attorney General relating to the Department of Justice’s response to the committee’s investigation into Operation Fast and Furious. Similar to the U.S. Attorneys controversy, a civil suit was filed to compel the executive branch to comply with the committee subpoena. That case is currently pending before the U.S. District Court for the District of Columbia.⁹

The Watergate Cases

In interbranch information disputes since the early 1980s, 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, 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 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

⁸ See “Committee on the Judiciary v. Miers.”

⁹ See “Committee on Oversight and Government Reform v. Holder.”

¹⁰ 487 F.2d 750 (D.C. Cir. 1973).

¹¹ *Id.* at 757.

¹² *Id.*

¹³ 498 F.2d 725 (D.C. Cir. 1974).

¹⁴ *Id.* 730-31.

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 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

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 Counsels’ 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.

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 ignored 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 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

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).

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

President at the request of the Watergate Special Prosecutor requesting tape recordings and documents relating to the President's conversations with close aides and advisers. 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 advisers 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 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

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).

³⁸ *Nixon II*, 433 U.S. at 439.

³⁹ *Id.* at 446.

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 Judicial Reluctance

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:

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

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

⁴¹ *Id.* at 453.

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

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.

⁴⁶ *Id.*

⁴⁷ *Id.* at 129.

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 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

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).

⁵⁴ *Id.* at 151.

⁵⁵ *Id.* at 152-53.

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

Espy, Judicial Watch, and Beyond

Existing precedent left important gaps in the law of executive privilege. 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 Executive Office of the President; whether the privilege encompasses all communications in which the President may be interested or if it is confined to a particular type of presidential decision making; and precisely what kind of demonstration of need can overcome the privilege and justify the release of privileged materials. The U.S. Court of appeals for the District of Columbia Circuit took up many of these issues in *In re Sealed Case* and *Judicial Watch v. Department of Justice*.

In re Sealed Case (Espy)

In *Espy*,⁵⁸ 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.

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, which applies to executive branch officials generally, is a

⁵⁶ *Id.* at 152, 153.

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

⁵⁸ 121 F.3d 729 (D.C. Cir. 1997).

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.”⁵⁹

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.”⁶⁰ 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.”⁶¹ The presidential communications privilege applies to all documents in their entirety,⁶² including pre- and post-decisional materials.⁶³

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.”⁶⁴ 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.”⁶⁵

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 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

⁵⁹ *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.’”).

⁶⁰ *Id.* at 745, 752; *see also id.* at 753 (“... these communications nonetheless are ultimately connected with presidential decisionmaking”).

⁶¹ *Id.* at 754, 757.

⁶² 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.

⁶³ *Id.* at 745.

⁶⁴ *Id.* at 752.

⁶⁵ *Espy*, 121 F.3d at 752.

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.⁶⁶

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.”⁶⁷

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.”⁶⁸ 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.

Judicial Watch v. Department of Justice

The District of Columbia Circuit’s 2004 decision in *Judicial Watch, Inc. v. Department of Justice*⁶⁹ appears to lend substantial support to the interpretation of *Espy* discussed above. *Judicial Watch* involved requests for documents concerning pardon applications and pardon

⁶⁶ *Id.* (footnote omitted).

⁶⁷ *Id.* at 752.

⁶⁸ *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”).

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

grants reviewed by the Justice Department’s Office of the Pardon Attorney and the Deputy Attorney General for consideration by President Clinton.⁷⁰ 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.⁷¹ 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.”⁷²

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.”⁷³ *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.⁷⁴

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

⁷⁰ 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.

⁷¹ *Judicial Watch*, 365 F.3d at 1109-12.

⁷² *Id.* at 1112.

⁷³ *Id.* at 1114.

⁷⁴ *Id.* at 1117.

to a large swath of the executive branch a privilege that is bottomed on a recognition of the unique role of the President.⁷⁵

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.”⁷⁶ The *Espy* court, it explained, was confronted for the first time with the question of whether communications made by the President’s closest advisers 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.⁷⁷

The facts before the *Judicial Watch* court tested the *Espy* principles. While the exercise of the President’s pardon power was certainly a nondelegable, 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 advisers 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.⁷⁸ 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 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 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 notifying the committees that the testimony sought from Ms. Miers was subject to a “valid claim of Executive Privilege,”

⁷⁵ *Id.* at 1121-22.

