

EXECUTIVE PRIVILEGE AND CONGRESSIONAL OVERSIGHT

HEARING BEFORE THE COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES ONE HUNDRED SIXTEENTH CONGRESS FIRST SESSION

MAY 15, 2019

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WASHINGTON : 2019

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CONTENTS

MAY 15, 2019

OPENING STATEMENTS

	Page
The Honorable Jerrold Nadler, Chairman, Committee on the Judiciary	1
The Honorable Doug Collins, Ranking Member, Committee on the Judiciary ..	20

WITNESS

Kate Shaw, Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University	
Oral Testimony	30
Prepared Testimony	34
Paul Rosenzweig, Senior Fellow, National Security & Cybersecurity, R Street Institute	
Oral Testimony	47
Prepared Testimony	49
Jonathan Turley, J.B. and Maurice C. Shapiro Professor of Public Interest Law, The George Washington University Law School	
Oral Testimony	66
Prepared Testimony	68
Neil Kinkopf, Professor of Law, Georgia State University College of Law	
Oral Testimony	97
Prepared Testimony	138

LETTERS, STATEMENTS, ETC., SUBMITTED FOR THE HEARING

A letter for the record submitted by the Honorable Jerrold Nadler, Chairman, Committee on the Judiciary	4
A letter for the record submitted by the Honorable Jerrold Nadler, Chairman, Committee on the Judiciary	17
A letter for the record submitted by the Honorable Doug Collins, Ranking Member, Committee on the Judiciary	23
Excerpts from a report by the Project in Government Oversight for the record submitted by the Honorable Jerrold Nadler, Chairman, Committee on the Judiciary	99

APPENDIX

A Statement and articles for the record submitted by the Honorable Sheila Jackson Lee, a Member of Congress from the State of Texas, Committee on the Judiciary	188
A Statement for the record submitted by the Honorable Sylvia Garcia, a Member of Congress from the State of Texas, Committee on the Judiciary ...	210
A Statement for the record submitted by Caroline Fredrickson, President, American Constitution Society, and Noah Bookbinder, Executive Director, Citizens for Responsibility and Ethics in Washington, on behalf of the joint ACS/CREW Presidential Education Project	213

EXECUTIVE PRIVILEGE AND CONGRESSIONAL OVERSIGHT

WEDNESDAY, MAY 15, 2019

HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
Washington, DC.

The committee met, pursuant to call, at 10:11 a.m., in Room 2141, Rayburn Office Building, Hon. Jerrold Nadler [chairman of the committee] presiding.

Present: Representatives Nadler, Lofgren, Jackson Lee, Johnson of Georgia, Deutch, Bass, Jeffries, Cicilline, Lieu, Raskin, Jayapal, Correa, Scanlon, Garcia, McBath, Stanton, Dean, Mucarsel-Powell, Collins, Chabot, Gohmert, Buck, Ratchiffe, Gaetz, Biggs, McClintock, Lesko, Reschenthaler, Cline, Armstrong, and Steube.

Staff present: David Greengrass, Senior Counsel; John Doty, Senior Advisor; Lisette Morton, Director of Policy, Planning, and Member Services; Madeline Strasser, Chief Clerk; Moh Sharma, Member Services and Outreach Advisor; Susan Jensen, Parliamentarian/Senior Counsel; Sophie Brill, Counsel, Constitution Subcommittee; Will Emmons, Professional Staff Member, Constitution Subcommittee; Sarah Istel, Counsel; Matt Morgan, Counsel; Brendan Belair, Minority Chief of Staff; Robert Parmiter, Minority Deputy Staff Director and Chief Counsel; Jon Ferro, Minority Parliamentarian; Paul Taylor, Minority Chief Counsel, Constitution Subcommittee; Carlton Davis, Minority Chief Oversight Counsel; Ashley Callen, Minority Senior Adviser and Oversight Counsel; and Erica Barker, Minority Clerk.

Chairman NADLER. The Judiciary Committee will come to order. Without objection, the chair is authorized to declare recesses of the committee at any time.

We welcome everyone to today's hearing on executive privilege and congressional oversight. I will now recognize myself for an opening statement.

For more than 200 years, Congress has exercised its power under Article I of the Constitution to conduct oversight of the executive branch. Congress' power of inquiry, recognized by the Supreme Court in case after case for nearly a century, is essential to our constitutional order. Without it, Congress would have no way to expose waste or misconduct, to inform itself for purposes of writing new legislation, or to ensure that public officials, including the President, remain accountable to the people they are supposed to serve.

Congress and the executive branch have fought over requests for information in the past. At times, this has included disagreement over the scope of executive privilege, the doctrine that holds that certain information may be withheld from Congress under limited circumstances to protect the President's ability to seek candid advice from his or her advisers. But while the courts have held that the President's communications are entitled to some degree of confidentiality, they have consistently held that the privilege is not an absolute shield and can be overcome when the interest of justice require it.

Until recently, no President had ever stated that his plan across the board would be to fight any and all oversight from Congress. In declaring that he plans to "fight all the subpoenas," President Trump has announced his hostility to our system of checks and balances and is thereby seeking to hold himself above the law. The President's statement was not just isolated rhetoric. It was an admission of what this Administration has been doing and has really escalated since the start of the 116th Congress when it became clear the House of Representatives would carry out its duty and the will of the voters by engaging in constitutionally-necessary oversight of the executive branch.

By this Administration's command, the White House has attempted to impede over 20 congressional investigations, including by ignoring or failing to provide meaningful responses to dozens of letters requesting information on topics ranging from the Affordable Care Act to the security of our elections to the policy of separating children from their parents at the border. Government witnesses have failed to appear for hearings and interviews. While in other administrations Congress issued subpoenas only as a last resort when negotiations failed, the Trump Administration has often been unwilling to engage with Congress at all unless and until a subpoena is issued and a contempt proceeding is looming. This constitutional brinksmanship is particularly unacceptable where, as here, the President is using the powers of his office to impede an investigation into his own alleged misconduct.

For months, this committee and others have made clear our expectation that the Department of Justice must produce an unredacted version of Special Counsel Mueller's report as well as the evidence and other investigatory materials underlying the report. We wrote to Attorney General Barr about this in February. We repeated that request multiple times throughout the months of March and April. The committee's contempt report describes these exchanges in exhaustive detail.

On April 18th, having received no substantive response from Attorney General Barr, the committee issued a subpoena for the unredacted Mueller report and the underlying materials. This is information to which we are constitutionally entitled and which we need to fulfill our legislative and oversight duties, including to protect the integrity of our Nation's elections. Yet it was only in the days and hours leading up to this committee's markup of the contempt report that the Justice Department engaged in negotiations. Even then the Department's "accommodation efforts" were wholly insufficient. I put that in quotes because I wouldn't even call them real accommodation efforts.

The Department was willing only to discuss severely-restrictive terms in which a small number of members could review some of the redacted portions of the Mueller report. It remained unwilling to make any substantive offers to produce any underlying evidence or investigative files. Then at 10:00 p.m. on the night before the contempt markup, the Department informed us that it was ending those negotiations and would request that President Trump assert executive privilege as to the redacted portions of the Mueller report and for each and every underlying document subject to the committee's subpoena.

The President's protective assertion of executive privilege is unprecedented in its scope. The Justice Department openly admits that it has not even reviewed all the underlying documents, let alone provided any specific reasons for withholding them. Although the Attorney General has cited one example from the Clinton era in which the President made a protective assertion of privilege to allow more time to review the requested materials, in that instance the White House had already been providing documents to Congress on a rolling basis for nearly a year, and the White House completed its review just 15 days later.

This Administration has produced none of the evidence underlying the Mueller report, and it has made no effort to show that it is now reviewing these documents on a good-faith basis to determine which ones, if any, are legitimately subject to privilege. In any event, as the committee has pointed out in multiple letters to the Attorney General, the White House has already waived executive privilege several times over, to the extent that it never could have applied to underlying evidence collected by the Special Counsel's Office.

Moreover, no court has ever held that the executive branch can withhold documents from Congress in the face of a subpoena simply because they consist of law enforcement files. Congress routinely receives this type of information. In just the last Congress, the Justice Department produced hundreds of thousands of pages of sensitive law enforcement files in response to congressional subpoenas, including files pertaining to the Russian investigation which was ongoing at the time.

For these and other reasons, I am deeply troubled by the President's 11th-hour decision to make a blanket invocation of executive privilege for all redacted portions of the Mueller report and all of the underlying materials. I invited White House Counsel Pat Cipollone to testify at today's hearing so that he could better explain and defend the White House's assertions of privilege. But he has declined that invitation, and he has instead submitted a written statement that restates the same arguments previously raised by the Justice Department. I ask unanimous consent to enter this letter into the record.

Without objection, it will be entered.

[The information follows:]

**CHAIRMAN NADLER FOR THE OFFICIAL
RECORD**

THE WHITE HOUSE

WASHINGTON

May 14, 2019

The Honorable Jerrold Nadler
Chairman
Committee on the Judiciary
United States House of Representatives
Washington, D.C. 20515

Dear Chairman Nadler:

I write in response to your letter dated May 10, 2019, which I received yesterday, inviting me to testify tomorrow before the Committee on the Judiciary ("Committee"). Putting aside the very limited notice provided by your letter, the more important point is that, based on clearly established constitutional doctrines and precedent, close advisers to the President in administrations of both political parties have consistently declined invitations to testify before congressional committees. See *Immunity of the Assistant to the President and Director of the Office of Political Strategy and Outreach from Congressional Subpoena*, 38 Op. O.L.C. ___, *1 (2014); see also Letter from Robert F. Bauer, Counsel to the President, to Darrell E. Issa, Chairman, Committee on Oversight and Government Reform (June 16, 2011). Therefore, in keeping with settled precedent, I must decline the invitation to appear before the Committee tomorrow.

I would, however, like to respond to your request for a brief explanation concerning the legal basis for the President's decision to make a protective assertion of executive privilege over the materials subpoenaed by the Committee. The Committee served a subpoena on the Attorney General seeking an extraordinary volume of documents. That subpoena requested not only the redacted portions of the Special Counsel's report, but the entire investigative file of the Special Counsel, which the Department of Justice has informed you includes millions of pages of highly sensitive classified and unclassified documents, law enforcement information, information about sensitive intelligence sources and methods, and grand jury information that the Department is prohibited by law from disclosing. Despite the fact that the Department of Justice was engaged in ongoing negotiations with the Committee, you abruptly decided to end the accommodation process by noticing a Committee vote recommending an unwarranted finding of contempt against the Attorney General. The Committee rejected the Department of Justice's reasonable request that you defer the vote until the President could make a final decision on whether to assert executive privilege. It was on that record that, acting at the Attorney General's request and upon his recommendation, the President determined to make a protective assertion of executive privilege over the undisclosed materials subject to the subpoena.

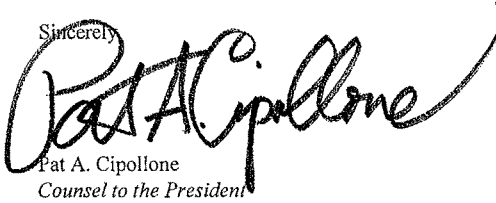
The Committee's decision to repeatedly ignore the Attorney General's reasonable accommodations suggests that the Committee does not genuinely desire to reach agreements in order to obtain information, but instead is merely bent on inciting unnecessary confrontations

without legal support in order to feed a false political narrative about the Administration. Indeed, at every step, the Committee has chosen a strategy of confrontation instead of taking advantage of information provided or offered by the Department of Justice. For instance, the Attorney General voluntarily made available to the Chairman and other congressional leaders a minimally redacted version of the Special Counsel's report that excluded only grand-jury information, which could not lawfully be disclosed to Congress. In response, you refused even to review the minimally redacted report and, instead, chose to issue a subpoena that same day. Letter from Stephen E. Boyd, Assistant Attorney General, to Jerrold Nadler, Chairman, Committee on the Judiciary 1 (May 7, 2019) (hereinafter May 7, 2019 Boyd Letter) (attached as Tab A). The Committee's April 18, 2019 subpoena demanded the production of, among other things, the Special Counsel's entire investigative file, which consists of millions of pages of classified and unclassified documents, including grand-jury material. *Id.*

Since then, the Attorney General offered further accommodations, including offering to expand the number of individuals who may review the minimally redacted report and allowing Members to take and retain notes following their review. *Id.* My understanding is that these negotiations continued through the evening of May 7, when the Committee effectively ended them by insisting on moving forward with a vote on a resolution recommending contempt, unless the Department of Justice agreed (i) to make disclosures to dozens of Members of Congress that would risk violating court orders and rules in multiple ongoing prosecutions and compromising ongoing investigations, and (ii) take the legally unsupportable position in court that the Committee could receive access to grand-jury information in violation of Rule 6(e) of the Federal Rules of Criminal Procedure. *Id.* at 1-2. The Department of Justice plainly could not agree to such unreasonable eleventh-hour demands. Faced with the looming and unnecessary contempt vote, on the evening of May 7, 2019, the Department of Justice asked the Committee to postpone the vote, pending the Attorney General's formal request and the President's determination concerning executive privilege over the subpoenaed materials. *Id.* at 2. The Committee refused that reasonable request too, and insisted upon holding the vote on May 8, 2019.

The Committee's refusal to grant sufficient time to conduct an adequate review of the subpoenaed materials compelled the President to make a protective assertion of executive privilege. See Letter from Stephen E. Boyd, Assistant Attorney General, to Jerrold Nadler, Chairman, Committee on the Judiciary 1 (May 8, 2019) (hereinafter May 8, 2019 Boyd Letter) (attached as Tab B). Because the Committee declined to grant sufficient time to review the materials subject to the subpoena, the President, consistent with law and past practice, made a protective assertion of executive privilege. He did so in order to preserve his ability to make a final decision, in consultation with the Attorney General, as to whether some or all of the subpoenaed documents, which include many classified and law-enforcement sensitive documents, merit a conclusive assertion of executive privilege. See Letter from William P. Barr, Attorney General, to the President (May 8, 2019) (attached as Tab C). The letter from the Attorney General to the President explaining this reasoning was provided to the Committee by the Department of Justice at the time of the President's protective assertion of executive privilege on May 8, 2019. Finally, the President's protective assertion of executive privilege in this matter is consistent with the procedure followed by President Clinton in 1996. See *Protective Assertion of Executive Privilege*, 20 Op. O.L.C. at 1 (1996) (opinion of Attorney General Janet Reno).

Here, as we have done in every matter, we have followed longstanding Executive Branch positions and precedents established by prior administrations of both political parties. If you would like to discuss any of the issues addressed in this letter, please let me know.

Sincerely,

Pat A. Cipollone
Counsel to the President

cc: The Honorable Doug Collins, Ranking Member

Attachments

Tab A	May 7, 2019 Boyd Letter
Tab B	May 8, 2019 Boyd Letter
Tab C	May 8, 2019 Letter from William P. Barr, Attorney General, to the President

TAB A



U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

May 7, 2019

The Honorable Jerrold Nadler
Chairman
Committee on the Judiciary
United States House of Representatives
Washington, D.C. 20515

Dear Chairman Nadler:

As you know, the Attorney General has repeatedly sought to accommodate the interests of the House Committee on the Judiciary in the investigation conducted by Special Counsel Robert S. Mueller, III. On April 18, 2019, the Attorney General voluntarily disclosed to Congress the Special Counsel's report, which was intended to be "confidential" under the applicable regulations, with as few redactions as possible, consistent with the law and long-established confidentiality interests of the Executive Branch. He also made available to you and other congressional leaders a minimally redacted version of the report that excluded only grand-jury information, which could not lawfully be shared with Congress. In response, you refused even to review the minimally redacted report, and you immediately served a subpoena, dated April 18, 2019, demanding production of the fully unredacted report and the Special Counsel's entire investigative files, which consist of millions of pages of classified and unclassified documents, bearing upon more than two dozen criminal cases and investigations, many of which are ongoing.

Since then, the Department of Justice has offered further accommodations to the Committee. In particular, the Department offered to expand the number of staff members who may review the minimally redacted report; to allow Members of Congress who have reviewed the minimally redacted report to discuss the material freely among themselves; and to allow Members to take and retain their notes following their review. We expressed our hope that these further accommodations would prompt you and your colleagues actually to review the minimally redacted report, which would allow the parties to engage in meaningful discussions regarding possible further accommodations of the Committee's additional expansive requests. We further proposed a framework for those discussions, and made clear that we were open to conducting them on an expedited basis.

Unfortunately, the Committee has responded to our accommodation efforts by escalating its unreasonable demands and scheduling a committee vote to recommend that the Attorney General be held in contempt of Congress. In particular, the Committee has demanded that the Department authorize review of the minimally redacted report by all 41 members of the Committee, as well as all members of the House Permanent Select Committee on Intelligence,

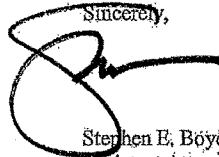
and additional staff members. As we have explained, however, doing so would force the Department to risk violating court orders and rules in multiple ongoing prosecutions, as well as risk the disclosure of information that could compromise ongoing investigations. In addition, you have demanded that the Department join in a request that a court grant the Committee access to grand-jury material protected by Federal Rule of Criminal Procedure 6(e), even though we have explained that such a request would force the Department to ignore existing law. Such unreasonable demands, together with the Committee's precipitous threat to hold the Attorney General in contempt, are a transparent attempt to short-circuit the constitutionally mandated accommodation process and provoke an unnecessary conflict between our respective branches of government. They are also counterproductive. They will not further the Committee's interests in obtaining the requested information.

In the face of the Committee's threatened contempt vote, the Attorney General will be compelled to request that the President invoke executive privilege with respect to the materials subject to the subpoena. I hereby request that the Committee hold the subpoena in abeyance and delay any vote on whether to recommend a citation of contempt for noncompliance with the subpoena, pending the President's determination of this question.

This request is consistent with long-standing policy of the Executive Branch about congressional requests for information implicating executive privilege. See President Ronald Reagan, Memorandum for the Heads of Executive Departments and Agencies, Procedures Governing Responses to Congressional Requests for Information 2 (Nov. 4, 1982) (directing executive agencies to "request the Congressional body to hold its request for the information in abeyance" in order to "protect the privilege pending a Presidential decision"). Regrettably, the Committee has made this request necessary by threatening to pretermitt the constitutionally mandated accommodation process between the branches and to hold a vote on contempt tomorrow morning.

This request is not itself an assertion of executive privilege. If the Committee decides to proceed in spite of this request, however, the Attorney General will advise the President to make a protective assertion of executive privilege over the subpoenaed material, which undoubtedly includes material covered by executive privilege. President Clinton, acting on the advice of Attorney General Janet Reno, made such a protective assertion of privilege in similar circumstances. See *Protective Assertion of Executive Privilege Regarding White House Counsel's Office Documents*, 20 Op. O.L.C. 1 (1996). We remain open to further discussions with the Committee, and we hope that the Committee does not make it necessary for the President to take that step tomorrow.

Sincerely,



Stephen E. Boyd
Assistant Attorney General

cc: The Honorable Doug Collins
Ranking Member

TAB B



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

May 8, 2019

The Honorable Jerrold Nadler
 Chairman
 Committee on the Judiciary
 United States House of Representatives
 Washington, D.C. 20515

Dear Chairman Nadler:

We are disappointed that you have rejected the Department of Justice's request to delay the vote of the Committee on the Judiciary on a contempt finding against the Attorney General this morning. By doing so, you have terminated our ongoing negotiations and abandoned the accommodation process with respect to your April 18, 2019, subpoena of confidential Department of Justice materials related to the investigation conducted by Special Counsel Robert S. Mueller, III. As we have repeatedly explained, the Attorney General could not comply with your subpoena in its current form without violating the law, court rules, and court orders, and without threatening the independence of the Department of Justice's prosecutorial functions. Despite this, we have attempted to engage with the Committee in good faith in an effort to accommodate your stated interest in these materials. Unfortunately, rather than allowing negotiations to continue, you scheduled an unnecessary contempt vote, which you refused to postpone to allow additional time for compromise.

Accordingly, this is to advise you that the President has asserted executive privilege over the entirety of the subpoenaed materials. As I indicated in my letter to you last night, this protective assertion of executive privilege ensures the President's ability to make a final decision whether to assert privilege following a full review of these materials. See *Protective Assertion of Executive Privilege Regarding White House Counsel's Office Documents*, 20 Op. O.L.C. 1 (1996) (opinion of Attorney General Janet Reno). Regrettably, you have made this assertion necessary by your insistence upon scheduling a premature contempt vote.

Sincerely,

Stephen E. Boyd
 Assistant Attorney General

cc: The Honorable Doug Collins
 Ranking Member

TAB C



The Attorney General
Washington, D.C.

May 8, 2019

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

I am writing to request that you make a protective assertion of executive privilege with respect to Department of Justice documents recently subpoenaed by the Committee on the Judiciary of the House of Representatives. In cases like this where a committee has declined to grant sufficient time to conduct a full review, the President may make a protective assertion of privilege to protect the interests of the Executive Branch pending a final determination about whether to assert privilege. *See Protective Assertion of Executive Privilege Regarding White House Counsel's Office Documents*, 20 Op. O.L.C. 1 (1996) (opinion of Attorney General Janet Reno). The Committee has demanded that I produce the "complete and unredacted version" of the report submitted to me on March 22, 2019, by Special Counsel Robert S. Mueller, III, regarding his investigation of Russian interference in the 2016 presidential election. The Committee also seeks "[a]ll documents referenced in the Report" and "[a]ll documents obtained and investigative materials created by the Special Counsel's Office." The Committee therefore demands all of the Special Counsel's investigative files, which consist of millions of pages of classified and unclassified documents bearing upon more than two dozen criminal cases and investigations, many of which are ongoing. These materials include law enforcement information, information about sensitive intelligence sources and methods, and grand-jury information that the Department is prohibited from disclosing by law.

Consistent with paragraph 5 of President Reagan's 1982 memorandum about assertions of executive privilege, the Department requested that the Chairman of the Committee hold the subpoena in abeyance and delay any vote recommending that the House of Representatives approve a resolution finding me in contempt of Congress for failing to comply with the subpoena, pending a final presidential decision on whether to invoke executive privilege. *See Memorandum for the Heads of Executive Departments and Agencies, Re: Procedures Governing Responses to Congressional Requests for Information* at 2 (Nov. 4, 1982). The Department made this request because, although the subpoenaed materials assuredly include categories of information within the scope of executive privilege, the Committee's abrupt resort to a contempt vote—notwithstanding ongoing negotiations about appropriate accommodations—has not allowed sufficient time for you to consider fully whether to make a conclusive assertion of executive privilege. The Chairman, however, has indicated that he intends to proceed with the markup session scheduled at 10 a.m. today on a resolution recommending a finding of contempt against me for failing to produce the requested materials.

In these circumstances, you may properly assert executive privilege with respect to the entirety of the Department of Justice materials that the Committee has demanded, pending a final decision on the matter. As with President Clinton's assertion in 1996, you would be making only a preliminary, protective assertion of executive privilege designed to ensure your ability to make a final assertion, if necessary, over some or all of the subpoenaed materials. *See Protective Assertion of Executive Privilege*, 20 Op. O.L.C. at 1. As the Attorney General and head of the Department of Justice, I hereby respectfully request that you do so.

Sincerely,

A handwritten signature in black ink, appearing to read "W.P. Barr", written in a cursive style.

William P. Barr
Attorney General

Chairman NADLER. I also ask unanimous consent to enter a letter I sent to the White House on May 10th, 2019, also on the topic of executive privilege.

Again, without objection.
[The information follows:]

**CHAIRMAN NADLER FOR THE OFFICIAL
RECORD**

JERROLD NADLER, New York
CHAIRMAN

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ONE HUNDRED SIXTEENTH CONGRESS

Congress of the United States House of Representatives

COMMITTEE ON THE JUDICIARY

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GREG STEUBE, Florida

May 10, 2019

Mr. Pat Cipollone
Counsel to the President
The White House
1600 Pennsylvania Ave, N.W.
Washington, D.C. 20002

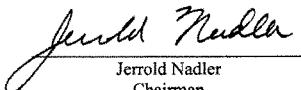
Dear Mr. Cipollone:

On May 15, 2019 the Committee on the Judiciary will hold a hearing entitled "Executive Privilege and Congressional Oversight" at 10:00 a.m. in room 2141 Rayburn House Office Building. I write to invite you to testify at this hearing. The hearing will examine the role of executive privilege within the framework of our constitutional system, particularly as it relates to the Committee's request for the full Mueller Report and the underlying materials referenced therein from the Department of Justice.

As the Committee learned from Assistant Attorney General Boyd's May 8 letter, "the President has asserted executive privilege over the entirety of the subpoenaed materials" that were the subject of the Committee's May 8 contempt proceedings with regard to Attorney General Barr. Due to the time exigencies involved in this matter, I recognize we are not providing you with the customary two weeks-notice. Given the breadth of the President's "protective" assertion of executive privilege earlier this week, however, we wanted to give you the opportunity to articulate and defend the President's position. In the event you are unable to attend, we welcome you forwarding to the Committee a further written submission.

Thank you for your attention to this matter.

Sincerely,



Jerrold Nadler
Chairman
Committee on the Judiciary

cc: Hon. Doug Collins, Ranking Member, Committee on the Judiciary

Chairman NADLER. This letter sets out a more detailed description of our negotiations with the Department of Justice prior to its 11th-hour invocation of executive privilege.

Fortunately, today's witnesses have a wealth of experience and expertise on matters of executive privilege, including from the Justice Department, the White House Counsel's Office, and even the office of former Independent Counsel, Kenneth Starr. Although these issues about privilege and document requests may appear technical, what they ultimately come down to is whether the President can shield himself from accountability to a co-equal branch of government. I look forward to today's discussion of these important matters which lie at the core of our nation's commitment to the basic principle that no man or woman is above the law.

It is now my pleasure to recognize the Ranking Member of the Judiciary Committee, the gentleman from Georgia, Mr. Collins, for his opening statement.

Mr. COLLINS. Thank you, Mr. Chairman, and I think as we will see today, welcome, you know, to a redo of something that probably should have happened a long time ago. A deliberative body like the Judiciary Committee commands respect, but only when it conducts itself in a respectable manner, and what we have seen in the last 5 months is their actions have put our influence at risk.

In fact, no one on our side, and it is sort of crazy. No one on our side is questioning oversight ability of Congress. I have said it many times when we were in the majority and I have in the minority. Oversight of Congress is a powerful tool and should be used. Article II, many times what I have found is Members of Congress before I got here gave up a lot of our, you know, the authority that we have in Article I to Article II, and that is a problem, but, however, you use it in the right way.

Oversight power that is properly done is a powerful tool, but when it is not done right, it actually weakens us. When you actually, as the Chairman talked about subpoena power, you actually threaten the Acting Attorney General at the time with a subpoena and then had to back off. A subpoena was not used as a last resort. It was used as a threat and then backed off of. This is what we have seen so far in this Congress. We talked about it last week.

One of the reasons I believe we are having this hearing today is, to come to talk about executive privilege and to talk about these things is because last week we showed in the contempt hearing that the majority actually did ask for 6(e) information. Actually asked for 6(e) information, which they cannot have without going to court. It is in the subpoena, and there is not a law professor sitting in front of me that wouldn't agree that the four corners of a subpoena is what the judge acts on, not the intent of the majority.

So when we do this, we continue to downplay the role of this committee. Many of us were lawyers before we became politicians, and I was actually a lawyer and a pastor before, beloved professions in which reason matters. When we come before us today in this matter, I am glad that you are all here. I appreciate your backgrounds and your opinions, and we are going to hear this today, but, again, I think we have come after the fact. We are now trying to go back and lay groundwork for what they may want to do later

when this could have been done beforehand. We said this last week.

You know, it is often said, and the chairman just said, that the Congress is a co-equal branch. I actually think it is the premiere branch because we are the ones that actually start the money. We are the ones that actually have control. We are the closest to the people. We are the ones that have enormous power, and the President does answer to Congress. And with all its power to enact laws and the enormous breadth, this committee's authority to remove a president and upending an entire election, that is what the majority has chosen to focus on. That is it.

For the past month, the Democrats have focused on the few areas in which we are not given boundless prerogative. We know the danger of simple majority rule. We are not a country run by a 51 percent majority. Without a division of centralized power, democracy becomes anarchy, and so the Supreme Court has power. The Attorney General has power. And even if he is not a member of your party, the President has power, which we recognized when Mr. Obama was in power.

But for the past months, we have besmirched this body and failed to do our jobs. This committee is one of the most important bodies in Congress and has become a parody. When the results of the Mueller investigation did not satisfy the Democrats, they quickly started peddling to the American people the manufactured constitutional crisis. The majority turned a reasonable discussion of the Mueller report into an opening of cannon fire for the circus that they have created. And we are back at the circus again, and you have been brought into it.

We have also looked at those who are channeling outrage for impeachment while then going on TV and saying we need to back out. It is a base perception, political issue. We even have some that have actually on the other side become megaphone operators, roaring about evidence nowhere to be found and demanding punitive action when they cry for what is next. Never mind the absurdity of what is next when, for example, the chairman claims that a subpoena is merely the beginning of a dialogue weeks after assuring our committee that a subpoena is a powerful and coercive tool, and to be only used when our attempts to reach accommodation with the witness have reached an impasse. That is what we actually heard last week.

Not only is a subpoena the start of a dialogue, it is to give us better standing in court. I mean, my law school didn't teach that. In fact, the judges that I went before actually believe the subpoena is a powerful tool, as the chairman said earlier this year. We are going very fast. You are here today to give cover, and they did so with no hearing, no groundwork when they held Mr. Barr in contempt. In fact, a mere 19 days have passed from the issuance of the subpoena and contempt. When the Oversight Committee held Eric Holder in contempt, 255 days had passed, 13 times as fast.

Now the Democrats tell us that they are taking the circus to court because the President has asserted executive privilege, a fact they claim represents a constitutional crisis. Today we will discuss that debate and privilege. Many people claim Republicans on this committee are covering for the President when we should join the

Democrats in their demand did the Attorney General violate the law, which is what this subpoena said.

So instead of stripping our branch and our oversight authority, we actually believe that we have it. But I can't also let it pass because, Mr. Chairman, here we are again having this hearing. And, again, I appreciate the witnesses coming and spending your time with us. But we have a crisis on our border. Even the New York Times, Washington Post, everybody else, they talk about the crisis. We have not heard anything about that. We have talked about DACA, but we have not talked about the crisis on the border. We have issues of intellectual property and trade on the front headlines of a deal with China. This is the intellectual property committee. Have we done anything? No. We have focused entirely on this one area.

But the one that got me the most, frankly, as a son of a Georgia State trooper, was this is Police Week. This is a time in which we honor our police officers and law enforcement and which they have come. Thirty thousand almost are in D.C. this week, and yesterday we had one bill on the floor, bulletproof vests, a great bill. I was the co-sponsor, original. One bill. In the past we have averaged 9 to 10 addressing the issues and needs of our police officers.

But what we did have from the chairman, and I ask unanimous consent that it be entered into the record, is a letter from the chairman and several of our members to General Barr wanting to talk about police-involved shootings and unarmed people in Ferguson, Baltimore, Cleveland, Chicago, Falcon Heights, Tulsa, Pittsburgh, and Dallas.

[The information follows:]

**RANKING MEMBER COLLINS FOR THE
OFFICIAL RECORD**

U.S. House of Representatives
Committee on the Judiciary
 Washington, DC 20515-6216
 One Hundred Sixteenth Congress

May 14, 2019

The Honorable William P. Barr
 Attorney General
 U.S. Department of Justice
 950 Pennsylvania Avenue, NW
 Washington, D.C. 20530

Dear Attorney General Barr:

As you know, the House Judiciary Committee exercises legislative and oversight jurisdiction in areas of civil rights and criminal law enforcement. These areas continue to be subjects of intense national concern in the wake of high-profile incidents involving the fatal use of force by law enforcement against unarmed people in cities such as Ferguson, Baltimore, Cleveland, Chicago, Falcon Heights, Tulsa, Pittsburgh, and Dallas. In 2018, 992 people were shot and killed by police.¹ In the first two months of this year, at least 265 people have suffered the same fate.²

Despite continuing concerns from civil rights and community-based organizations, the Department has sharply curtailed its statutory role in identifying and eradicating civil rights abuses by law enforcement. Excessive force in police-civilian encounters presents a crisis of trust throughout our nation. Changes to Department policy and failure to uphold the law run the risk of undermining federal oversight authority in this space.

Congress identified the need for the Department and community stakeholders to play a role in eliminating unjust and discriminatory practices by law enforcement. With that goal in mind, Congress has provided the Department with the authority to identify and eliminate patterns and practices of unconstitutional conduct in law enforcement agencies through civil action and administrative authority.³ Additionally, it provided the Department the ability to encourage communities to have a voice in how they are policed through programs offered by the Community Oriented Policing Services or “COPS Office.”⁴ These tools must be used to promote Constitutional policing practices that support public safety and respect civil rights and civil liberties.

¹ *Fatal Force Database 2018*, WASH. POST, (last updated Mar. 31, 2019), https://www.washingtonpost.com/graphics/2018/national/police-shootings-2018/?utm_term=.85b6e050a755.

² *Fatal Force Database 2019*, WASH. POST, (last updated Apr 15, 2019), https://www.washingtonpost.com/graphics/2019/national/police-shootings-2019/?utm_term=.1ccebda1d2e7.

³ 34 U.S.C. § 12601 (recodified from 42 U.S.C. § 14141) (2018).

⁴ 34 U.S.C. § 10381(d).

Accordingly, we write to request information related to the manner in which the Department of Justice is currently carrying out its statutory responsibilities to eliminate patterns and practices of unconstitutional conduct in law enforcement agencies. We respectfully request you provide complete responses and produce the relevant documents and communications listed below by no later than June 5, 2019:

1. Documents and communications dated from January 1, 2017 to March 31, 2017, relating to Attorney General Sessions's March 31, 2017 Memorandum, "Supporting Federal, State, Local, and Tribal Law Enforcement." This should include any prior drafts of the memorandum. Please include a list identifying all individuals involved in the decision to conduct the review of "existing or contemplated consent decrees."
2. Documents and communications dated from January 1, 2017 to November 7, 2018, relating to Attorney General Sessions's November 7, 2018 Memorandum "Principles and Procedures for Civil Consent Decrees and Settlement Agreements with State and Local Government Entities." This should include any prior drafts of the memorandum. Please include a list identifying all individuals involved in the decision to identify issues arising from the Department's "civil action[s] against a state or local government ... by consent decree or settlement agreement."
3. Documents and communications dated from January 1, 2017 to November 21, 2018, from or to the Acting Associate Attorney General Jesse Panuccio and Deputy Associate Attorney General Stephen Cox concerning the Department's recession or withdrawal of policies, procedures, and guidance issued by the Civil Rights Division, the Office of Justice Programs, the COPS Office, and the Office of Violence Against Women.
4. Please provide copies of any standards or guidelines, by which the Department identifies potential patterns or practices of conduct by law enforcement agencies that deprive persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.
5. Documents and communications dated from January 1, 2017 to the date of this letter, identifying any Department-negotiated consent decree, authorized under 34 U.S.C. Section 12601(b), that has "deprived the elected representatives of the people of any affected jurisdiction of control over their government."
6. Documents and communications dated from January 1, 2017 to the date of this letter, identifying any Department-negotiated consent decree, authorized under 34 U.S.C. Section 12601(b), that has subjected a law enforcement agency to ongoing court oversight after the Department determined that the purpose of the consent decree had been achieved.
7. Documents and Communications dated from January 1, 2017 to the date of this letter, from non-government organizations relating to the Department's review of existing or proposed consent decrees or reform agreements pursuant to the Attorney General's March 31, 2017 Memorandum.
8. Documents and communications dated from November 7, 2018 to the date of this letter, relating to updating standards or guidelines used to identify patterns and practices of

discriminations by state or local law enforcement agencies. This response should include how complaints against recipients of federal financial assistance from the Office of Justice Programs, other grant making agencies, and participants in the Asset Forfeiture Program are centrally accounted for or tabulated and considered in opening investigations into alleged discriminatory patterns and practices by law enforcement agency.

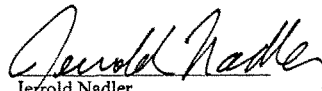
9. Copies of standards or guidelines in force as of January 1, 2017, that the Department uses to determine whether the Attorney General has reasonable cause to believe that a violation of 34 U.S.C. Section 12601(a) has occurred.
10. Documents and communications dated from November 7, 2018 to the date of this letter, relating to updating guidelines or standards used to determine whether the Attorney General has reasonable cause to believe that a violation of 34 U.S.C. Section 12601(a) has occurred.
11. Copies of any evidence-based study, analysis, or report supporting the decision to adopt the general statement of principles as memorialized in the Attorney General's November 7, 2018 Memorandum.
12. Documents and communications dated from January 1, 2018 to the date of this letter, relating to proposed changes to the existing memorandums of understanding or agreement, resolution agreements, or consent decrees, including but not limited to the matters open in Baltimore, Chicago, and Ferguson.
13. Total number of preliminary inquiries and investigations of law enforcement agencies opened, initiated, or given a case or other tracking number by the Civil Rights Division or civil rights matters opened by the Office of Justice Programs after January 1, 2017. Please include a list identifying each law enforcement agency subject to a preliminary investigation or inquiry after January 1, 2017, and a brief description of the basis for the preliminary investigation or inquiry.
14. Total number of preliminary inquiries or investigations of law enforcement agencies closed after March 31, 2017. Please include a list identifying the date each case was closed, the identity of the law enforcement agency subject of the preliminary inquiry or investigation, and a brief description of the basis for closing the preliminary investigation or inquiry.
15. Total number of complaints, referrals, or multi-party complaints received by the Department after January 1, 2017, from a federal, state, or local public official relating to potential pattern or practice violations by a law enforcement agency. Please provide brief descriptions of each referral or complaint.
16. Documents and communications dated from February 9, 2017 to the date of this letter, relating to modifications of existing agreements for technical assistance with law enforcement agencies, COPS Office proposed budget, or changes to existing Department guidelines or standards relating to the administration of the Collaborative Reform Initiative for Technical Assistance.
17. Total number of requests, including any memorandums or communications dated after January 1, 2017 to the date of this letter, to open investigations of law enforcement


agency officers or agencies from the Special Litigation Section to the Assistant Attorney General for Civil Rights under section 12601.

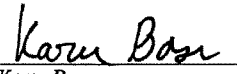
18. Documents or Communications dated from January 1, 2017 to the date of this letter, related to the review and decision to retreat from the agreement in principle with the Chicago Police Department and Chicago, including any review or analysis of the findings by the AG and his office of evidence of constitutional violations presented in the findings letter dated January 3, 2017.
19. An account of open investigations alleging an unlawful pattern and practice or disparate impact involving law enforcement agencies and explanation of what steps the Department has taken to withdraw federal funding of law enforcement agencies that are subject to the grant conditions pursuant to Title I of the Omnibus Crime Control and Safe Streets Act of 1968.⁵ In your response, please address the Department's investigations of the Springfield, Massachusetts Police Department, the Alabama Law Enforcement Agency, and the Orange County District Attorney's Office and Sheriff's Department.

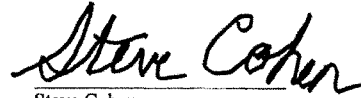
Thank you for your prompt attention on this matter. We look forward to working more closely with your office in the 116th Congress.

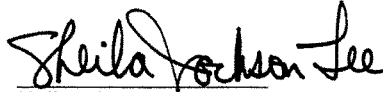
Sincerely,


 Jerrold Nadler
 Chairman
 House Committee on the Judiciary


 Mary Gay Scanlon
 Vice Chair
 House Committee on the Judiciary


 Karen Bass
 Chairwoman
 Subcommittee on Crime,
 Terrorism, and Homeland Security
 House Committee on the Judiciary


 Steve Cohen
 Chairman
 Subcommittee on Constitution, Civil
 Rights, and Civil Liberties
 House Committee on the Judiciary


 Sheila Jackson Lee
 Member of Congress

⁵ 34 U.S.C. §§ 10221-10238.