⁷⁶ *Judicial Watch*, 365 F.3d at 1116.

⁷⁷ *Id.* at 1116-17.

⁷⁸ *Id.* at 1118-24.

and would be asserted by the President if the matter could not be resolved before the scheduled appearance date.⁷⁹

On July 9, 2007, 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's 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."⁸⁰ 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."⁸¹ 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.⁸² 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."⁸³ 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's and Mr. Bolton's privilege claims. The Judiciary Committee filed its report formally reporting a contempt violation to the House in November 2007.⁸⁴ After further attempts at accommodation failed, the matter was brought to the floor of the House on February 14, 2008. The House voted⁸⁵ in favor of two resolutions.⁸⁶ One directed the Speaker to certify the contempt citation detailing Ms. Miers's and Mr. Bolten's refusal to comply with the committee subpoena to the U.S. Attorney for the District of Columbia for presentation to a grand jury pursuant to 2 U.S.C. Sections 192 and 194.⁸⁷ The second resolution was passed in apparent anticipation that the U.S. Attorney would not present the criminal contempt citation to the grand jury. That resolution authorized the chairman of the Judiciary Committee to initiate civil judicial proceedings in federal court to seek a declaratory judgment enforcing the subpoena.

⁷⁹ 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>.

⁸⁰ 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].

⁸¹ *Id.* at 1.

⁸² *Id.* at 2.

⁸³ *Id.*

⁸⁴ H.Rept. 110-423 110th Cong., 1st Sess. (2007).

⁸⁵ 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>.

⁸⁶ 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.

⁸⁷ H.Res. 979, 110th Cong. (Feb. 14, 2008).

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."⁸⁸ On March 10, 2008, the House General Counsel filed a civil action for declaratory judgment and injunctive relief that sought an order directing Ms. Miers to appear before the committee, respond to questions, and only invoke executive privilege if appropriate.⁸⁹

On July 31, 2008, the U.S. District Court for the District of Columbia Circuit (D.C. District Court) issued a lengthy opinion rejecting 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.⁹⁰

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*,⁹¹ 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."⁹² 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."⁹³ 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."⁹⁴ 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.⁹⁵ The *Miers* district court concluded that in this matter, since there was no involvement of national security or foreign policy concerns, neither Ms. Miers's nor Mr. Bolten's close proximity to the President was sufficient under *Harlow* to provide either absolute or qualified immunity.⁹⁶

⁸⁸ Letter from Attorney General Michael Mukasey to Speaker of the House Nancy Pelosi, Feb. 29, 2008 (on file with the authors).

⁸⁹ 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).

⁹⁰ *Miers*, 558 F. Supp. 2d at 99.

⁹¹ 457 U.S. 800 (1982).

⁹² *Id.* at 808.

⁹³ *Id.* at 807.

⁹⁴ *Id.* at 810.

⁹⁵ *Id.* at 812-13.

⁹⁶ *Miers*, 558 F. Supp. 2d at 100-01, 104-05.

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,

Senior executive officials often testify before Congress as a normal part of their jobs ... 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 ... 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.⁹⁷

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.⁹⁸ 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.*" 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... 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.⁹⁹

The Administration appealed the district court decision and asked the 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.¹⁰⁰ 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."¹⁰¹ 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.¹⁰²

⁹⁷ *Id.* at 102 (emphasis in original) (internal citations omitted).

⁹⁸ *Nixon I*, 418 U.S. at 707-08. The District Court also rejected the executive's fall-back position that even if Ms. Miers is not entitled to absolute immunity, she should be accorded qualified immunity. *Id.* at 105 ("The Executive's showing, then, does not support either absolute or qualified immunity in this case.")

⁹⁹ *Miers*, 558 F. Supp. 2d at 102-03.

¹⁰⁰ Committee on the Judiciary v. Miers, 542 F.3d 909 (D.C. Cir. 2008) [hereinafter *Miers II*].

¹⁰¹ *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.

¹⁰² 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)).

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.¹⁰³ Accordingly, the D.C. Circuit dismissed *Miers* on October 14, 2009, pursuant to a motion for voluntary dismissal.¹⁰⁴ Thus, the *Miers* litigation ended more than a year and a half after the committee first filed its suit to enforce the subpoenas. Ultimately, however, the committee was able to gain access to much of the information it had been seeking.¹⁰⁵

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 advisers, 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's 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."¹⁰⁶

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*.¹⁰⁷ 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 advisers.¹⁰⁸ 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,¹⁰⁹ 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."¹¹⁰ 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

¹⁰³ 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.