Cc: Honorable Doug Collins, Ranking Member, House Committee on the Judiciary
Honorable John Ratcliffe, Subcommittee Ranking Member, House Committee on the
Judiciary
Honorable Mike Johnson, Subcommittee Ranking Member, House Committee on the
Judiciary

Mr. COLLINS. And they list off statistics citing in 2018, 992 people were shot and killed by police. No context. No thought about how many of those actually pulled a gun on an officer, how many of those actually were looking, and unfortunately what we have seen is the phenomenon of suicide by cop. We just throw numbers out there. Well, I am going to throw a couple other numbers.

A hundred and forty-four officers died in the line of duty. This year over 86 have died in the line of duty. When one of the police organizations heard about this letter, this was their reaction: "Well, that is a slap in the face." It is tone deaf. We could have waited a week then had this. Nobody would have said a word, but in the middle of Police Week, Mr. Chairman, with everything this committee has going on.

We will have this hearing. I am glad our witness is here, I am glad your witnesses are here, because we are having to redo, get the cart before the horse again, trying to get it right for this one single-minded focus of hatred for a President and an Attorney General. The oversight of this committee is unquestioned. We have oversight. We will work through that. But we are hellbent on finding the excuse to the point that we slap our officers in the face.

I have no problem with looking into these issues, none at all. But when we put one bill on the floor and we send this to the Attorney General during Police Week, I don't think there is a person on the other side of this dais should say anything about supporting police this week. Just be quiet. Go on to the next week, and we will get on to this letter then. And hopefully, Mr. Chairman, we will take something, as one of your members and I have talked on several occasions, maybe we will get to some things that we can agree on. I have got no problem disagreeing with the other side on policy. What I do have a problem with is we never get to it. We are back at the same thing again and again.

So for the folks here, and our witnesses, and for both sides of the dais, welcome back to the circus. Another week is here, and we will pop the popcorn while we continue to rehash the past. With that, I yield back.

Chairman NADLER. Thank you, Mr. Collins. I will now introduce today's witnesses. Professor Kate Shaw teaches law at Yeshiva University's Benjamin Cardozo School of Law. She received her bachelor of arts from Brown University and her J.D. from the Northwestern University Pritzker School of Law. Prior to joining Cardozo, Professor Shaw worked in the White House Counsel's Office under President Barack Obama as Special Assistant to the President and Associate Counsel to the President.

Paul Rosenzweig is senior fellow for national security and cybersecurity at R Street Institute. He is also the Professorial Lecturer in Law at George Washington University School of Law. He received his B.A. from Haverford College, his J.D. from the University of Chicago Law School. His prior professional experience includes working as Senior Counsel on Independent Counsel Ken Starr's investigation of President Bill Clinton.

Jonathan Turley is the J.B. and Maurice C. Shapiro Professor of Public Interest Law at the George Washington University School of Law. He is a nationally-recognized legal scholar and has written extensively in areas ranging from constitutional law to legal theory

and tort law. Professor Turley received his B.A. from the University of Chicago and his J.D. from Northwestern University Pritzker School of Law. In 2008, he was given an honorary doctorate of law from John Marshall Law School for his contribution to civil liberties and the public interest.

Neil Kinkopf is a Professor of Law at Georgia State University College of Law. He graduated from Boston College with a B.A. and received his J.D. from Case Western Reserve University. Professor Kinkopf's prior professional experience includes serving as special assistant to the Office of Legal Counsel at the Department of Justice under President Bill Clinton. During the Clinton impeachment proceedings in 1999, Professor Kinkopf was the legal counsel to then Senator Joe Biden.

We welcome all of our distinguished witnesses, and we thank them for participating in today's hearing. Now, if you would please rise, I will begin by swearing you in, although I must confess that I always feel a little silly asking people to swear that they will tell us their opinions truthfully. [Laughter.]

Chairman NADLER. But nonetheless, do you swear or affirm under penalty of perjury that the testimony you are about to give is true and correct to the best of your knowledge, information, and believe, so help you God?

[A chorus of ayes.]

Chairman NADLER. Thank you. Let the record show the witnesses answered in the affirmative. You may be seated.

Please note that each of your written statements will be entered into the record in its entirety. Accordingly, I ask that you summarize your testimony in 5 minutes. To help you stay within that time, there is a timing light on your table. When the light switches from green to yellow, you have 1 minute to conclude your testimony. When the light turns red, it signals your 5 minutes have expired.

Professor Shaw, you may begin.

TESTIMONIES OF KATE SHAW, BENJAMIN N. CARDOZO SCHOOL OF LAW, YESHIVA UNIVERSITY, NEW YORK, NEW YORK; PAUL ROSENZWEIG, SENIOR FELLOW, NATIONAL SECURITY & CYBERSECURITY, R STREET INSTITUTE, WASHINGTON, D.C.; JONATHAN TURLEY, J.B. AND MAURICE C. SHAPIRO PROFESSOR OF PUBLIC INTEREST LAW, THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL, WASHINGTON, D.C.; AND NEIL KINKOPF, PROFESSOR OF LAW, GEORGIA STATE UNIVERSITY COLLEGE OF LAW, ATLANTA, GEORGIA

TESTIMONY OF KATE SHAW

Ms. SHAW. Chairman Nadler, Ranking Member Collins, and distinguished members of the committee, I thank you for the opportunity to testify here today. As the chairman said, my name is Katie Shaw. I am a professor of law at Cardozo in New York City, and before I began teaching, I spent several years as a lawyer in the White House Counsel's Office.

I understand that the purpose of today's hearing is to contextualize and assess the White House's recent protective asser-

tion of executive privilege over the entirety of the unredacted Mueller report and underlying materials, as well as the committee's ongoing exchanges with the White House regarding former White House Counsel Don McGahn's documents and testimony. So in brief, my view as both a scholar and a former White House lawyer who does believe in a constitutionally-grounded executive privilege, is that blanket invocations of executive privilege of the sort the White House has made here are without substantial support in either case law or executive branch practice. Moreover, they are unsupported by the principles that underlie the privilege.

My written testimony provides background on executive privilege, both generally and in the context of congressional oversight, so I am not going to spend much time on that background. I'll just say that the judicial authority in this area is limited both in volume and its utility. What I think is more significant here is the authority from the political branches, in particular, the numerous written opinions directives from presidents and senior Department of Justice officials from both Republican and Democratic administrations that have guided the executive branch's approach to these issues for many years.

I won't describe those documents in detail. Instead I'll just say that they reflect a strong vision of executive privilege, an entitlement which the executive branch understands to have constitutional foundations to keep certain documents and communications confidential. But they also reflect a recognition of Congress' constitutional entitlement to access at least some executive branch information.

So abiding by these principles, the executive branch in countless inquiries over the years worked with Congress to grant some information access while protecting documents they believed in good faith could ultimately be subject to an assertion of executive privilege. That, I believe, distinguishes the executive branch's approach in these proceedings from longstanding principles and practices. The White House's broad protective assertion of privilege encompasses documents that could not possibly be subject to a claim of privilege. So let me elaborate on this, first, in the context of the committee's request for the full, unredacted Mueller report and underlying materials.

First, the White House has not identified the particular strains of executive privilege that might attach to the materials at issue here. Executive privilege isn't a free-floating entitlement to conceal embarrassing or inconvenient information from public disclosure. It protects certain narrow categories of information for specific reasons, chief among them, the importance of protecting confidential advice to the President. Some of the materials at issue may implicate that strain of executive privilege. Some may implicate other categories of executive privilege. But many appear to likely have, at best, shaky support in law and in practice.

Second, as to those portions of the report that have already been publicly released, and potentially some of the underlying materials that are summarized and reflected in the Mueller report, the White House, by failing to object to public release, has clearly waived any plausible claim of privilege.

Third, insofar as some of the documents contained within the set might contain evidence of misconduct, and even a cursory read of the Mueller report establishes that some very likely do, claims of executive privilege may be weakened or unavailable. That is because a number of courts have held that allegations of misconduct erode, if not vitiate, at least some forms of executive privilege. So if the documents at issue reveal misconduct, that should minimize the President's legitimate Article II interest in protecting them and increase congressional authority to obtain them.

Fourth, there is some authority suggesting that in order to qualify for the privilege, at least the presidential communications privilege, right, the subset of executive privilege, the communications at issue must have some nexus to the performance of a presidential function, and must be consistent with presidential duty. So the D.C. Circuit, echoing the Supreme Court's foundational executive privilege case, *United States v. Nixon*, has emphasized that the purpose of the presidential communications privilege is to ensure that the president receives full and frank advice with regard to non-delegable powers. And the key D.C. Circuit cases here involve the appointment and removal power and the pardon powers. These are key presidential powers.

So documents that pertain to the exercise of those powers may well fall within the privilege. But as to documents that reflect the President engaged in very different kinds of conduct, conduct like potentially endeavoring to end an investigation for corrupt or self-interested reasons, those documents might not be eligible for the assertion of privilege at all.

Briefly, as to the additional documents in the possession of former White House Counsel Don McGahn, the White House has suggested that the documents sought by the committee implicate significant executive branch confidentiality interests and executive privilege, but to my knowledge has not moved to formerly invoke executive privilege. For several reasons, the White House, I believe, lacks the strong foundation for an assertion of privilege here as well.

First, the White House did not assert any privilege with respect to McGahn's provision of information to the Special Counsel's Office, and, more importantly, nor did it object to the release of the largely-unredacted report. Now, this may not constitute a waiver as to all of the documents in Don McGahn's possession, but as to those materials that were incorporated into the now-public report, I do not believe there remains any strong privilege claim.

Second, the President has made numerous public statements, as recently as last week, to put before the public his version of conversations with former White House Counsel Don McGahn. Although there's no direct judicial authority on the impact of such statements, there is some analogous authority, cases that prevent the executive from making self-serving statements, then retreating to privilege to prevent the disclosure of information that might undermine a one-sided account.

And third—I see my time is expiring—third, where there is evidence of misconduct, as with materials underlying the Mueller report writ large, the argument against their disclosure is accordingly quite weakened. As to all of these, these are legitimate mat-

ters of congressional inquiry. And, again, as to those potentially misconduct-revealing documents, the White House does not have any strong legal basis to resist their disclosure. And by saying a strong executive privilege and strong congressional oversight authority are critically important principles, the sequence of events, as I understand them, suggests that the conduct of the White House poses a threat to both.

With that, thank you, and I look forward to your questions.

[The statement of Ms. Shaw follows:]

“Executive Privilege and Congressional Oversight”

House Committee on the Judiciary

Wednesday, May 15, 2019

Testimony of Kate Shaw

Professor of Law, Benjamin N. Cardozo School of Law

Chairman Nadler, Ranking Member Collins, and Distinguished Members of the Committee:

Thank you for the opportunity to testify today regarding the nature and scope of executive privilege. My name is Kate Shaw, and I am a Professor of Law at Cardozo Law School, where my work focuses, among other things, on executive power and questions of constitutionalism outside the courts. Before I began teaching, I worked as an Associate Counsel in the Obama White House Counsel’s Office, from 2009–2011.

I understand that the purpose of today’s hearing is to contextualize and assess the White House’s recent “protective” assertion of executive privilege over the entirety of the unredacted “Report on the Investigation into Russian Interference in the 2016 Presidential Election,” prepared by Special Counsel Robert S. Mueller, III, and underlying materials sought by this Committee, as well as the ongoing exchanges between this Committee and the executive branch regarding requests for documents and testimony from former White House Counsel Donald McGahn. Accordingly, my testimony will offer some brief background on executive privilege, both generally and in the context of Congress’s exercise of its oversight authority. It will then address more specifically the legal questions presented by recent events involving Committee requests for documents and testimony, subpoenas, and the formal assertion (and the more informal suggestions) of executive privilege.

In this statement, I will draw on legal authority from both courts and the political branches. As a general matter, the judicial authority in this area is sparse. That’s no accident: historically, the overwhelming majority of disputes between Congress and the President over access to information have been resolved internally, within the political branches. So, while I will address the handful of court cases that grapple with the contours of executive privilege, and the subset of those that arose in the context of congressional requests for information, I think equally important is the extra-judicial history—the principles and practices that for decades have guided the political branches in their approach to executive privilege.

In brief, the history I canvass here makes clear that blanket invocations of the privilege over wide swaths of executive-branch material are without substantial support in either case law or executive-branch practice; moreover, they are unsupported by the principles that underlie the privilege. That

said, as to many of the individual documents at issue, there may be viable claims of privilege; if the executive-branch wishes to achieve a resolution that allows it to protect individual communications without risking erosion of the privilege in court, it would be well-advised to reconsider its approach in favor of one that better comports with long-standing practice.

JUDICIAL AUTHORITY

The Nature & Scope of Executive Privilege

The term “executive privilege” does not appear in the Constitution. But the power to withhold certain information from the courts and Congress is today broadly understood as an important, if bounded, privilege enjoyed by the president. The Supreme Court confirmed the existence of a constitutionally grounded executive privilege in *United States v. Nixon*, where it found that some form of executive privilege was both “fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.”¹ But the *Nixon* Court also held that “neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications” could “sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances.”²

The executive privilege identified in *Nixon*, then, was presumptive and qualified, not absolute. And the Court went on to reject President Nixon’s assertion that the privilege shielded him from compelled production of tapes and documents sought by the Watergate Special Prosecutor.³

Nixon remains the single most important case on the nature and scope of executive privilege, but it left many questions unanswered. In the years since *Nixon*, the D.C. Circuit has decided several significant cases that create additional executive-privilege doctrine. First, in *In re Sealed Case (Espy)*,⁴ a case involving an Office of Independent Counsel investigation into Agriculture Secretary Mike Espy, the D.C. Circuit identified several distinct strains of executive privilege: first, a deliberative process privilege; and second, a privilege that attached to presidential communications. As to both, the court held that when evaluating a claim of privilege, “courts must balance the public interests at stake in determining whether the privilege should yield in a particular case, and must specifically consider the

¹ *United States v. Nixon*, 418 U.S. 683, 708 (1974). Although the first formal judicial recognition of executive privilege did not appear until 1974, presidents since Washington have been asserting the prerogative to withhold some communications from both Congress and the courts. Some suggest that judicial recognition of executive privilege is traceable to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170, 2 L.Ed. 60 (1803), where in addition to announcing the power of judicial review, Chief Justice Marshall also suggested a need for courts to avoid “intrud[ing] into the cabinet, and intermeddl[ing] with the prerogatives of the executive.” See also MARK J. ROZELL, EXECUTIVE PRIVILEGE: THE DILEMMA OF SECRECY AND DEMOCRATIC ACCOUNTABILITY 37–38 (1994) (discussing President Jefferson’s attempts to keep from Congress certain documents related to Aaron Burr’s involvement in a secessionist conspiracy).

² *Nixon*, 418 U.S. at 706.

³ *Id.* at 713.

⁴ 121 F.3d 729 (D.C. Cir. 1997).

need of the party seeking privileged evidence.”⁵ Applying that balancing, the court found that the Independent Counsel had made out a sufficiently strong showing to overcome the presidential communications privilege as to some of the requested documents.⁶

In 2004, the D.C. Circuit decided *Judicial Watch v. Department of Justice*, a case involving a FOIA request for DOJ documents in the offices of the Pardon Attorney and the Deputy Attorney General. Describing the case as “call[ing] upon the court to strike a balance between the twin values of transparency and accountability of the executive branch on the one hand, and on the other hand, protection of the confidentiality of Presidential decision-making and the President’s ability to obtain candid, informed advice,”⁷ the court rejected the invitation to extend the presidential communications privilege identified in *Espy* to encompass documents created outside of the White House and that “never make their way to the Office of the President.”⁸ In both of these D.C. Circuit cases, then, presidents have been unsuccessful in their attempts to expand the scope of the judicially recognized privilege for presidential communications.

Executive Privilege and Congressional Oversight

Nixon involved a grand jury subpoena, and much of the Court’s discussion was grounded in, and at times expressly limited to, the criminal context; *Espy* arose in the context of an Independent Counsel investigation; *Judicial Watch* involved FOIA litigation. So none of these cases addressed clashes between claims of executive privilege and requests for information in the context of congressional oversight.⁹

Like executive privilege, Congress’s oversight power is nowhere to be found in the text of the Constitution. But like executive privilege, its existence today is beyond serious dispute—an accepted extension of, and incident to, Congress’s enumerated powers. The Supreme Court made explicit in the 1927 case *McGrain v. Daugherty* that the “power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.”¹⁰ The *McGrain* Court continued: “the houses of Congress have the power, through their own processes, to compel a private individual to appear before it or one of its committees and give testimony needed to enable it efficiently to exercise a legislative function belonging to it under the constitution.”¹¹ Later cases have elaborated

⁵ *Id.* at 746.

⁶ *Id.* at 761–62.

⁷ *Judicial Watch, Inc. v. Dep’t of Justice*, 365 F.3d 1108, 1112 (D.C. Cir. 2004).

⁸ *Id.* at 1116–17.

⁹ Indeed, *Nixon* itself was noncommittal about its applicability to congressional oversight, *United States v. Nixon*, 418 U.S. 683, 712 n.19 (1974) (“We are not here concerned with the balance between the President’s generalized interest in confidentiality and . . . congressional demands for information.”).

¹⁰ 273 U.S. at 177. As with *Nixon* and executive privilege, *McGrain* in many ways merely represented judicial confirmation of a practice the political branches had long understood to have constitutional foundations.

¹¹ *Id.* at 160.

on the mechanics of this function, explaining that the “[i]ssuance of subpoenas” is “a legitimate use by Congress of its power to investigate.”¹²

The Court has also identified prerequisites to the exercise of the power of inquiry, explaining that congressional investigation must be “related to and in furtherance of, a legitimate task of the Congress.”¹³ So long as these prerequisites are satisfied, however, the power of inquiry is broad: “The scope of the power of inquiry, in short, is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.”¹⁴

Only a handful of cases directly address congressional requests for executive-branch information. In *Senate Select Committee on Presidential Campaign Activities v. Nixon*, the D.C. Circuit declined to enforce a Senate committee subpoena for the tapes that would eventually be obtained by the Watergate Special Prosecutor; pointing to the House Judiciary Committee’s presidential impeachment inquiry, the court held that “the Select Committee’s immediate oversight need for the subpoenaed tapes is, from a congressional perspective, merely cumulative. Against the claim of privilege, the only oversight interest that the Select Committee can currently assert is that of having these particular conversations scrutinized simultaneously by two committees.”¹⁵

Two relatively recent district court opinions address congressional demands for information and executive resistance to those demands. In *Committee on Judiciary v. Miers*, a case involving a subpoena for testimony from White House officials in conjunction with an investigation into the firing of nine U.S. Attorneys, the district court “reject[ed] the Executive’s claim of absolute immunity for senior presidential aides.”¹⁶ And *Committee on Oversight and Government Reform v. Holder*, while not addressing the merits of the dispute over access to documents sought as part of a committee investigation into the “Fast and Furious” firearm purchase and transfer operation, firmly rejected the Department of Justice’s argument that “because the executive is seeking to shield records from the legislature, another co-equal political body, the law forbids the Court from getting involved.”¹⁷

In both of these recent disputes, then, the executive branch pressed in the courts expansive notions of the scope or unreviewability of executive privilege, and in both instances it was unsuccessful. But the congressional victories came too late for meaningful oversight of the presidencies at issue; accordingly, while generally reinforcing legislative authority, these cases are viewed by some scholars as cautionary tales about the limits of courts’ ability to resolve legislative oversight disputes.

POLITICAL-BRANCH PRACTICE AND AUTHORITY

¹² *Eastland v. U. S. Servicemen’s Fund*, 421 U.S. 491, 504 (1975).

¹³ *Id.* at 505.

¹⁴ *Barenblatt v. United States*, 360 U.S. 109, 111 (1959).

¹⁵ *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 732 (D.C. Cir. 1974).

¹⁶ 558 F. Supp. 2d 53, 99 (D.D.C. 2008).

¹⁷ *Comm. on Oversight & Gov’t Reform v. Holder*, 979 F. Supp. 2d 1, 12 (D.D.C. 2013).

The cases discussed above represent the key judicial authority on these questions. But this limited *judicial* authority does not mean there is no other legal authority on the contours of congressional entitlement to information from the executive branch.¹⁸ Indeed, a rich body of executive-branch legal authority reflects a strong vision of executive power to protect information from disclosure, but also appears to accept the legitimacy of Congress's constitutional entitlement to access some executive-branch information.¹⁹ These writings also set forth a cooperative vision of information exchange that should provide a roadmap for the next steps in the present dispute.

Not surprisingly, Memoranda from the Office of Legal Counsel and opinions or letters by senior executive-branch officials describe a strong executive privilege. For one thing, they identify categories of privileged information beyond the "presidential communications privilege" and "deliberative process privilege" endorsed by the D.C. Circuit. A 1989 opinion by then-Assistant Attorney General William Barr, for example, describes three categories of executive privilege: "state secrets, law enforcement, and deliberative process."²⁰

These executive-branch writings, however, also appear to accept the principle that under some circumstances, Congress has a legitimate entitlement to executive-branch information. As Attorney General William French Smith wrote in 1981, "In cases in which the Congress has a legitimate need for information that will help it legislate and the Executive Branch has a legitimate, constitutionally recognized need to keep information confidential, the courts have referred to the obligation of each Branch to accommodate the legitimate needs of the other . . . The accommodation required is not simply an exchange of concessions or a test of political strength. It is an obligation of each Branch to make a principled effort to acknowledge, and if possible to meet, the legitimate needs of the other Branch."²¹ A Memorandum issued by President Ronald Reagan explained that "The policy of this Administration is to comply with Congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the executive branch. . . . executive privilege will be asserted only in the most compelling circumstances, and only after careful review demonstrates that the assertion of privilege is necessary."²² And in 2000, OLA head Robert Raben reiterated that basic position: "In implementing the longstanding policy of the Executive Branch

¹⁸ JOSH CHAFETZ, CONGRESS'S CONSTITUTION 14 (2017) ("[A]t its heart, the American constitutional separation of powers focuses on the creation of . . . conflict between branches of government without an overarching adjudicator to resolve the conflict in a principled, binding, and lasting way.").

¹⁹ Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 IOWA L. REV. 489, 496 (2007) ("Beginning with the Eisenhower administration, some Presidents have articulated explicit policies on executive privilege through letters, public statements, and memoranda").

²⁰ Cong. Requests for Confidential Exec. Branch Info., 13 U.S. Op. Off. Legal Counsel 153, 154 (1989). *See also* 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).

²¹ 43 U.S. Op. Att'y. Gen. 327, 332 (1981).

²² Memorandum from President Ronald Reagan for the Heads of Executive Departments and Agencies, *Re: Procedures Governing Responses to Congressional Requests for Information* (Nov. 4, 1982), <https://www.documentcloud.org/documents/3864882-1982-Reagan-Memo-re-procedures-governing.html>.

to comply with Congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch, the Department's goal in all cases is to satisfy legitimate legislative interests while protecting Executive Branch confidentiality interests."²³

Authority from Congress, not surprisingly, centers on congressional prerogatives and entitlement to information from the executive branch; but it too recognizes the legitimacy of some form of executive privilege.²⁴ An oversight manual produced by the Congressional Research Service, for example, explains that "while the congressional power of inquiry is broad, it is not unlimited. . . . the power to investigate may be exercised only 'in aid of the legislative function' and cannot be used to expose for the sake of exposure alone."²⁵ The same report acknowledges that executive privilege is "a doctrine which, like Congress' powers to investigate and cite for contempt, has constitutional roots."²⁶ Another CRS report approvingly cites a judicial statement that "the Framers relied '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.'"²⁷

What forms have these methods of compromise and accommodation taken over the years? At times congressional committees have narrowed requests, and the executive branch has provided documents pursuant to more narrowly drawn requests. On other occasions, the executive has given access to sensitive documents to a subset of committee members and staff, or has provided summaries rather than documents themselves, or access but not the ability to retain documents. Sometimes these processes are protracted. Professor Peter Shane describes several episodes in the 1980s; each began with "initial informal demand, negotiation, subpoena, further negotiation, a subcommittee vote, further negotiation, a committee vote," and in one instance "further negotiation, a House vote, and still further negotiation."²⁸ And in general executive privilege assertions are rare, carefully considered, and made only after genuine attempts at pursuing available alternatives.

²³ Letter from Robert Raben, Assistant Att'y Gen., to John Linder, House Subcomm. on Rules & Org. of the House 2-3 (Jan. 27, 2000). See also Andrew McCauley Wright, *Constitutional Conflict and Congressional Oversight*, 98 MARQ. L. REV. 881, 922-23 (2014).

²⁴ MORTON ROSENBERG CONG. RESEARCH SERV., INVESTIGATIVE OVERSIGHT: AN INTRODUCTION TO THE LAW, PRACTICE AND PROCEDURE OF CONGRESSIONAL INQUIRY (1995).

²⁵ *Id.* at 2 (quoting *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880)).

²⁶ *Id.* at 14.

²⁷ CONG. RESEARCH SERV., CONGRESSIONAL SUBPOENAS: ENFORCING EXECUTIVE-BRANCH COMPLIANCE 1 n. 7 (Mar. 27, 2019) (quoting *United States v. AT&T Co.*, 567 F.2d 121, 127 (D.C. Cir. 1977)).

²⁸ Peter M. Shane, *Legal Disagreement and Negotiation in a Government of Laws: The Case of Executive Privilege Claims Against Congress*, 71 MINN. L. REV. 461, 515 (1987). See also Neal Devins, *Congressional-Executive Information Access Disputes: A Modest Proposal—Do Nothing*, 48 ADMIN. L. REV. 109, 125 (1996) ("Rather than having the executive unconditionally turn over all requested information to Congress or having the Congress withdraw its request for information altogether, information access disputes are typically worked out through one of several intermediate options").

This history of compromise and mutual accommodation is relevant in itself; these practices structure and order the legal obligations by which actors within the political branches understand themselves to be bound. It is additionally relevant because courts are particularly attentive to past practice when they render decisions in separation-of-powers disputes. Justice Frankfurter's famous concurring opinion in *Youngstown* explained that "It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them,"²⁹ and courts today routinely invoke practice between and among the branches in separation-of-powers cases.³⁰

LIMITS ON EXECUTIVE PRIVILEGE

As the materials discussed above suggest, the proper balance between congressional need for information and executive-branch confidentiality interests is highly contextual and fact-specific. So it is somewhat hazardous to offer any categorical pronouncements in this sphere. But three broad principles that relate to limits on executive privilege merit brief discussion: the impact of allegations of misconduct on the availability of the privilege; the operation of waiver when it comes to executive privilege; and the need for a nexus between communications subject to a privilege (at least the presidential communications privilege), the performance of some legitimate presidential function, and presidential duty.

Misconduct

Some courts have held that allegations of misconduct erode if not vitiate at least some forms of executive privilege. The *Espy* court directly addressed this issue, dividing its misconduct analysis between the two forms of privilege it identified. The deliberative process privilege, the court held, "disappears altogether when there is any reason to believe government misconduct occurred."³¹ The court found that the presidential communications privilege, a stronger privilege, did not disappear on a suggestion of official misconduct; rather, a "party seeking to overcome the presidential privilege seemingly must always provide a focused demonstration of need, even when there are allegations of misconduct by high-level officials . . ."³² Presumably, however, in the face of such a showing of need, allegations of misconduct would tilt the balance strongly in favor of the congressional requester.³³

²⁹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (Frankfurter, J., concurring).

³⁰ *NLRB v. Noel Canning*, 573 U.S. 513, 524 (2014) (stating that because the Recess Appointments Clause concerns the separation of elected powers, "in interpreting the Clause, we put significant weight upon historical practice" (emphasis omitted)). For discussions of "gloss" analysis, see generally Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097 (2013); Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV L. REV. 411, 479 (2012).

³¹ *In re Sealed Case (Espy)*, 121 F.3d 729, 746 (D.C. Cir. 1997).

³² *Id.*

³³ See also *Mobil Oil Corp. v. Dep't of Energy*, 520 F. Supp. 414, 419 (N.D.N.Y. 1981) (in case involving subpoena issued in civil litigation, describing the "duty of a court . . . to balance the competing interests of the parties with respect to the release of the disputed information," and identifying "the public interest in the proper functioning of its governmental

Several district court cases have followed *Espy*. In one case, the district court held that “as a legal matter . . . the deliberative process privilege does not apply if there is a discrete factual basis for the belief that ‘the deliberative information sought may shed light on government misconduct.’”³⁴ The court continued: “if there is ‘any reason’ to believe the information sought may shed light on government misconduct, public policy (as embodied by the law) demands that the misconduct not be shielded merely because it happens to be predecisional and deliberative.”³⁵ And courts in two FOIA cases have addressed the impact of alleged misconduct on attempts to withhold deliberative material. In one, the court held that the deliberative process privilege did not apply to memoranda that demonstrated that the Nixon White House considered using the IRS “in a selective and discriminatory fashion” because the memoranda were “no more part of the legitimate governmental process intended to be protected by [FOIA] Exemption 5 than would be memoranda discussing the possibility of using a government agency to deliberately harass an opposition political party.”³⁶ In the second, the court held that the misconduct exception did not apply, cautioning that “[i]f every hint of marginal misconduct sufficed to erase the privilege, the exception would swallow the rule,” and explaining that “[i]n the rare cases that have actually applied the exception, the ‘policy discussions’ sought to be protected with the deliberative process privilege were so out of bounds that merely discussing them was evidence of a serious breach of the responsibilities of representative government.”³⁷

Executive branch practice generally takes a broader view of the power of credible allegations of misconduct to vitiate claims of privilege. As a general matter, lawyers within the executive branch have historically operated within a strong culture in which documents that reveal governmental misconduct are not viewed as candidates for a potential assertion of executive privilege.

So what must “misconduct” consist of in order to pierce the privilege? And how much of a threshold showing of misconduct should be required to undermine a claim of privilege? Neither courts nor executive-branch practice have made this clear; but it is unlikely that the “misconduct” would need to be chargeable criminal conduct, or the privilege could function as a shield to conceal wrongdoing and evade accountability.

Waiver

Any privilege can be waived. The D.C. Circuit in *Espy* made clear that “release of a document . . . waives these privileges for the document or information specifically released,”³⁸ but declined to go

agencies” in a case in which “the DOE has been accused . . . of mismanaging a billion dollar governmental program that has far-reaching effects on the American public.”)

³⁴ *Alexander v. FBI*, 186 F.R.D. 154, 164 (D.D.C. 1999).

³⁵ *Id.*

³⁶ *Tax Reform Research Group v. IRS*, 419 F. Supp. 415, 426 (D.D.C. 1976).

³⁷ *ICM Registry, LLC v. U.S. Dep’t of Commerce*, 538 F. Supp. 2d 130, 133 (D.D.C. 2008).

³⁸ *In re Sealed Case (Espy)*, 121 F.3d 729, 741 (D.C. Cir. 1997).

further—that is, to find that the executive privilege, like the attorney-client privilege, would be deemed waived whenever documents were disclosed to third parties. Waiver in the context of executive privilege, then, is subject to a fact-intensive inquiry, which I discuss further below.

Nexus to Presidential Function / Presidential Duty

Finally, there is some authority suggesting that in order to qualify for the privilege (at least the presidential communications privilege), the communications at issue must have some nexus to the performance of some presidential function, and must be consistent with presidential duty. The D.C. Circuit, in both *Espy* and *Judicial Watch*, emphasized that the purpose of protecting presidential communications is to “ensure that the President would receive full and frank advice with regard to . . . non-delegable . . . power[s]”³⁹—appointment and removal in *Espy*; the pardon power in *Judicial Watch*. These are core Article II powers, of course, and thus must be discharged consistent with Article II’s Oath and Take Care clauses.⁴⁰ So there is an argument, rooted in Article II, that the privilege cannot be used to shield from disclosure communications that do not have a nexus to core presidential functions, or that reveal bad-faith or corrupt exercises of presidential power, or conduct inconsistent with the President’s obligations.⁴¹

CURRENT DISPUTES OVER SPECIAL COUNSEL REPORT, RELATED DOCUMENTS, AND MCGAHN DOCUMENTS AND TESTIMONY

Turning to the present disputes between the Committee and the executive branch, I will make several points related to what I understand to be the respective actions and positions taken over the course of this inquiry.

“Protective” Privilege Assertion over Mueller Report and Related Documents

The sequence of events set forth in the Committee Report⁴² suggests that the executive branch response to the Committee has not been consistent with the practices and principles laid out above.

³⁹ *Judicial Watch, Inc. v. Dep’t of Justice*, 365 F.3d 1108, 1116 (D.C. Cir. 2004).

⁴⁰ U.S. CONST. art II § 3, 1.

⁴¹ See Andrew Kent, Ethan Leib, & Jed Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. (forthcoming 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3260593 (arguing that the President’s duty of “faithful execution” requires the President to be “true, honest, diligent, due, skillful, careful, good faith, and impartial” in execution of law, and to avoid self-dealing and other self-interested conduct.).

⁴² I should note here that I have no independent knowledge of these events, so my comments are based on the facts as laid out in the report, as well as the exchange of letters between the Committee and the executive branch. H. COMM. ON THE JUDICIARY, 116TH CONG., COMMITTEE REPORT FOR RESOLUTION RECOMMENDING THAT THE HOUSE OF REPRESENTATIVES FIND WILLIAM P. BARR, ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, IN CONTEMPT OF CONGRESS FOR REFUSAL TO COMPLY WITH A SUBPOENA DULY ISSUED BY THE COMMITTEE ON THE JUDICIARY (Comm. Print 2019), <https://docs.house.gov/meetings/JU/JU00/20190508/109451/HRPT-116-ResolutionRecommendingthattheHouseofRepresentativesFindWilliamPBarrAttorneyGeneralU.pdf>.

Here it seems critical to distinguish between *document-specific* invocations of the privilege, which may well be legitimate, and the sorts of categorical invocations that the administration has sought to make, which are without substantial support in either case law or executive-branch practice. The facts suggest that the executive branch's approach to the documents sought by the Committee has not involved careful analysis of individual documents and categories of documents, conducted against a background of acceptance of the Committee's legitimate oversight authority, but rather rests on a strategy to deny the Committee any access at all.

This course of conduct is reflected in the “protective” assertion of executive privilege over all of the subpoenaed materials, communicated to the Committee via letter from Assistant Attorney General Stephen Boyd.⁴³

For several reasons, this assertion is untenable. First, the vast majority of the Mueller Report is already in the public domain, so it is no longer subject to a potential privilege assertion—that it, the privilege has been waived as to those public portions of the document.

Second, the White House has not identified what particular strains of executive privilege might attach to individual portions of the still-redacted portions of the report, or non-public underlying materials; some, like personal privacy and ongoing investigations, have at best shaky support in the case law, even if executive-branch practice is generally to avoid public disclosure. And, as discussed above, where some of the documents at issue involve documented allegations of misconduct, this should minimize the President's legitimate Article II interest in protecting them, and increase congressional authority to obtain them.

Third, the Department of Justice rests its protective assertion of executive privilege on a 1996 opinion by then-Attorney General Janet Reno. But that opinion involved facts quite different from those at issue here. First, all of the documents at issue were (a) White House documents that were (b) indisputably predecisional and deliberative, primarily involving legal analysis prepared by White House lawyers in response to ongoing investigations by Independent Counsel Ken Starr. Second, none of the materials sought by Congress had been made public.⁴⁴

That said, one of the categories of information presently sought by the Committee appears so broad as to put the executive-branch officials to a nearly impossible task. The third item on the Committee's subpoena consists of “All documents obtained and investigative materials created by

⁴³ Letter from Stephen E. Boyd, Assistant Att'y Gen., to Jerrold Nadler, Chairman of the House Comm. on the Judiciary, 116th Cong. (May 8, 2019), <https://assets.documentcloud.org/documents/5993531/5-8-19-Boyd-Letter-Nadler.pdf>.

⁴⁴ Assertion of Executive Privilege Regarding White House Counsel's Office Documents, 20 Op. O.L.C. (1996).

the Special Counsel's Office."⁴⁵ We know from the Special Counsel's Report that the investigation involved more than 2,800 subpoenas, 500 warrants, 230 communications records orders, and over 500 witnesses.⁴⁶ In light of this volume, the Committee cannot in good faith expect compliance; accordingly, the burden is on the Committee to substantially narrow this aspect of its request.

The Committee appears to believe that the executive branch has essentially withdrawn from the process of negotiation,⁴⁷ providing affirmative authorization for Congress to do the same by moving quickly to a subpoena and then contempt vote. These developments do not, however, relieve the Committee of its obligation to continue to negotiate—to frame requests with specificity and care, and where possible narrowly—both to potentially achieve some sort of resolution outside the courts, and to allow the courts to adjudicate a narrow dispute if and when one party invokes their jurisdiction.

Documents and Testimony from Former White House Counsel Donald McGahn

The White House has suggested that the documents sought by the Committee from former White House Counsel Don McGahn “implicate significant Executive Branch confidentiality interests and executive privilege,”⁴⁸ but to my knowledge has not moved to formally invoke executive privilege. For at least three reasons, the White House lacks a strong foundation for an assertion of executive privilege over all of the documents in the possession of former WH Counsel McGahn. First, the White House did not assert any privilege with respect to McGahn's provision of information to the Special Counsel's Office, nor did it object on the basis of privilege to the release of the largely unredacted report. This may not constitute a waiver as to all of the documents in McGahn's possession, but as to those materials that were incorporated into the now-public report, there is no longer any strong claim of privilege.

Second, the President has made numerous public statements, as recently as this week, to put before the public his version of his conversations with Don McGahn. On April 25, the President tweeted that he “never told the White House Counsel Don McGahn to fire Robert Mueller.”⁴⁹ On May 11, he tweeted that “I was NOT going to fire Bob Mueller, and did not fire Bob Mueller. In fact, he

⁴⁵ Subpoena to the Honorable William P. Barr (April 18, 2019), <https://assets.documentcloud.org/documents/5993566/1-4-KgVnKxM9Muaz7AAKgh3w.pdf>.

⁴⁶ 1 SPECIAL COUNSEL ROBERT S. MUELLER III, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 13 (2019), <https://games-cdn.washingtonpost.com/notes/prod/default/documents/f5fe536c-81bb-45be-86e5-a9fee9794664/note/a8d336ef-e98d-4a08-987d-b4c154b22700.pdf>.

⁴⁷ Charlie Savage, *Trump Vows Stonewall of “All” House Subpoenas*, N.Y. TIMES, Apr. 24, 2019.

⁴⁸ Letter from Pat A. Cipollone, Counsel to the President, to Jerrold Nadler, Chairman of the House Committee on the Judiciary, 116th Cong. (May 7, 2019), <https://int.nyt.com/data/documenthelper/812-cipollone-letter-mcghahn/6500f55136eae0eebaf3/optimized/full.pdf>.

⁴⁹ Donald J. Trump (@realDonaldTrump), Twitter (April 25, 2019, 4:47 AM), <https://twitter.com/realDonaldTrump/status/1121380133137461248>.

was allowed to finish his Report with unprecedented help from the Trump Administration. Actually, lawyer Don McGahn had a much better chance of being fired than Mueller. Never a big fan!⁵⁰ Although there is no direct judicial authority on the impact of such statements on a privilege claim, there is some analogous authority: courts' treatment of public statements in the context of FOIA litigation in which the government attempts to shield certain information from disclosure. One such case involved a request for CIA records on the use of drones in targeted killings. The CIA provided a "*Glomar*" response," in which an agency refuses to confirm or deny the existence of responsive records on the grounds of national security. The D.C. Circuit held that statements by the President and other executive-branch officials effectively confirmed the existence of a drone program, such that the CIA could not invoke *Glomar*.⁵¹ And the Second Circuit reached a similar conclusion in a case seeking access to OLC documents on targeted killings; that court similarly cited statements by executive-branch officials in concluding that the executive branch had waived its right to claim that the documents at issue were exempt from disclosure.⁵²

Third, there is strong evidence, detailed in the Mueller Report, that the exchanges between the President and Don McGahn contain evidence of misconduct⁵³—something both the courts and the executive-branch itself have suggested is an impermissible use of the privilege.