¹⁰⁴ *Committee on the Judiciary v. Miers*, 2009 U.S. App. LEXIS 29374 (D.C. Cir. 2009).

¹⁰⁵ The testimony and documents are available at http://judiciary.house.gov/issues/issues_WHInterviews.html: http://judiciary.house.gov/issues/issues_WHInterviews.html.

¹⁰⁶ *Miers*, 558 F. Supp. 2d. at 105.

¹⁰⁷ 550 F.3d 32 (D.C. Cir. 2008).

¹⁰⁸ *Id.* at 37.

¹⁰⁹ *Id.* ("[T]wo executive privileges [] are relevant here: the presidential communications privilege and the deliberative process privilege.")

¹¹⁰ *Id.* at 39.

were viewed by the President was sufficient to bring them within the privilege.¹¹¹ It is important to note that in its relatively 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*.

Committee on Oversight and Government Reform v. Holder

Committee on Oversight and Government Reform v. Holder, which is currently pending before the D.C. District Court, may provide substantial insight into the contours of executive privilege, especially with regard to balancing the privilege against Congress’s constitutionally based oversight authority.

The controversy surrounding Operation Fast and Furious erupted in early 2011 when it was reported that firearms found at the scene of a shootout in which a U.S. Border Patrol agent was killed had been allowed to pass to criminals in Mexico by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF).¹¹² On February 4, 2011, DOJ sent a letter to Congress denying that the ATF had any knowledge of the “gun walking” operation.¹¹³ The committee nonetheless continued its investigation, which was reinvigorated in December 2011 when DOJ withdrew the February 4 letter, conceding that it contained “inaccurate information” about ATF’s actions and the depth of DOJ’s knowledge of those actions, and that the operation itself was “fundamentally flawed.”¹¹⁴

At this point, the committee investigation shifted to the question of how DOJ had provided the committee with inaccurate information; why it took almost 10 months to correct the mistake; and whether the agency had sought to obstruct the committee’s investigation by providing misleading information. In that vein, the committee narrowed its focus to documents created after February 4 relating to DOJ’s response to the committee investigation. Following a series of subpoenas and negotiations, the Attorney General ultimately refused to turn over certain documents, citing the President’s determination that the information was protected by executive privilege.¹¹⁵ The House subsequently voted to hold the Attorney General in contempt of Congress for his refusal to comply with the subpoena, and simultaneously authorized the committee to file a civil lawsuit in federal court to enforce the subpoena.¹¹⁶ While DOJ announced that a criminal contempt of

¹¹¹ *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 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.

¹¹² John Solomon, David Heath, and Gordon Witkin, “ATF Let Hundreds 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>.

¹¹³ Letter from Assistant Attorney General Ronald Weich to Ranking Member Charles Grassley, February 4, 2011, available at <http://oversight.house.gov/wp-content/uploads/2012/06/Feb-4-Dec-2-letters.pdf>.

¹¹⁴ 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>.

¹¹⁵ Letter from Deputy Attorney General James Cole to Chairman Darrell Issa, June 20, 2012, available at <http://oversight.house.gov/wp-content/uploads/2012/08/June-20-2012-Letter-from-Deputy-Attorney-General-Cole-to-Rep.-Darrell-Issa-with-attachment.pdf>.

¹¹⁶ H.Res. 711, 112th Cong. (2012); H.Res. 706, 112th Cong. (2012).

Congress prosecution against the Attorney General was not forthcoming, the committee did file a civil lawsuit in August 2012.¹¹⁷

On September 30, 2013 the district court issued its first opinion in the case, rejecting DOJ's motion to dismiss the civil enforcement suit on jurisdictional and justiciability grounds.¹¹⁸ The court's opinion echoed that of the District Court for the D.C. Circuit in *Miers*,¹¹⁹ and addressed arguments for dismissal based on separation-of-powers concerns, the court's jurisdiction to hear the case, and the plaintiff's standing to bring suit. Since that decision, the court has denied motions for summary judgment from both parties and has ordered DOJ to provide the court with a list of documents it is withholding and a description of why each document is privileged and protected from disclosure.¹²⁰ The court has yet to reach the merits of the executive privilege question.