CONCLUSION

A strong executive privilege and strong congressional oversight authority are both important principles. For decades, it has been possible to give expression to both.

The sequence of events set forth in the House Committee Report and related letters suggests that the conduct of the WH poses risks to both: first, it threatens Congress's ability to conduct meaningful investigation and oversight; second, if the White House continues on this path and a court ultimately renders a decision on the dispute, these events could result in judicial curtailment of the privilege—ultimately weakening the executive branch's ability to protect certain legitimate categories of information. At the same time, Congress has an independent obligation to continue to

⁵⁰ Donald J. Trump (@realdonaldtrump), Twitter (May 11, 2019, 3:39 PM), <https://twitter.com/realDonaldTrump/status/1127342552745762816>.

⁵¹ *Am. Civil Liberties Union v. C.I.A.*, 710 F.3d 422, 429 (D.C. Cir. 2013) ("The President of the United States has himself publicly acknowledged that the United States uses drone strikes against al Qaeda.").

⁵² *N.Y. Times Co. v. U.S. Dep't of Justice*, 756 F.3d 100, 114, 116 (2d Cir. 2014) (citing "the numerous statements of senior Government officials discussing the lawfulness of targeted killing of suspected terrorists, which the [district] court characterized as 'an extensive public relations campaign to convince the public that [the Administration's] conclusions . . . are correct'" in concluding that "waiver of secrecy and privilege . . . has occurred"). For more on these disputes, see Katherine Shaw, *Beyond the Bully Pulpit: Presidential Speech in the Courts*, 96 TEX. L. REV. 71, 113 (2017).

⁵³ II SPECIAL COUNSEL ROBERT S. MUELLER III, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 80-90 (2019), <https://games-cdn.washingtonpost.com/notes/prod/default/documents/f5fe536c-81bb-45be-86e5-a9fee9794664/note/a8d336ef-e98d-4a08-987d-b4c154b22700.pdf>.

participate in the accommodations process, including by continuing to narrow the requests it has issued.

Chairman NADLER. Thank you very much. Professor Rosenzweig.

TESTIMONY OF PAUL ROSENZWEIG

Mr. ROSENZWEIG. Chairman Nadler, Ranking Member Collins, members of the committee, I, too, thank you for the opportunity to appear today and testify on the issue of executive privilege and congressional oversight.

I confess I am somewhat surprised to be called today. As you know, Mr. Chairman, I have testified before the House and this committee on earlier occasions, almost always as an invited witness of the Republican members, and in at least one instance, in substantive, but I hope polite, disagreement with you on an issue related to the domain name system. Today, however, I come to speak about the rule of law and the virtue of its consistent application, a premise on which I hope we can all agree. In my written testimony today I made a few points which I can summarize as follows.

First, there is a long history of congressional oversight of the executive branch activity that dates back to the founding of the American republic. I was delighted to hear, Congressman Collins, that you agree with Congress' investigative and oversight authority because just yesterday President Trump's attorneys argued to the contrary before the District Court, suggesting that investigative authority was limited to the executive branch, an assertion that, in my judgment is both wrong and almost ahistorical in its nature.

Throughout our history, at least until recently, presidents have been circumspect in their assertion of a privilege to thwart congressional or criminal inquiry. Those views on the privilege have waxed and waned over time. Throughout much of our Nation's history, they have bent toward accommodation of legitimate investigative interest. Recent history sadly tells us a different tale, one of presidential invocations of privilege intended to conceal wrongful conduct or thwart legitimate constitutional interests.

I saw much of that firsthand during the investigation of President Clinton, an investigation that resulted in repeated invocations of privilege that were rejected almost uniformly by the courts. Much the same pattern of presidential resistance to oversight can be seen today. For me, the application of the same principles that guided the Clinton inquiry should guide this committee. Claims of executive privilege should be narrow, focused, and justified only by legitimate executive interests in fostering candid advice to the President. Broader invocations are ill considered and ought to be rejected by this committee, by the courts to which these disputes might fall for adjudication, and by the American public.

Indeed, it seems clear to me that the current broad-brush invocation of privilege advanced by the President stands on relatively weaker ground than did that of President Clinton. President Clinton's invocations, unlike those at issue today, were exclusively focused on the core of the privilege, presidential communications. And Congress' interest in the current question of Russian electoral interference is surely more of constitutional moment than the investigation of misconduct that surrounded President Clinton.

In addition, President Clinton, unlike President Trump, did not seek to throw the cloak of privilege over documents that had already been disclosed to outside third parties, nor try and prevent

private citizens from responding to a subpoena. And all of President Clinton's invocations occurred while he still faced potential criminal liability for his wrongdoing, a circumstance that, given Attorney General Barr's determination, no longer applies to this President.

Finally, this particular invocation does not occur in a vacuum, nor is, in my judgment, this committee required to ignore the context in which it arises. By any measure, the President appears to have determined to resist almost all congressional inquiries through a variety of means, as yesterday's District Court hearing demonstrates. This pattern is such that this committee may fairly evaluate the instant invocation against that background, which might be characterized as an attempt to avoid or, at a minimum, delay scrutiny of his conduct.

For me, true adherence to the rule of law means that rules have to be applied evenhandedly, regardless of whether a political party or other interest is immediately benefitted. It means not invoking privileges to conceal wrongdoing, and it means not invoking them to frustrate legitimate congressional inquiry. That obligation, to be sure, falls on all citizens, but, in my judgment, it falls even more strongly on the President, who takes an oath to uphold the law. Accordingly, if you continue to think that President Clinton's use of the privilege to avoid scrutiny of his actions was violative of his oath of office and deserving of condemnation, as I do, you can no less about President Trump.

As James Wilson, one of the founders and members of the first Supreme Court, put it, "Far from being above the laws, the President is amenable to them in his private character as a citizen." The framers of our Constitution rightly thought that presidents could and should be subject to congressional oversight, and the thoughtless invocation of privilege is in derogation of that high principle. I remain hopeful that in the end the Department of Justice and the Administration will recognize these principles and make reasonable accommodations to enable this committee to receive the information it needs, while protecting the legitimate public interest embodied in the privilege.

Thank you very much, Madam Chairman.

[The statement of Mr. Rosenzweig follows:]

STATEMENT

of

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Washington, D.C.

before the

Committee on the Judiciary
United States House of Representatives

May 15, 2019

Executive Privilege and Congressional Oversight

Introduction

Chairman Nadler, Ranking Member Collins, and Members of the Committee, I thank you for your invitation to appear today and to present testimony on the issue of “Executive Privilege and Congressional Oversight.” My name is Paul Rosenzweig and I am a Senior Fellow at the R Street Institute.¹ I am also the Principal and founder of a small consulting company, Red Branch Consulting, PLLC, which specializes in, among other things, cybersecurity policy and legal advice; and a Professorial Lecturer in Law at George Washington University, where I teach a course on Cybersecurity Law and Policy and another on Artificial Intelligence Law and Policy.

My testimony today is in my individual capacity and does not reflect the views of any institution with which I am affiliated or any of my various clients.

¹ The R Street Institute is a public policy, research, and educational organization recognized as exempt under section 501(c)(3) of the Internal Revenue Code. It is privately supported and receives no funds from any government at any level, nor does it perform any government or other contract work. Information about our funding is available at: <http://www.rstreet.org/about-rstreet/funding-and-expenditures>. My Truth in Testimony Disclosure accompanies this testimony.

Members of R Street testify as individuals discussing their own independent research. The views expressed are their own and do not reflect an institutional position for the R Street Institute or its board of trustees. I thank my colleagues at R Street for their research assistance and for helpful comments on an earlier draft of this testimony.

Personal Background and Introduction

Given the somewhat contentious nature of the topic of today's hearing it might be useful for me to put my remarks into context by expanding somewhat on my personal and political background. Normally, I prefer not to do so, since my views on policy and the law are, I hope, independent of any partisan affiliation. But today's topic does suggest that it is worthwhile to establish my political and philosophical *bona fides*.

For most of my adult life, I have been a registered Republican. The first political act I can recall was supporting the candidacy of Gerald Ford during a high school debate before I could legally vote. I have been a member of the Federalist Society (a conservative and libertarian legal group) since 1983, and remain so to this day. I am a co-founder of Checks & Balances, a group of conservative and libertarian attorneys founded in the fall of 2018 to speak out in defense of the rule of law.² After serving as a career prosecutor in the Department of Justice, my legal career has included stints as a defense attorney and as an investigative counsel for the Republican staff of the House Committee on Transportation and Infrastructure. From 2005 to 2009, I served as the Deputy Assistant Secretary for Policy in the Department of Homeland Security, as an appointee of President George W. Bush. In my non-legal career, I have worked for an extended stint at The Heritage Foundation and now work, as I said, at the R Street Institute, both generally characterized as conservative think tanks.

In short, I am a conservative. I have testified before Congress on more than a dozen occasions as an invited witness, almost always at the request of members of the Republican party. I dare say that on many issues of substance my policy views diverge from those of many of the members of the majority sitting here today.

In so far as my professional career goes, my most salient experience relative to today's hearing involves my work on the investigation of President Clinton. From 1997 to 2000, I served as Associate Independent Counsel and then Senior Counsel in the Office of the Independent Counsel (*In re: Madison Guaranty Savings and Loan*) under Judge Kenneth W. Starr. When I left the OIC in 2000, I continued to work as a contractor for that office as well as for two other Independent Counsels on issues relating to their inquiries and their final reports.

With that extended background in mind, I am pleased to be here to testify, as I think that the principles of law that animated the investigation of President Clinton that I worked on 20 years ago are verities that bear repeating. Intellectual consistency demands that our approach to questions of law must not vary based on partisan views or political benefit and for that reason, the same principles that counseled against President Clinton's invocations of executive privilege apply to the evaluation of President Trump's claims.

² "About Checks & Balances," Checks & Balances, 2019. <https://checks-and-balances.org/about>. Following the release of the Special Counsel's report and the activities it documented, I joined a Checks & Balances statement calling for continuing Congressional investigation. See "Statement from co-founders and additional members of Checks & Balances," Checks & Balances, April 23, 2019. <https://checks-and-balances.org/new-statement-from-checks-and-balances-on-the-mueller-report>.

In my testimony today, I want to make a few points, which I can summarize as follows:

- There is a long history of congressional oversight of executive branch activity that dates back to the Founding of the American Republic.
- Throughout that time, at least until recently, Presidents have been circumspect in their assertion of a privilege to thwart congressional or criminal inquiry. Though views of the privilege have waxed and waned over time, throughout much of our nation's history, they have bent toward accommodation of investigative interests.
- Recent history tells a different tale – one of Presidential invocations of privilege intended to conceal wrongful conduct and thwart legitimate inquiries. I saw much of that firsthand during the investigation of President Clinton, an investigation that resulted in repeated invocations of privilege that were rejected, almost uniformly, by the courts.
- Much the same pattern of Presidential resistance to oversight can be seen today. For me, the application of the same principles that guided the Clinton inquiry should guide this committee. Claims of executive privilege should be narrow, focused, and justified only by legitimate executive interest in fostering candid advice to the president. Broader invocations (as, for example, with attempts to prevent private citizens from testifying or to conceal documents that have already been released to third parties) are ill-considered and ought to be rejected by this committee, by the courts to which these disputes might fall for adjudication, and by the American public.
- Finally, true adherence to the rule of law means that rules have to be applied even-handedly, regardless of whether a political party or other interest is immediately benefited. It means not invoking privileges to conceal wrongdoing; and it means not invoking them to frustrate legitimate congressional inquiry. That obligation falls on all citizens but, in my judgment, it falls even more strongly on the president, who takes an oath to uphold the law. Accordingly, if you continue to think that President Clinton's use of the privilege to avoid scrutiny of his actions was violative of his oath of office and deserving of condemnation—as I do—you can say no less about President Trump.

The Long History of Congressional Oversight

Congress's authority to demand and receive information from the executive has been recognized from the founding. At the Philadelphia Convention, George Mason emphasized that members of Congress "are not only Legislators but they possess inquisitorial powers. They must meet frequently to inspect the Conduct of the public office."³ As James Wilson, a framer and later Supreme Court justice, emphasized in his writings and lectures, the House would constitute the "grand inquest of the state" and "diligently inquire into grievances, arising both from men and things."⁴

³ Max Farrand, *The Records of the Federal Convention of 1787* (1911), 2 Farrands 206, quoted in United States House of Representatives, "Investigations & Oversight," United States Congress, <https://history.house.gov/Institution/Origins-Development/Investigations-Oversight>.

⁴ Kermit L. Hall and Mark David Hall, eds., *Collected Works of James Wilson* (Liberty Fund, 2007), II, p. 74. http://lf-ol.s3.amazonaws.com/titles/2074/Wilson_4141_EBk_v6.0.pdf.

In 1792, President Washington and his cabinet recognized this principle—that the House is “an inquest” and “may institute inquiries,” while “the Executive ought to communicate such papers as the public good would permit,” refusing only those “the disclosure of which would injure the public.”⁵

In this, as in so many things, Washington set a precedent that guides us to this day. The occasion was the St. Clair disaster, a military defeat in Indian country that resulted in the death of more than 650 men and the wounding of more than 250 others. It was likely the most significant Indian victory over American forces in the history of the nation—more than triple that of Little Bighorn, for example.

Congress undertook an inquiry into the military failure. They saw the separation of powers not as a prohibition on one branch examining the conduct of another, but as a means of checking the growth of power in any branch. And so, Congress chartered a select committee to examine the disaster.

When the committee asked the War Department for records, it caused a fair amount of consternation in the Cabinet (or so Thomas Jefferson tells us). Nobody was sure whether or not the House had the authority to make such a request for information or whether the Washington administration had a duty to answer. Ultimately, Washington, in effect, asserted for the first time the existence of what we have come to think of as executive privilege. But he did so in a way that preserved executive prerogative while also accommodating legitimate congressional interest.

Washington’s successors, at least until the current administration, have recognized an obligation to provide information to Congress. As Mark Rozell has observed:

Although executive privilege is a legitimate power with constitutional “underpinnings,” it is not an unlimited, unfettered presidential power. Traditionally, presidents who have exercised executive privilege have done so without rejecting in principle the legitimacy either of Congress to conduct inquiries or of the judiciary to question presidential authority. For the most part, presidents have recognized the necessity of a balancing test to weigh the importance of legitimate competing institutional claims.⁶

The Fundamentals of Executive Privilege

Against that historical background the current contours of the executive privilege have developed. While much of the law and policy of the issue is unclear and often the product of negotiation and accommodation between the various branches of government, there are certain aspects of the question that are relatively well-settled.

⁵ 1 *Writings of Thomas Jefferson* 304 (Andrew Lipscomb, ed. 1903), quoted in William P. Barr, “Congressional Requests for Confidential Executive Branch Information,” (June 19, 1989). <https://www.justice.gov/file/24236/download>.

⁶ Mark Rozell, *Executive Privilege: The Dilemma of Secrecy and Democratic Accountability* (The Johns Hopkins University Press, 1994), p. 62.

First, there is a positive value to the privilege. Broadly speaking, the idea is that we wish to enable the advice that senior officials give the president, which often involves matters of national security and domestic economic prosperity, and is of critical importance to the nation. A president will often have private conversations with members of his Cabinet or the administration. It hardly seems plausible that a president could do his or her job and fulfill their constitutional obligations without the candid advice of senior advisors. It is thought that protecting the confidentiality of these conversations will foster open communication.

And so, executive privilege extends not just to the legal advice that the president receives but, at least in theory, to all of the many communications that take place within the executive branch that are intended to develop policy for the benefit of the president. As the Supreme Court said in *United States v. Nixon* while reviewing President Nixon's claim of privilege, there is a "valid need for protection of communications between high government officials and those who advise and assist them in the performance of their manifold duties."⁷

Given such theoretical grounding, we have come to recognize that the phrase "executive privilege" is really a general term that covers a number of different, more-specific types of privilege. In assessing any claim, it is therefore critical to consider which of these types of specific privilege is under consideration. Broadly speaking, these sub-categories include: presidential communications, law enforcement investigative information, internal deliberations not involving the president directly (also sometimes called the deliberative processes privilege), confidential national security or diplomatic information (including classified information), and information related to the governmental attorney-client relationship.

Over time, I have come to believe that some of these sub-categories (like immediate communications with a president) are closer to the core of the constitutional values protected by the executive privilege than others (such as, for example, law enforcement investigative information) at least in part because they more directly serve the value of enabling presidential exercise of Article II authority. To be sure, there are confidentiality values in protecting the wholesale disclosure of other categories of information (such as law enforcement files), but the sensitivity of those documents often must yield to the committee's need for information.

Second, it is abundantly clear the privilege (in all of its forms) is not absolute. That's why Richard Nixon ultimately lost his effort to prevent disclosure of the tapes he had made of conversations in the White House. Nixon asserted that the confidential nature of the conversations made all of them privileged against disclosure but the Court rejected Nixon's extreme reading that he had an absolute power to withhold the tapes, saying:

⁷ *United States v. Nixon*, 418 U.S. 683 (1974).

To read the Article II powers of the President as providing an absolute privilege as against a subpoena essential to enforcement of criminal statutes on no more than a generalized claim of the public interest in confidentiality of nonmilitary and nondiplomatic discussions would upset the constitutional balance of “a workable government” and gravely impair the role of the courts under Article III.⁸

And, one might add, quite obviously it might also impair the role of Congress under Article I.

The Court’s balancing test suggests that the more significant the investigative interest, the greater the likelihood that the privilege should yield. As in *Nixon*, a criminal investigation would seem to be a high-value investigative interest, as would a congressional inquiry into presidential misconduct. By contrast, perhaps, a congressional interest directed at a more mundane legislative objective (say, reform of the carried-interest tax deduction to cite as abstruse an example as I can imagine), however important a topic it might be, is likely to carry lesser weight and less successfully justify piercing the privilege.

Third, as my former colleague at The Heritage Foundation, Todd Gaziano, wrote over seven years ago, when the subject of inquiry is a congressional investigation, the president bears a burden of accommodation:

[T]he president is required when invoking executive privilege to try to accommodate the other branches’ legitimate information needs in some other way. For example, it does not harm executive power for the president to selectively waive executive privilege in most instances, even if it hurts him politically by exposing a terrible policy failure or wrongdoing among his staff. The history of executive-congressional relations is filled with accommodations and waivers of privilege. In contrast to voluntary waivers of privilege, Watergate demonstrates that wrongful invocations of privilege can seriously damage the office of the presidency when Congress and the courts impose new constraints on the president’s discretion or power (some rightful and some not).⁹

Gaziano even went so far as to characterize an invocation of privilege to cover up wrongdoing as an “illegal invocation.”¹⁰

Congressional Interpretation of the Privilege

The legislative and executive branches have fundamentally different views of the scope of executive privilege and these no doubt reflect their different institutional roles in our government.

⁸ *Id.* at 707.

⁹ Todd F. Gaziano, “Executive Privilege Can’t Shield Wrongdoing,” *The Heritage Foundation*, June 22, 2012, <https://www.heritage.org/the-constitution/commentary/executive-privilege-cant-shield-wrongdoing>.

¹⁰ *Ibid.*

Some constitutional scholars and members of Congress have argued that the executive has little or no authority to withhold any information from Congress. Raoul Berger famously maintained that executive privilege was a “myth,” contending that the framers intended Congress to be a “grand inquest,” with powers modeled on the historic powers of the British Parliament. Prominent members of Congress have also expressed skepticism of executive privilege. Representative John Moss, for example, “vigorously opposed the use of executive privilege by presidential administrations” and pressed every administration from Kennedy to Ford to adopt an explicit policy that it could only be invoked by the president personally.¹¹ Indeed, as University of Chicago law professor Aziz Huq has noted, the concept of executive privilege lacks any firm textual foundation at all in the Constitution—it exists, if at all, by implication from other provisions of the Constitution like the vesting clause and the structural requirements of the system, which is to say it is on relatively weaker ground than explicitly authorized constitutional powers.¹²

Nevertheless, as a matter of practice, Congress has generally accepted the legitimacy of the qualified presidential communications privilege recognized in *Nixon*, even though the Supreme Court noted that it was not addressing how the president’s interests in confidentiality were to be balanced against congressional demands for information. It has also tacitly accepted the “states secrets” branch of the privilege (*i.e.*, military and diplomatic secrets), with the caveat that there are now established and usually trustworthy mechanisms, such as the intelligence committees, through which such information can be shared.

By contrast, under presidents of both parties, the executive branch has taken a much broader view of the privilege, arguing that it extends beyond presidential communications and state secrets to include deliberative process at the agency level, law enforcement information (particularly with respect to open law enforcement files), and attorney-client and work-product material.

Aside from a single district court decision (involving the Fast and Furious investigation), no court has ever recognized that any of these latter types of privilege apply to congressional inquiries and Congress has routinely rejected the idea that executive privilege applies in these areas.¹³

Finally, as Rozell details, even the executive recognizes that the privilege is not absolute. Every modern president has accepted at least theoretical limitations on the invocation of executive privilege,

¹¹ Rozell, pp. 11, 14-20 and 47.

¹² Aziz Huq, “‘Executive privilege’ is a new concept built on a shaky legal foundation,” *The Washington Post*, May 12, 2019. https://www.washingtonpost.com/outlook/executive-privilege-is-a-new-concept-built-on-a-shaky-legal-foundation/2019/05/10/fa92b82e-7292-11e9-9eb4-0828f5389013_story.html?utm_term=.0a4ca1010b11.

¹³ See *Committee on Oversight and Government Reform v. Lynch*, 156 F.Supp.3d 101 (D.D.C. 2016). Counsel for the House of Representatives recently notified the court of appeals of a settlement of the matter that included a commitment by both the House and the Executive Branch not to rely on this decision (or an earlier decision on standing, *Committee on Oversight and Government Reform v. Holder*, 979 F.Supp.2d 1 (D.D.C. 2013)), in any subsequent litigation.

particularly the requirement that it must (ultimately) be invoked by the president personally.¹⁴ In fact, even Richard Nixon adopted a policy limiting the use of executive privilege, promising that it would be exercised only “in the most compelling circumstances and after a rigorous inquiry into the actual need for its exercise” and “with specific Presidential approval.”¹⁵

Senator Sam Ervin, however, was not satisfied with Nixon’s implementation of this policy and supported a bill that would have required any assertion of executive privilege to be accompanied by a signed statement of the president invoking the privilege. Ervin’s caution was wise. When the Senate Watergate hearings began, “Nixon tried to prevent his present and former aides from testifying by threatening a claim of executive privilege that would stop the committee from questioning them.” Ervin responded by calling a press conference, which he ended “by threatening to have the aides arrested if the president did not allow them to testify publicly and under oath before the Senate committee.”¹⁶

In the decades following Watergate, the stigma of executive privilege was such that administrations were motivated to reach an accommodation with Congress before a president was forced to make a decision to formally invoke it. However, as time passed, presidents have become more willing to invoke (or at least threaten to invoke) the privilege. Moreover, the Office of Legal Counsel has undermined the use of the criminal contempt statute in cases involving the assertion of executive privilege. In the absence of any reliable mechanism for enforcing congressional subpoenas and with no deadlines for asserting executive privilege, it has become increasingly attractive for the executive branch to stonewall and delay in response to congressional demands for information.¹⁷

If I could summarize this broad expanse of law and history it would be as follows: While the legal rules are important, in this context, they are more like guideposts than firm mandates. You should therefore be wary of anyone who is excessively doctrinal on the question of what the “rules” are. In my judgment, the key to resolving most executive privilege disputes is accommodation. Congress needs information to

¹⁴ Rozell, pp. 47-48 and 84-141.

¹⁵ Karl E. Campbell, *Senator Sam Ervin, The Last of the Founding Fathers* (The University of North Carolina Press, 2007), p. 239. See also, Rozell, pp. 63-66. I can find no record of how Ervin thought he would implement his threat of arrest, should it have become necessary.

¹⁶ Campbell, p. 285.

¹⁷ *Senate Select Committee v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974), denied the Senate committee access to the Watergate tapes in large part because the House Judiciary Committee, which was conducting impeachment proceedings, already had possession of the tapes. This holding is often used by the executive branch to suggest that Congress’s interest in obtaining executive information is less compelling when it is merely for oversight purposes. This reading, however, is controversial and should be of no assistance to the executive branch when Congress is conducting an investigation preliminary to the consideration of impeachment questions. See, Todd Garvey, *Presidential Claims of Executive Privilege: History, Law, Practice, and Recent Developments*, Congressional Research Service, Dec. 15, 2014, pp.2-4. <https://fas.org/sgp/crs/secrecy/R42670.pdf>.

do its job. The executive branch may have a legitimate interest in protecting certain materials from disclosure, and that is either a formula for accommodation or for confrontation.

The Clinton Privilege Fights

Against this backdrop of history and these general principles, I want to review some of our experiences with the investigation of President Clinton. I raise this history not to re-litigate the merits of that inquiry, which are now well-settled by the judgment of history. Rather, I want to use the experience as a lens through which to view current events.¹⁸

In the opinion of Independent Counsel Starr (in his report to Congress), there was “substantial and credible information” that the president’s repeated and unlawful invocation of executive privilege was inconsistent with his duty to faithfully execute the laws of the United States and constituted grounds for potential impeachment. In making this recommendation, the Independent Counsel was echoing the history of Watergate. In 1974, when this committee drafted articles of impeachment for the House to consider, the third article adopted recommended impeachment on the ground that the president had refused to comply with lawful subpoenas from Congress, in part by the wrongful invocation of executive privilege. Starr’s report to this body suggested that Clinton had acted similarly, albeit with respect to a criminal investigation rather than a congressional one.

The Starr report recounts a history that echoes recent events. It recalls President Clinton’s promise on public TV that he would “cooperate fully” with the investigation into his contacts with Ms. Lewinsky. We are reminded that in 1994, Lloyd Cutler, then the White House counsel, issued a legal opinion directing that the Clinton administration not invoke executive privilege in cases involving allegations of personal wrongdoing.¹⁹

In the end, however, those promises were unavailing. During the course of the Lewinsky investigation President Clinton invoked the presidential communications version of the executive privilege and the governmental attorney-client version of the privilege with respect to five witnesses: Bruce Lindsey, Cheryl Mills, Nancy Hernreich, Sidney Blumenthal and Lanny Bruer.

He withdrew one claim before litigation and lost the remaining claims in a ruling by the district court.²⁰ The breadth of the claim was, in some cases, striking. For example, Cheryl Mills (who was, at the time a Deputy White House Counsel) not only claimed privilege over internal communications with the president and other senior staff but also asserted that her communications with the president’s private

¹⁸ I take most of what follows in this section from the “Referral from Independent Counsel Kenneth W. Starr in Conformity with the Requirements of Title 28, United States Cod, Section 595(c),” House Doc. 105-310 (Sept. 11, 1998) [hereinafter *Starr Report*].

¹⁹ Memorandum for all Executive Department and Agency General Counsels from Lloyd N. Cutler, Special Counsel to the President, “Congressional Requests to Departments and Agencies for Documents Protected by Executive Privilege,” September 28, 1994.

²⁰ *In Re Grand Jury Proceeding*, 5 F. Supp. 2d 21 (D.D.C. 1998); see also, *In re: Bruce R. Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998) (affirming the district court).

lawyers (who, of course, are not part of the executive branch) were protected by the presidential privilege.

Even more ambitiously (if that is the proper word), President Clinton attempted to craft a new form of executive privilege related to, but distinct from, the privilege against the disclosure of law enforcement information. He authorized the assertion of a “protective function” privilege that would have permitted Secret Service agents to refuse to testify before a grand jury as to their observations of behavior that was the subject of a criminal investigation. The reasoning was (again echoing the confidentiality argument that undergirds the presidential communications branch of the privilege) that if agents could be called to testify, then a president would push the agents away, increasing his personal risk.

In a letter to the White House, Independent Counsel Starr wrote:

We recognize the interests of the Secret Service and the Department in ensuring the continued safety of the President and future Chief Executives. We also believe that the inevitable delay that will result from litigating the ‘protective function privilege’ will hinder the grand jury’s investigation and be against the best interests of the country.²¹

In May 1998, District Judge Norma Holloway Johnson determined that Secret Service agents had no such privilege, writing:

In the end, the policy arguments advanced by the Secret Service are not strong enough to overcome the grand jury’s substantial interest in obtaining evidence of crimes or to cause this court to create a new testimonial privilege. Given this and the absence of legal support for the asserted privilege, this court will not establish a protective function privilege [against giving testimony].²²

On appeal, this effort to create a sort of loyal Praetorian Guard was unavailing and rejected by the court of appeals.²³

In short, from my own personal perspective, the history of the Clinton experience teaches us that the invocation of an executive privilege is sometimes the refuge of one who is concealing misconduct. It is also frequently asserted in an overbroad manner as a way of thwarting or delaying an inquiry. I trust we can all agree that, when used in that manner, the invocation is both ill-founded legally and contrary to basic principles of the rule of law that demand the accountability of the president for his or her actions.

²¹ Kenneth W. Starr, “Re: Presidential Invocation and Waiver of the Proposed ‘Protective Function Privilege,’” Letter to the White House, April 28, 1998, p. 2.

<http://www.cnn.com/ALLPOLITICS/1998/05/20/secret.service.docs/starr.letter/2.jpg>.

²² Andrew Glass, “Secret Service agents ordered to testify in Lewinsky scandal,” *Politico*, May 22, 2018. <https://www.politico.com/story/2018/05/22/judge-orders-secret-service-agents-to-testify-in-lewinsky-scandal-may-22-1998-599428>.

²³ *In re Sealed Case*, 148 F.3d 1073 (D.C. Cir. 1998).

President Trump's Invocation of Privilege

Today, we face a situation with many echoes from that earlier time. Unlike President Washington's original, generous and accommodating construction of his obligation to enable congressional oversight, President Trump, echoing Presidents Nixon and Clinton, has seemed to erect the executive privilege as a barrier to oversight and inquiry into his own conduct.

President Trump's "protective" invocation is broad and comprehensive. It nominally covers several things: First, and most obviously, it purports to cover all of the redacted material that Attorney General Barr has removed from the Mueller report. Second, it purports to cover all of the underlying documents and materials gathered by the Mueller investigative team as part of their efforts. As such, the invocation seems to resonate with a number of strands of executive privilege almost all of which ought, in the end, to yield to this committee's legitimate interests.

Let us first consider the redactions themselves. As the committee is well aware, the redactions made by the Attorney General involved four categories: (1) national security, including material identified by the intelligence community as "potentially compromising sensitive sources and methods"; (2) material that relates to or would harm ongoing investigations, of the sort that may be kept confidential under the Freedom of Information Act; (3) materials that would compromise personal privacy; and (4) materials relating to grand-jury investigations.

We can start with the obvious—that compromises of personal privacy are not a matter for executive privilege. They may raise prudential concerns about good policy and may even involve application of statutory law, but none of the existing sub-categories of the privilege align, in any way, with the idea of personal privacy of non-government employees. Indeed, almost by definition, the executive branch's privilege cannot cover non-executive individuals.

Let me also briefly address the first category: national security matters that may include classified material. At the core of executive confidentiality requirements, this sort of material has long been recognized as potentially privileged. But as our history indicates, as far back as Washington, such questions are best addressed on a case-by-case basis, with any number of accommodations possible (limited distribution, for example) and perhaps, the engagement of the intelligence committee. I suspect that if the president's invocation were limited to this category a ready and quick accommodation would be reached.

I want to focus the remainder of my remarks on the facially overbroad assertions that underlie the second and fourth categories of the redactions and which (at least if public reports are to be credited) have been extended beyond the four corners of those categories to include all related investigative matters (like FBI 302s – that is, notes of interviews), documents shared with third parties and even (or so it seems) to an invocation intended to prevent percipient witnesses from testifying.

To begin with, redactions and limitations involving harm to ongoing matters, law enforcement information, and grand jury materials do sound in the executive privilege but, by any measure, they are less weighty than other core executive privilege claims. For one thing, none of them involve direct presidential communications. For another, unlike classified matters, none of them are likely threats to our national security.²⁴ Thus, the underlying grounds of effective executive action that animate the privilege generally are weaker in this context than, for example, in the context of diplomatic discussions with the president.

Indeed, my own personal experience is that law enforcement materials are frequently turned over to Congress and are the subject of your oversight and review. I recall quite vividly my service as a trial attorney in the Environmental Crimes Section of the DOJ. In the early 1990s, it came to pass that the office had determined to decline prosecution of a particular matter that arose in Hawaii. That declination was controversial especially in that it came over the objection of the investigators at the EPA who had presented us with the matter.

Given the difference of views, Congress got involved. Over the objections of political officials in the Bush White House and at the Department of Justice, a decision was eventually made to turn over our case files to the House Energy and Commerce Committee (then-chaired by Congressman John Dingell). I personally sat for several hours of depositions to review the investigative steps I had taken and the prosecutorial judgments that I, and my superiors, had made. You may well imagine that as a young trial attorney—barely five years out of law school—I found the experience daunting in the extreme, and most unpleasant. And I think it was a grave mistake for the DOJ not to have worked harder to defend me against an effort to examine the work of career line prosecutors. But I don't think anyone doubted the lawfulness of Congress's investigation nor did any official seriously contemplate a wholesale invocation of privilege to prevent the inquiry. In fact, quite to the contrary, although we sought to convince the committee to focus its questioning on accountable political officials rather than careerists such as me, we all understood that, in the end, we were obliged to respond in a full-and-complete manner.²⁵

²⁴ To be sure, the category of grand jury material is subject to other law [namely Rule 6(e) of the Federal Rules of Criminal Procedure] that may restrict its disclosure, but that is not a claim of executive privilege. Nor is it likely to be a barrier to this committee's inquiry. As *McKeever v. Barr*, No. 17-5149 (D.C. Cir. Apr. 7, 2019) (petition for rehearing *en banc* pending), <https://www.documentcloud.org/documents/5796185-McKeever-Cadc-20190405.html>, makes clear, the limitations of Rule 6(e) can accommodate a congressional inquiry if it addresses the type of governmental misconduct that could be grounds for impeachment. More importantly, as the D.C. Circuit held in *In re Sealed Case No. 99-3091*, 192 F.3d. 995 (D.C. Cir. 1999), the protections of Rule 6(e) are limited to matters that actually occur before a grand jury (such as transcripts of proceedings) or are immediately preliminary to a grand jury proceeding. The prohibition on disclosure does not encompass internal prosecutorial deliberations, draft indictments or interview notes and, as such, this category is likely to be quite modest in scope and irrelevant to the bulk of this committee's subpoena.

²⁵ Although the Department of Justice has long had a formal policy that investigative materials are confidential and that congressional access would not be in the public interest, Congress has never acquiesced in that judgment and as my own experience demonstrates, it has been honored as much in the breach as in its application. See 40 Op. Att'y Gen. 45 (1941).

Notwithstanding my general view that privilege claims are best examined on a case-by-case basis with respect to specific instances of testimony or specific documents, three overarching general considerations should inform this committee's response to President Trump's wholesale privilege invocation with respect to law enforcement materials.

- First, this invocation does not occur in a vacuum, nor is this committee required to ignore the context in which it arises. By any measure, the president has determined to resist all congressional inquiries through a variety of means. By one count, he is currently defying as many as 20 different efforts to examine his conduct.²⁶ Not all of these involve executive privilege. Indeed, some involve the form of non-assertion of a privilege, in a manner that deviates from well-settled executive practice that goes back more than 30 years to President Reagan.²⁷ Perhaps some of these invocations of privilege and refusals to assist congressional investigation are well-meaning and well-justified. But the pattern of resistance is such that this committee may fairly evaluate the instant invocation against that background and, rightly in my view, conclude that much of the president's resistance is undertaken in bad faith in an attempt to avoid, or at a minimum delay, scrutiny of his conduct.
- Second, the claim of privilege is especially weak where it appears to be designed to thwart congressional inquiry into presidential wrongdoing. Indeed, some have called this type of effort an "illegal invocation" that is, itself, ground for concern. Here, as more than 800 former federal prosecutors with experience in the administrations of both parties have said, the evidence already public in Special Counsel Mueller's report strongly evinces that the president has engaged in criminal conduct. Indeed, for them, the question is not even a "matter[...]" of close

²⁶ Rachel Baude and Seung Min Kim, "A guide to 20 inquiries Trump and his allies are working to impede," *The Washington Post*, May 12, 2019. https://www.washingtonpost.com/politics/a-guide-to-20-inquiries-trump-and-his-allies-are-working-to-impede/2019/05/11/83114574-733a-11e9-9eb4-0828f5389013_story.html?utm_term=.a7e3158f9dbc.

²⁷ See, e.g., Ronald Reagan, "Memorandum from President Ronald Reagan for the Heads of Executive Departments and Agencies, on Procedures Governing Responses to Congressional Requests for Information," The White House, Nov. 4, 1982. <https://www.govinfo.gov/content/pkg/GPO-CHRG-REHNQUIST/pdf/GPO-CHRG-REHNQUIST-4-16-4.pdf>. The case law leaves open many questions about the proper application of executive privilege, including "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." Todd Garvey, *Presidential Claims of Executive Privilege: History, Law, Practice, and Recent Developments*, Congressional Research Service, Dec. 15, 2014. <https://fas.org/sgp/crs/secrecy/R42670.pdf>.

professional judgment.”²⁸ Though this committee should not, of course, prejudge the case in the absence of a complete record, the *prima facie* validity of the allegations is further ground to justify broad congressional access to the materials in question and also to judge the presidential invocation as comparatively weaker than other variants of the privilege.

- Third, the Attorney General’s determination that the president has not committed any crime and thus to exonerate him of any criminal wrongdoing has the effect of reducing, if not eliminating, much of the executive interest in the confidentiality of law enforcement information. As the Office of Legal Counsel has noted:

Once an investigation has been closed without further prosecution, many of the considerations previously discussed lose some of their force. Access by Congress to details of closed investigations does not pose as substantial a risk that Congress will be a partner in the investigation and prosecution or will otherwise seek to influence the outcome of the prosecution; likewise, if no prosecution will result, concerns about the effects of undue pretrial publicity on a jury would disappear.²⁹

It would seem, therefore, that the Attorney General’s decision to close the criminal investigation of the president further weakens the executive claim of privilege.³⁰

One final, broad point is worth making – however weak President Clinton’s invocation of the privilege was (and I think it was not well-founded), it was systematically stronger than that of President Trump today. First, it is clear that, however ill-founded the claims might have been, Clinton’s privilege invocation was related to core presidential communications that merit the highest degree of protection. By contrast, as we are discussing, President Trump’s invocation has wandered much further afield, to include the protection of law enforcement information and even personal privacy of non-executive individuals. Second, Clinton’s invocation was related to his own personal conduct, a circumstance that, while significant, was of little systematic import to the nation, and thus, arguably, was of less importance to Congress. By contrast, the investigation of Russian interference into our elections that is at the bottom of the special counsel’s investigation is a critical matter for the nation, and so this committee’s justification for inquiring into the matter is all the greater. In short, President Clinton’s efforts to interpose an executive privilege, which were in my judgment properly rejected, were on a stronger footing than the invocation facing this committee today.

²⁸ DOJ Alumni Statement, “Statement by Former Federal Prosecutors,” May 6, 2019.

<https://medium.com/@dojalumni/statement-by-former-federal-prosecutors-8ab7691c2aa1>.

²⁹ Charles J. Cooper, “Response to Congressional Requests for Information Regarding Decisions made Under the Independent Counsel Act,” 10 U.S. Op. Off. Legal Counsel 68, 77 (1986).

https://www.justice.gov/sites/default/files/olc/opinions/1986/04/31/op-olc-v010-p0068_0.pdf.

³⁰ As the Barr redactions indicate, this argument is not applicable to some ongoing matters (e.g. relating to Roger Stone) that have not yet closed. Likewise, if there were any material connected to ongoing criminal investigations of President Trump personally (for example, the much-rumored investigations in the Southern District of New York) those, too, would be more highly protected as ongoing, open matters.

Let me now turn to some specific questions that are raised by the president's invocation of a privilege. While we could profitably go through each aspect of the invocation in detail, two particular aspects seem worthy of specific consideration, both on their own merits and for the light they shed on the broader question.