Executive Branch Positions on the Scope of Executive Privilege

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.¹²¹ 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.¹²² 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.¹²³

¹¹⁷ Complaint, Committee on Oversight and Government Reform v. Holder, No. 1:12-cv-1332 (D.D.C. August 13, 2012), available at <http://oversight.house.gov/wp-content/uploads/2012/08/Complaint-08-13-12-1.pdf>.

¹¹⁸ Comm. on Oversight and Gov't Reform, U.S. House of Representatives v. Holder, 979 F. Supp. 2d 1 (D.D.C. 2013).

¹¹⁹ DOJ did not argue that the facts in *Holder* were distinguishable from those in *Miers*; it "simply urge[d] the Court to come to a different conclusion." *Id.* at 11.

¹²⁰ For a discussion of the district court's order and its relevance to the distinctions drawn in *Espy* between the deliberative process privilege and the presidential communications privilege, see CRS Legal Sidebar WSLG1109, Three Parties, Two Cases, One Set of Documents; Not a Fast and Furious Resolution, by Alissa M. Dolan and Todd Garvey.

¹²¹ 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.

¹²² See Smith Letter/Watt, *supra* note 20, at 28-31; Barr Memo, *supra* note 20, at 187-90; Reno Letter/FALN, *supra* note 20.

¹²³ 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 (continued...)

The result has been a presumption by the executive that its predecisional 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.”¹²⁴ 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.”¹²⁵

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.”¹²⁶ Executives have also taken the position that the privilege covers confidential communications

(...continued)

A. Zellif, Jr., October 1, 1996, at 1 [hereinafter Quinn Letter/FBI]; Memorandum from President Bush to Secretary of Defense Richard Cheney Re: Congressional Subpoena for an Executive Branch Document, August 8, 1991, at 1 [hereinafter Bush Memo].

¹²⁴ 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”).

¹²⁵ 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.”).

¹²⁶ Smith Letter/Watt, *supra* note 20, at 29.

with respect to policymaking well beyond the confines of the White House and the President's closest advisers.

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 advisers, 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 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."¹²⁷ The Attorney General went on to argue that "[i]t is well established that 'the doctrine of executive privilege ... encompasses Executive Branch deliberative communications.'"¹²⁸ 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*.

Executive Branch Interpretation Immediately Following *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, 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 management of the objects to be protected." 16 U.S.C. §431. 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,

¹²⁷ Letter to President Barack Obama from Eric Holder, Attorney General, June 19, 2012 at 3.

¹²⁸ *Id.*

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.

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.”¹²⁹ 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.”¹³⁰ 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.¹³¹

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.¹³² 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.”¹³³

Concluding Observations

As indicated in the above discussion, recent appellate court rulings may cast doubt on the broad claims of privilege posited by the executive branch in the past. Taken together, *Espy* and *Judicial Watch* arguably have effected 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:

¹²⁹ Cutler Memo, *supra* note 59, at 1.

¹³⁰ 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].

¹³¹ See David Hoffman, *President Offers to Share Iran Sales Notes with Hill; Aides Reversed on Memoir Materials*, WASH. POST, Feb. 3, 1987, at A1.

¹³² Olson Memo, *supra* note 58, at 486; Rabkin Letter, *supra* note 61.

¹³³ *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”).

1. The communication must be authored or “solicited and received” by a close White House adviser or the President. The judicial test requires that an adviser 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 executive’s 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 appellate court rulings have reiterated the qualified nature of the privilege.¹³⁴ 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.¹³⁵

¹³⁴ *Miers*, 558 F. Supp. 2d at 103.

¹³⁵ *Espy*, 121 F.3d at 753.

In the continuing absence of a post-Nixon Supreme Court decision there is continuing uncertainty as to how executive privilege claims should be analyzed when asserted in response to congressional requests for information. While *Holder* may ultimately address some lingering questions regarding the application of executive privilege in the congressional oversight context, the district court has yet to reach the merits of that claim.

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 adviser 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 advisers 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 precedential 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 nonprivileged 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 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 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. The suit withstood a motion to dismiss on the basis of jurisdiction and justiciability, and is currently pending before the district court.

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