First, consider this committee's pending document subpoena to former White House Counsel Don McGahn. It appears that the current White House Counsel is of the view that the records provided to Mr. McGahn remain subject to White House control, and may be prevented from disclosure by exercise of an executive privilege. [Notably, his letter to this committee does not actually appear to invoke the privilege—yet another example of the way in which this administration's practice reminds me of President Clinton's efforts to prevent cooperation without the formal necessity of a privilege invocation.]³¹

Leaving aside whether or not the president might have been able to assert a plausible deliberative process privilege over the documents in question in the first instance, there can be little doubt that the current assertion is without solid legal foundation. As I understand it, the subpoena to Mr. McGahn involves documents that were provided to him and to his counsel in connection with their preparation for the Mueller investigation. To my mind, the law here is abundantly clear that disclosure to an outside third party (here Mr. McGahn's attorney) constitutes a waiver of any claim of executive privilege. Indeed, this case is on all-fours with the holding of the D.C. Circuit in *In re Sealed Case (Espy)*, which also involved disclosure to the attorney for a former government official, and clearly determined that the White House "waive[s] its claim of privilege in regard to specific documents that it voluntarily reveal[s] to third parties outside the White House."³²

Thus, while the administration may take the position that there has been no waiver of executive privilege, it would seem that the real question is the scope of the waiver that has occurred. At a minimum, the privilege would seem to be waived as to all documents previously disclosed to third parties and as to testimony related to those portions of the Mueller report that have already been made public.³³ I find it completely implausible to argue, for example, that this committee is only entitled to get Mr. McGahn's story with respect to President Trump's telling him to lie through Mueller's narration of the event. At a minimum, the committee should be able to get Mr. McGahn's actual statements and records on which Mueller based his report and the documents produced to his attorney, as well as to question McGahn directly about the incident.

³¹ Thus, to the extent that the invocation has not yet been made, the subpoena recipient is not excused from compliance with the committee's subpoena. The privilege only applies when, and if, a showing has been made that a particular individual record satisfies the prerequisites for the invocation of the privilege. See, e.g., *Committee on the Judiciary v. Miers*, 558 F.Supp.2d 53 (D.D.C. 2008).

³² *In re Sealed Case*, 121 F.3d 729, 741-42 (D.C. Cir. 1997).

³³ There is a plausible argument based on *Espy* that the scope of the waiver should be narrowly construed. But that narrowness cannot apply to matters that have actually been disclosed. The extent to which it applies to related collateral matters is a more difficult question.

One other potential invocation of the privilege bears mentioning. If the president's public statements are to be taken at face value, he intends to try and prevent private citizens who never worked for him in any official, governmental capacity from testifying before this committee regarding his interactions with them.

It is easy to see why the president might wish this were the case. To cite but one example from the current docket of issues facing you, among the information that is being withheld under the president's invocation of privilege is Corey Lewandowski's 302s (the FBI's notes about his interview with them). The committee is rightly interested in determining whether President Trump told Mr. Lewandowski to pressure Attorney General Sessions to "un-recuse" himself from overseeing the Mueller investigation. No matter what your legal view on the merits of the claim with respect to notes of interview are, it is fair to say that any court fight will result in a lengthy legal battle that will delay this committee's work. By contrast, the expedient of calling Mr. Lewandowski to testify should not engender a legal assertion of privilege and would give this committee direct access to the testimony of a percipient witness.

There can be no colorable executive privilege claim over the president's conversations with a private citizen. As the *Espy* case we just discussed makes clear, it is a complete waiver of any executive privilege to disclose matters to non-executive branch individuals who are outside third parties. The nearest analogy I can find in the Starr investigation for such a frivolous claim would be if then-Deputy White House Counsel Cheryl Mills had asserted that a privilege protected her communications with the private attorneys of present and former employees of the Clinton White House.³⁴

Were President Trump to extend his claim this far, it would be a Nixonian excess. As I've already recounted, "Nixon tried to prevent his present and former aides from testifying by threatening a claim of executive privilege that would stop the committee from questioning them." Ervin's response—to threaten their arrest—abated Nixon's effort³⁵ and President Trump's similar suggestion should, likewise, be met with derision.

Indeed, to put this point as bluntly as possible, were President Trump to attempt to invoke the executive privilege to prevent a private citizen like Corey Lewandowski from testifying before this committee as to matters that the president conveyed to him while Lewandowski was a private citizen, it would be as absurd an invocation as if President Clinton had tried to use the same theory to prevent Vernon Jordan from speaking about their interactions.

Conclusion

The invocation of executive privilege ought to be a moment of high consideration and thoughtfulness for the executive branch. Sadly, today, it increasingly appears that the president is acting in a manner designed to denigrate and disregard checks on his use of executive authority. To date, his actions appear

³⁴ *Starr Report*, p. 208.

³⁵ Campbell, p. 285.

unable to distinguish between the public interests that undergird the privilege and his own personal and political interests.

Every aspect of American history rejects such an idea. Indeed, we had a revolution to overthrow the idea of a kingly prerogative. As James Wilson, one of the founders and a member of the first Supreme Court put it: "far from being above the laws, [the president] is amenable to them in his private character as a citizen."³⁶ The framers of our Constitution rightly thought that presidents could and should be subject to congressional oversight and that the thoughtless invocation of privilege is in derogation of that high principle. I remain hopeful that, in the end, the Department of Justice and the administration will recognize these principles and make reasonable accommodations to enable this committee to receive the information it needs while protecting the legitimate public interests embodied in the executive privilege.

³⁶ *Speech at the Constitutional Convention in Philadelphia, 1787*. <https://www.u-s-history.com/pages/h2413.html>.

Chairman NADLER. Thank you very much. Mr. Turley.

TESTIMONY OF JONATHAN TURLEY

Mr. TURLEY. Thank you, Chairman Nadler, Ranking Member Collins, members of the committee. Thank you again for the opportunity to appear before you to talk about a subject of such great importance as executive privilege and congressional oversight in the context of our current controversies.

At the outset, I should repeat my well-known bias as a Madisonian scholar. I tend to favor the legislative branch. My default tends to be Article I. My academic work has defended the authority of Congress for over 30 years. I've represented members of the House of Representatives individually as well as the House of Representatives as a whole in defense of what I consider to be inherent powers of this body that were being usurped by the expansion of executive power.

It is for that reason that this is a curious position for me to be in. But I am not here, I haven't been called, to give my personal view of executive privilege. I have always been a critic of executive privilege. I've been called to give my view of where the law stands now and how the courts are likely to view the current conflict. And on that, I will offer a relatively mixed account as to the relative claims of this committee and that of the White House.

The greatest concern I have, which I have put in my written testimony, is that this committee has an obligation, a sort of constitutional Hippocratic oath, to first do no harm. As an advocate of Article I, the precedent that is used by this body in its very important work is not as deep or as broad as most of us would like it. It can easily be undermined with reckless litigation. For that reason, in my testimony I've isolated what I consider to be the strongest and best ground for this committee to fight on, cases that I believe you would most certainly win. I've also identified areas that I've cautioned you not to pursue because the risks are too high.

Now, the President has a right to assert executive privilege, and the Attorney General is obligated to defend it, but this committee has to pick its fights wisely. Bad cases make for bad law. So Congress has an undeniable and legitimate interest in this information. As I have said publicly, as I say in my testimony, I think the President would serve the public and his office best by waiving executive privilege over much of the documents used in the special counsel's report. But we have to address what will happen once there's a challenge in court to examine that assertion.

This body has decided to proceed on a not an impeachment matter. That will weigh heavily in any fights with the White House. The courts have indicated that on impeachment matters, there's a heavy deference that is given to this body as a conventional oversight matter becomes more mixed. I've gone through five areas of information that is currently being withheld from this body. With some of those I believe this committee will lose.

On issues of the redactions, I believe this committee will lose. I think the case that the Attorney General has on those redactions is virtually unassailable. Where I believe this committee can win and where I think the White House is, frankly, unsupportable in its position, is to try block witnesses from this committee. And ulti-

mately, I believe that you will prevail on getting underlying material linked to the Mueller report.

The question then is how do you proceed. I've listed cases that give you an outline as to the most likely way to prevail, protect your precedent, and to move this along. Privilege fights are like invading Russia in winter. If you get into it, it's not going to be fast, and you're not going to get a warm reception in the courts. You have to be very careful of how you launch that campaign.

In *Paradise Lost*, Milton referred to a Serbonian bog where whole armies have sunk. Don't be one of those armies. If you attack Article II on weak grounds, you will sink in that bog. So what I encourage this committee in my testimony, which is probably too long quite frankly, is that you focus on your strongest suit. Focus on forcing these witnesses before your committee. Focus on getting the underlying documents.

Now, in that you're going to have a mixed result on forcing those documents to be released. What I say in my testimony is that the President has a valid executive privilege claim and this committee has a valid oversight claim. You're not going to win on a threshold fight. I also believe that it is not true that the President has waived executive privilege by showing material to special counsel. On that I believe you will lose, and I strongly encourage you not to make that argument in Federal court. The case law here is quite strong. That doesn't mean you're going to lose. It just means you're not going to have a takedown on the first round.

Now, one of the things I also advocate for you to consider is that when you look at the redactions, I understand that you want to see the full report. The report has given 98 percent of it to select members. I understand that there are objections to how rigid those limitations are. That is not good ground to fight on. These other areas, I would bet on you, and those are the areas I would encourage you to focus on.

Thank you very much.

[The statement of Mr. Turley follows:]

Written Statement

**Jonathan Turley,
Shapiro Professor of Public Interest Law
The George Washington University Law School**

“Executive Privilege and Congressional Oversight”

**Rayburn House Office Building
United States House of Representatives
Committee on the Judiciary**

May 15, 2019

I. Introduction

Chairman Nadler, Ranking Member Collins, and members of the Committee, my name is Jonathan Turley, and I am a law professor at George Washington University where I hold the J.B. and Maurice C. Shapiro Chair of Public Interest Law. It is an honor to appear before you today to discuss executive privilege and congressional oversight in the context of our current controversies following the release of the Special Counsel Report.

At the outset, I come to disputes of this kind with a well-known bias as a Madisonian scholar and frequent defender of the legislative branch and its powers under Article I.¹ My academic work on the Separation of Powers has been critical of the expansion of executive powers and privileges.² My prior testimony before both the

¹ I have been asked to include some of my prior relevant academic publications,

² See United States Senate, *Confirmation Hearing For Judge Neil M. Gorsuch To Be Associate Justice of the United States*, United States Senate Committee on the Judiciary, March 21, 2017 (testimony of Professor Jonathan Turley); United States House of Representatives, House Committee on Science, Space, and Technology, “*Affirming Congress’ Constitutional Oversight Responsibilities: Subpoena Authority and Recourse for Failure to Comply with Lawfully Issued Subpoenas*,” September 14, 2016 (testimony and prepared statement of Jonathan Turley); United States House of Representatives, House Judiciary Committee, Regulatory Reform, Commercial and Antitrust Law, “*Examining The Allegations of Misconduct of IRS Commissioner John Koskinen*” June 22, 2016 (testimony and prepared statement of Jonathan Turley); United States Senate, Committee on Homeland Security and Governmental Affairs, “*The Administrative State: An Examination of Federal Rulemaking*,” April 20, 2016 (testimony and prepared statement of Jonathan Turley); United States House of Representatives, House Judiciary Committee, Regulatory Reform, Commercial and Antitrust Law, “*The Chevron Doctrine: Constitutional and Statutory Questions in Judicial Deference to Agencies*,” March 15, 2016 (testimony and prepared statement of Jonathan Turley); *Authorization to Initiate Litigation for Actions by the President Inconsistent with His Duties Under the Constitution of the United States: Hearing Before the H. Comm. on Rules*, 113th Cong.

Senate and the House of Representatives has warned of increasing executive encroachment on legislative authority and asserted the need for Congress to be more aggressive in defending its Article I authority—particularly in its appropriation and oversight functions. Indeed, I have served as legal counsel for members of this body—including the House of Representatives as a whole—in defending its inherent powers from executive overreach and excess. With the shifting fortunes of politics, the commitment to the separation of powers tends to wane with control of the White House, as discussed below. Yet, I hope that all members of this Committee share the institutional interest in protecting existing precedent on congressional authority and jurisdiction.

In my view, President Trump would serve this country and his office best by waiving executive privilege to the underlying documents, information, and witnesses referenced in the Special Counsel Report to the fullest extent possible. With the exception of grand jury information, material under court seal, or intelligence information, our nation needs the greatest possible transparency in all of these investigations.

Of course, while I have long been a critic of executive privilege assertions, I have been called not to discuss my personal views but rather the view of the courts on the scope of both executive privilege and congressional oversight. The President has a right to assert executive privilege and the Attorney General is expected to defend such assertions. The current conflict is remarkable in the breadth of material claimed under executive privilege. In the resulting litigation involving multiple committees, courts will face a long spectrum of demands for tax records, bank records, internal deliberative material, grand jury material, and other information. The calculus for this body is to pick its fights wisely to match strong legal precedent with strong oversight needs. In doing so, the House must weigh carefully the costs and benefits of a legal action. The precedent supporting legislative authority has always been fiercely defended by this institution. Prior Congresses have understood that bad cases make for bad law. That has meant making judicious decisions on when to fight and when to compromise.

The current conflicts between Congress and the White House constitute some of the most serious in modern history. President Donald Trump has refused to comply with a wide array of subpoenas and oversight demands. Congress is correct in asserting oversight authority over much of this information. Though the challenges are likely to bog down Congress in court, it is likely to prevail in seeking material. However, there are also challenges that are likely to fail and, more importantly, undermine or eliminate

(2014) (prepared statement of Jonathan Turley, Shapiro Professor of Public Interest Law); *Enforcing The President's Constitutional Duty to Faithfully Execute the Laws: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. 30–47 (2014) (testimony and prepared statement of Jonathan Turley) (discussing nonenforcement issues and the rise of the Fourth Branch); *Executive Overreach: The President's Unprecedented "Recess" Appointments: Hearing Before the H. Comm. on the Judiciary*, 112th Cong. 35–57 (2012) (prepared statement of Jonathan Turley); see also *Confirmation Hearing for Attorney General Nominee Loretta Lynch: Hearing Before the S. Comm. on the Judiciary*, 114th Cong. (2015) (prepared statement of Jonathan Turley). Parts of my testimony today is taken from this prior work.

key judicial rulings. The most precarious course is the one taken by this Committee concerning Attorney General William Barr.³

Congress has an undeniable and legitimate interest in much of this information. However, oversight jurisdiction is not enough in the balancing tests employed by the courts. There must be both a showing of need and, more importantly, purpose. The House has decided not to pursue this information in the course of an impeachment process, where its position would be strongest, but instead as part of a more general exercise of conventional oversight authority. In so doing, it must articulate a purpose other than a desire simply to investigate. Absent a clear nexus between jurisdiction and purpose, investigations can appear more vindictive than jurisdictional for a court. With political passions at their apex, some demands can easily become recreational for an opposing party before an upcoming national election.

There has been considerable commentary about how President Trump clearly waived all executive privilege over material disclosed to the Special Counsel in the course of his investigation. Various members of Congress have echoed this view. I know of no case to support such a sweeping claim. To the contrary, the White House has a viable argument that such disclosures were made within the Executive Branch and do not constitute such a waiver. That does not mean that the White House will prevail on its blanket assertion but it does likely mean that it will prevail on critical elements. Moreover, this Committee has maintained that “neither Rule 6(e) nor any applicable privilege barred disclosure of these materials to Congress.”⁴ As I have stated before, that assertion is not true. I was counsel in one of the largest Rule 6(e) cases in history. In the “Rocky Flats Grand Jury” case, I represented a Special Grand Jury in seeking the release of a grand jury report accusing the government of wrongdoing. We lost after years of

³ Jonathan Turley, *A Question of Contempt: Why The Barr Vote Could Prove Costly To Congress*, May 10, 2019 (available at <https://jonathanturley.org/2019/05/10/first-do-no-harm-why-the-barr-contempt-vote-could-prove-costly-for-congress/>). For the purposes of full disclosure, I previously testified at the confirmation hearing of Attorney General Bill Barr and I previously represented him with other former Attorneys General of the United States. *Confirmation Hearing For Attorney General Nominee William Barr*, January 16, 2019, United States Senate Committee on the Judiciary, January 29, 2015 (testimony of Professor Jonathan Turley). I also testified at the confirmation hearing of Attorney General Loretta Lynch. *Confirmation Hearing For Attorney General Nominee Loretta Lynch*, United States Senate Committee on the Judiciary, January 29, 2015 (testimony of Professor Jonathan Turley).

⁴ In March, the House voted 420-0 to have the report made public. H. Con. Res. 24 (available at <https://www.congress.gov/bills/116th-congress/house-concurrent-resolution/24/text>). The resolution was narrower than the later position of the Judiciary Committee after the report was released. The resolution called for the public release of the report “except to the extent the public disclosure of any thereof is expressly prohibited by law.” However, it still demanded the release of “the full release to Congress of any report, including findings, Special Counsel Mueller provides to the Attorney General” with no exception for Rule 6(e) material. This would still violate controlling case precedent.

litigation despite a strong argument that the Justice Department was protecting itself in its use of Rule 6(e) to bury the report. Thus, as with executive privilege, I oppose the long-standing view of the Justice Department on such conflicts, but the law (written by this body) contradicts the position of the Committee in both its subpoena and its contempt sanction against General Barr.

In the written testimony that follows, I would like first to address the legal bases underlying these dueling claims of legislative oversight and executive privilege. As noted below, Congress and the White House have both asserted legitimate claims (though both are also problematic in scope). After that threshold determination, the legal inquiry must then proceed to the issue of waiver and a balancing of the rivaling positions of the two branches. As will become evident, I believe that any blanket assertions of executive privilege would be unsustainable, though the White House has indicated that its initial assertion is “preventative” to allow for the review of the underlying material. But I also believe that the Committee’s sweeping subpoenas are equally unsustainable. Accordingly, I encourage the House leadership to adopt a more tailored litigation strategy to minimize its risk of damaging judicial decisions while maximizing its chances of prevailing on these challenges. Flailing around in every direction is not a constitutional strategy; it is a political impulse. Impulsive litigation will only endanger vital precedent and guarantee both delay and conflicted results in its current struggle with the White House.

II. Congress Has Stated Sufficient Grounds for Issuing Subpoenas in the Mueller Investigation

The subject of today’s hearing falls on the convergent boundary between the branches of our government. Just as convergent tectonic plates in geology cause earthquakes, the same is true in the convergence of two constitutional plates. The courts must then decide how these conflicts are resolved and what will give between executive privilege and congressional oversight. With co-equal branches of government, the result is often dictated by a balancing of interests.

Madison believed that the separation of powers, as a structure, could defeat the natural tendency to aggrandize power that tended toward tyranny and oppression. In Madison’s view, “the interior structure of the government”⁵ distributed the pressures and destabilizing elements of nature in the form of factions⁶ and unjust concentration of power.⁷ He envisioned what he described as a “compound” rather than a “single” structure republic and suggested it was superior because it could bear the pressures of a large pluralistic state. Alexander Hamilton spoke in the same terms, noting that the superstructure of a tripartite system allowed for the “distribution of power into distinct departments” and for the republican government to function in a stable and optimal

⁵ THE FEDERALIST NO. 51, at 320 (James Madison).

⁶ See THE FEDERALIST NO. 10, at 79 (James Madison) (noting that the “causes of faction” are “sown in the nature of man.”).

⁷ See THE FEDERALIST NO. 51, *supra* note 5, at 320 (James Madison); see also Douglass Adair, “*That Politics May Be Reduced to a Science*”: David Hume, James Madison, and the Tenth Federalist, 20 HUNTINGTON LIBR. Q. 343, 348–57 (1957).

fashion.⁸

Oversight authority is the key moving part in this system of checks and balances. The subpoena authority of Congress is an implied rather than express power within Article I of the Constitution. Nevertheless, it is a power that is essential to the functioning of any legislative body based on representative democratic values. Indeed, John Stuart Mill famously wrote:

[T]he proper office of a representative assembly is to watch and control the government: to throw the light of publicity on its acts: to compel a full exposition and justification of all of them which any one considers questionable; to censure them if found condemnable, and, if the men who compose the government abuse their trust ... to expel them from office, and either expressly or virtually appoint their successors.⁹

Legislative authority means nothing without the ability to understand, and at times uncover, the insular actions of the institutions and organizations that influence public policies and programs. It is for that reason that the Supreme Court readily recognized that the scope of legislative investigatory powers must be commensurate with the scope of legislative jurisdiction. Thus, in *McGrain v. Daugherty*,¹⁰ the Supreme Court was faced with a dispute rising from the Teapot Dome scandal under President Warren Harding. The scandal was a classic matter of legislative investigation. Secretary of the Interior Albert Bacon Fall stood accused of bribery after he leased Navy petroleum reserves at Teapot Dome in Wyoming and two other locations at bargain rates and did not put up the leases for competitive bidding. During this period, Congress pursued a wider range of alleged fraud and exercised oversight over the failure of the Administration to prosecute powerful figures and companies for violations under the Sherman and Clayton Acts. That investigation ultimately turned to the role of Attorney General Harry M. Daugherty and his brother (and Ohio bank president) Mally S. Daugherty. Mally Daugherty refused to comply with a subpoena to testify and was arrested. In referencing the “ample warrant for thinking, as we do,”¹¹ the Supreme Court issued a resounding defense of congressional investigative authority, including compelling testimony from individuals and companies. The Court held that “the power of inquiry-with process to enforce it-is an essential and appropriate auxiliary to the legislative function.”¹² The Court emphasized that congressional authority to compel disclosures is necessary for committees to have a complete understanding of “the conditions which the legislation is intended to affect or change.”¹³

The limiting principle for this power was set by the scope of legislative jurisdiction. However, even on this limiting principle, the Supreme Court has recognized a minimal threshold test: exercise of oversight power must be undertaken with some

⁸ THE FEDERALIST NO. 9, at 72 (Alexander Hamilton).

⁹ John Stuart Mill, *Considerations on Representative Government*, 42 (1861).

¹⁰ See generally *McGrain v. Daugherty*, 273 U.S. 135 (1927).

¹¹ *Id.* at 175.

¹² *Id.* at 174.

¹³ *Id.* at 175.

“valid legislative purpose” in mind.”¹⁴ Indeed, even with the questionable uses of subpoena authority as during the Red Scare period, the Court maintained that it would not assume bad motivations in the exercise of congressional power.

Thus, in *Wilkinson v. United States*,¹⁵ the Court faced what was in my view an abusive use of congressional authority in pursuit of political dissidents and civil libertarians. In that case, the target was a Frank Wilkinson who (like Carl Braden) was a civil libertarian and campaigned against the work of the House Committee on Un-American Activities. It is clear that the men were targeted for the exercise of their free speech. The Court, however, separated the question of the motivation from the means of congressional investigations. It decided both *Wilkinson v. United States* and *Braden v. United States*¹ on the same day in 1961. It dismissed the free speech elements in the cases and affirmed the congressional authority to demand such testimony. In *McGrain*, the Court noted that Congress is often seeking to force information from opposing or reluctant parties but that such information is essential to determining what, if any, legislative actions is needed:

A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed. All this was true before and when the Constitution was framed and adopted. In that period the power of inquiry, with enforcing process, was regarded and employed as a necessary and appropriate attribute of the power to legislate—indeed, was treated as inhering in it. Thus there is ample warrant for thinking, as we do, that the constitutional provisions which commit the legislative function to the two houses are intended to include this attribute to the end that the function may be effectively exercised.¹⁶

In so holding, the Court not only reaffirmed the power of Congress to compel testimony but also rejected the notion that it would evaluate the motivations or wisdom of the use of that inherent power. The *Wilkinson* Court saw the matter of whether Congress could compel testimony in the area and held:

[I]t is not for us to speculate as to the motivations that may have prompted the decision of individual members of the subcommittee to summon the petitioner. As was said in *Watkins*, supra, “a solution to our problem is not to be found in testing the motives of committee members for this purpose. Such is not our function. Their motives alone would not vitiate an investigation which had been instituted by a House of Congress if that assembly’s legislative purpose is being

¹⁴ *Barenblatt v. United States*, 360 U.S. 109, 126 (1959).

¹⁵ See generally *Wilkinson v. United States*, 365 U.S. 399 (1961).

¹⁶ *McGrain*, 273 U.S. at 175.

served.”¹⁷

That position is in line with other holdings, including *Braden*.¹⁸ Thus, the analysis turns on the scope of congressional jurisdiction, not congressional motivation, in these cases.¹⁹

As discussed above, the Court continues to decline inquiries into the motivation as opposed to the means of congressional investigations—the same position that it has applied in other areas such as police stops.²⁰ The *Wilkinson* factors continue to guide this analysis. The Court established a standard for whether the congressional investigatory authority is properly used: (1) whether the Committee’s investigation of the broad subject matter area is authorized by Congress, (2) whether the investigation is pursuant to “a valid legislative purpose,” and (3) whether the specific inquiries involved are pertinent to the broad subject matter areas which have been authorized by Congress.²¹ Before addressing whether there exists some fundamental barrier to congressional investigations of state agencies, it is useful to first address the *Wilkinson* factors as to the authority of Congress to issue any subpoenas in this area—the core inquiry in past federal cases.

A. Authorized Subject Matter Jurisdiction

The first inquiry is whether the Judiciary Committee is exercising sufficiently broad authorized subject matter jurisdiction over the area in question. In my view, the Committee has such authorization in seeking the documents underlying the Special Counsel investigation as well as the testimony of material witnesses relevant to the oversight investigation. As a standing Committee, this Committee possesses, under House Rule X(1) both legislative and oversight authority over “judicial proceedings, civil and criminal”; “criminal law enforcement”; the “application, administration, execution, and effectiveness of laws and programs addressing subjects within its jurisdiction”; the “operation of Federal agencies and entities having responsibilities for the administration

¹⁷ *Wilkinson*, 365 U.S. at 412.

¹⁸ See generally *Braden v. United States*, 365 U.S. 431 (1961).

¹⁹ I have previously expressed my unease with these decisions from the McCarthy period. United States House of Representatives, House Committee on Science, Space, and Technology, “*Affirming Congress’ Constitutional Oversight Responsibilities: Subpoena Authority and Recourse for Failure to Comply with Lawfully Issued Subpoenas*,” September 14, 2016 (testimony and prepared statement of Jonathan Turley). The Supreme Court at the time had a narrower view of free speech protections and indeed reaffirmed the authority to pursue communists simply because of their beliefs (though, as discussed below, the Court did limit some congressional actions). In *Barenblatt*, the Court described the crackdown on communists as a public policy that was “hardly debatable.” The Court’s acquiescence to such crackdowns on free speech is of course highly “debatable” and in my view reprehensible. It was one of the lowest points in the Court’s history.

²⁰ See, e.g., *Whren v. United States*, 517 U.S. 806, 813 (1996) (“We think these cases foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved.”).

²¹ *Wilkinson*, 365 U.S. at 409.

and execution of laws and programs addressing subjects within its jurisdiction”; and any conditions or circumstances that may indicate the necessity or desirability of enacting new or additional legislation addressing subjects within its jurisdiction.” This also includes the authority to exercise subpoena authority to guarantee the appearance of witnesses and production of evidence.

The serious allegations of obstruction and abuse of power are certainly relevant to both the Committee’s legislative and oversight authority. While the Committee has declined to initiate impeachment proceedings, it also may claim an investigative interest in any possible high crimes and misdemeanors allegedly committed by the President.

B. Valid Legislative Purpose

The most obvious attack under the *Wilkinson* factors would likely be over the final two categories, starting with the valid legislative purpose element.

Even on the array of demands from other committees, the purpose element is often difficult to contest without exploring the motivations of the Committee. For example, President Trump has objected that efforts to secure his tax and other records are motivated by an effort to embarrass or undermine him. Congressional investigations will often produce negative collateral consequences for witnesses that can range from job terminations to divorces to criminal charges. The Court, however, has been consistent in not treating consequences or motivations as the determinative factors. For example, in *Sinclair v. United States*,²² the Senate pursued testimony from Harry F. Sinclair who refused to answer because he was facing a criminal trial on the allegations, stating “I shall reserve any evidence I may be able to give for those courts.”²³ His counsel objected that the Senate was trying to elicit testimony and evidence outside of the court system. The concern was a legitimate one for a criminal defense. However, it is not a legitimate objection to a subpoena, though invoking the privilege against self-incrimination would have been available absent a grant of immunity. The Court considered the collateral consequences to the trial as entirely immaterial because lawsuits or trials do not “operate[] to divest the Senate or the committee of power further to investigate the actual administration of the land laws.”²⁴ The Court has spoken honestly about its disinclination to judge the propriety or wisdom of broad committee functions:

It is, of course, not the function of this Court to prescribe rigid rules for the Congress to follow in drafting resolutions establishing investigating committees. That is a matter peculiarly within the realm of the legislature, and its decisions will be accepted by the courts up to the point where their own duty to enforce the constitutionally protected rights of individuals is affected. An excessively broad charter, like that of the House Un-American Activities Committee, places the courts in an untenable position if they are to strike a balance between the public need for a particular interrogation and the right of citizens to carry on their affairs free from unnecessary governmental interference. It is impossible in such a

²² See generally *Sinclair v. United States*, 279 U.S. 263 (1929).

²³ *Id.* at 270.

²⁴ *Id.* at 272.

situation to ascertain whether any legislative purpose justifies the disclosures sought and, if so, the importance of that information to the Congress in furtherance of its legislative function. The reason no court can make this critical judgment is that the House of Representatives itself has never made it. Only the legislative assembly initiating an investigation can assay the relative necessity of specific disclosures.²⁵

The current argument that Congress should be presumed to have an illegitimate or purely partisan motivation is, ironically, the same type of argument that the Trump Administration has been opposing in various courts. The Trump Administration argued that lower courts wrongly assigned a discriminatory intent in reviewing his travel ban. He also continues to argue that Congress is wrong to assume a “corrupt intent” on obstruction when non-criminal motivations were detailed in the Special Counsel Report. Yet, it is now asking the court to presume the same ill-motive in rejecting any legitimate purpose behind the exercise of oversight authority.

Some of us have expressed skepticism about the purpose of the subpoena fight, which will serve to delay any impeachment proceeding over a public report that was over 92 percent unredacted and a non-public report to select members that was 98 percent unredacted.²⁶ However, the desire to see the full report or underlying evidence can be justified as related to the need to ascertain the evidence of criminal acts. Some of the demands of Congress (like multiple years of tax and transactional evidence)²⁷ could present more challenging arguments on a legislative purpose, but the Judiciary Committee’s demand for evidence underlying the Mueller report should be viewed as squarely within a legislative purpose.

C. Pertinence

The final prong under *Wilkinson* is that the congressional demand for testimony or documents is pertinent and reasonably related to the matter under investigation. The demands linked to the underlying evidence of the Special Counsel are likely to satisfy the pertinence element. That could be more challenging, again, under some of the demands of other committees like the prior tax records.

This factor will also apply to the scope of witness testimony. Pertinence is a standard component for reviewing the obligation of witnesses and was articulated by the Supreme Court in *Watkins v. United States*:

²⁵ *Watkins v. United States*, 354 U.S. 178, 205-06 (1957).

²⁶ See e.g., Jonathan Turley, *Impeachment or Investigation? Democrats Send Mixed Message*, The Hill, May 11, 2019 (available at <https://thehill.com/opinion/white-house/443237-impeachment-or-investigation-democrats-send-mixed-signals>).

²⁷ The demand for multiple years of tax returns have only been defended as vaguely relevant to a legislative purpose. However, even on such an ambiguous purpose, a district court is likely to uphold the scope of a subpoena given past cases in favor of Congress. The danger is when that limited record will then be tested on appeal. Andrew Duehren, *Court Hearing Over Trump’s Accounting Firm Will Have Long-Lasting Consequences*, The Wall Street Journal, May 14, 2019.

[C]ommittees are restricted to the missions delegated to them, i.e., to acquire certain data to be used by the House or the Senate in coping with a problem that falls within its legislative sphere. No witness can be compelled to make disclosures on matters outside that area. This is a jurisdictional concept of pertinency drawn from the nature of a congressional committee's source of authority.²⁸

Thus, if questions are unconnected to the underlying investigation, it could be challenged. In *Watkins*²⁹, the Court reversed a conviction of a witness who refused to give testimony before the House Committee on Un-American Activities. The Committee's purpose was to investigate the Communist infiltration of organized labor. However, roughly one-quarter of the individuals that labor leader John Thomas Watkins was asked about were unconnected to labor. The questions that he refused to answer were outside of the legislative purpose stated by the Committee. The same result occurred in *Sacher v. United States*,³⁰ where the Court ordered the dismissal of an indictment by a witness who refused to answer questions that were not pertinent to the authorized subject matter of the Subcommittee on Internal Security of the Senate Judiciary Committee.

While expressing great deference to congressional investigation within proper authorizations, the Court in *Watkins* stressed that "broad as is this power of inquiry, it is not unlimited."³¹ As important as those limitations are, however, they are generally stated and relatively easily satisfied for any good-faith investigation. The Court has stressed that Congress has "no general authority to expose private affairs of individuals without justification in terms of the functions of the Congress." Moreover, "[n]o inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress. Investigations conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated are indefensible."³² Thus, specific questions can be objected to as outside of the subject matter³³ or fatally ambiguous in a congressional order.³⁴ However, the Court has also recognized that:

²⁸ *Watkins*, 354 U.S. at 206.

²⁹ See generally *id.*.

³⁰ See generally *Sacher v. United States*, 356 U.S. 576 (1958); see also *Knowles v. United States*, 280 F.2d 696, 696 (D.C. Cir. 1960) (finding subcommittee failed to establish pertinency of the questions for the witness); *Bowers v. United States*, 202 F.2d 447, 447 (D.C. Cir. 1953) (lack of demonstrated pertinency to sustain charge).

³¹ *Watkins*, 354 U.S. at 187.

³² *Id.*

³³ *Russell v. United States*, 369 U.S. 749, 767-78 (1962) (finding indictment invalid for failure to clearly state the subject matter of the questions) ("It is difficult to imagine a case in which an indictment's insufficiency resulted so clearly in the indictment's failure to fulfill its primary office—to inform the defendant of the nature of the accusation against him. Price refused to answer some questions of a Senate subcommittee. He was not told at the time what subject the subcommittee was investigating.")

³⁴ *Flaxer v. United States*, 358 U.S. 147, 151 (1958) (overturning the conviction based on ambiguity of the order to turn over list containing names and addresses to

“The wisdom of congressional approach or methodology is not open to judicial veto. . . . Nor is the legitimacy of a congressional inquiry to be defined by what it produces. The very nature of the investigative function - like any research - is that it takes the searchers up some ‘blind alleys’ and into nonproductive enterprises. To be a valid legislative inquiry there need be no predictable end result.”³⁵

The Court has distinguished cases like *Watkins* on the basis that they involved prior violations that resulted in criminal prosecutions. The *Watkins* conditions are met so long as there is continuity between the stated and legitimate purpose of the hearing and the questions posed to witnesses.³⁶

III. The White House Has Sufficient Grounds For Claiming Executive Privilege

The question next turns to whether the White House has asserted a proper claim of executive privilege. I have been critical of the Trump Administration’s instructions for witnesses not to answer questions on the possible basis of executive privilege. Congress was correct in objecting that such assertions need to be made through a proper declaration to Congress. I was equally critical of such refusals in prior administrations, including the Obama Administration. In relation to the Judiciary Committee demands, however, the Trump Administration has issued a formal assertion. Like the Committee subpoena, it is sweeping and unlikely to be upheld in its full scope. However, courts should recognize that much of the material and testimony falls within recognized areas of protected presidential communications and other privileges.

A. A Brief History of Executive Privilege

While not mentioned in the Constitution, executive privilege in some form can be traced back to George Washington.³⁷ Tensions between the chief executive and the judicial and legislative branches began almost immediately in the newly-created

Senate Committee) (“We stated in *Watkins v. United States*, . . . in reference to prosecutions for contempt under this Act that ‘the courts must accord to the defendants every right which is guaranteed to defendants in all other criminal cases.’”).

³⁵ *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 509 (1975).

³⁶ *Braden v. United States*, 365 U.S. 431, 431 (1961) (upholding Braden’s conviction for refusing to answer questions before subcommittee of the House Un-American Activities Committee); *Barenblatt v. United States*, 360 U.S. 109, 109 (1958) (upholding conviction for contempt of Congress for refusing to answer whether petitioner was or had ever been a member of the Communist Party).

³⁷ See generally Jonathan Turley, *Paradise Lost: The Clinton Administration and the Erosion of Presidential Privilege*, 60 MD. L. REV. 205 (2000) (Symposium); See Mark J. Rozell, *Executive Privilege: The Dilemma of Secrecy and Democratic Accountability* 37-48 (1994).

government. George Washington first invoked the doctrine in 1796 that certain documents relating to the controversial Jay Treaty were outside the legitimate interests of Congress and could be withheld by the president.³⁸ Invoking the principle of the separation of powers, Washington insisted that “the boundaries fixed by the Constitution between the different departments should be preserved, a just regard to the Constitution and to the duty of my office ... forbids a compliance with your request.”³⁹ Many of the early assertions of executive privilege were excessive and ignored the legitimate oversight authority of Congress. There was a paradigm shift with modern administrations where executive privilege became a central element in an expanding American presidency. President Eisenhower was particularly robust in his use of such claims.⁴⁰

The modern doctrine of executive privilege was the creation of the Supreme Court’s 1974 decision in *United States v. Nixon*,⁴¹ where the Court compelled President Richard Nixon to surrender audio tapes from the White House that were relevant to the Watergate scandal. Notably, there has been a certain ebb and flow to assertions as periods of scandal are followed by periods of restraint. After the Nixon crisis, the next two administrations showed both a notable disinclination for assertions of privilege and a determination not to test the scope of privilege in court. The presidencies of Gerald Ford and Jimmy Carter were called “the open presidencies,” due, in part, to their reluctance to rely on executive privilege.⁴² However, the Reagan Administration ramped up such assertions in congressional efforts to investigate the matters from the obstruction of environmental laws to the Iran-Contra affair. Again, those controversies were followed by a period of relative restraint in the Bush Administration, which maintained that it would be used “only if absolutely necessary.”⁴³

The pendulum then swung back with a vengeance during the Clinton Administration. Congress was investigating a variety of controversies from firing of employees working for the White House Travel Office to the Clinton’s anti-drug programs to Clinton’s grant of clemency to several members of the Armed Forces of National Liberation (FLAN). This included demands for notes from former White House Counsel John Quinn. Much like the controversy of the security clearances ordered by

³⁸ Rozell, *supra*, at 35-48.

³⁹ *Id.* at 35 (quoting 1 James Richardson, A Compilation of the Messages and Papers of the Presidents 186-87 (1897)).

⁴⁰ As I discussed in a prior work on executive privilege, it is notable that some of the most expansive views of privilege have come from former generals. Turley, *supra*; see also Rozell, *supra* note 12, at 32-46 (discussing the use of executive privilege by former generals such as Presidents George Washington, Andrew Jackson, James K. Polk, and Dwight D. Eisenhower). While certainly not an exclusive list, it does suggest a certain cultural predilection toward claims of authority to withhold information for the greater good. In addition to Presidents Washington and Eisenhower, Presidents (and former Generals) Jackson, Polk, and Grant were particularly resistant to congressional demands. See *id.*

⁴¹ 418 U.S. 683 (1974).

⁴² Rozell, *supra*, at 83.

⁴³ *Id.* at 125

President Trump. Travelgate involved allegations of abusive conduct in the White House. Clinton denied any involvement but Congress investigated allegations of the abusive use of the Internal Revenue Service and the Federal Bureau of Investigation to investigate Travel Office employees. In May 1996, Quinn conveyed Clinton's formal assertion of executive privilege over those documents. Like Trump's recent claim that House investigations depart from areas of legitimate congressional concern, Clinton asserted that this was simply a matter not worthy of congressional oversight.⁴⁴ It was a facially excessive assertion. Again, over the opposition of the Democratic members, Quinn was held in contempt by the Committee with former White House Director of Administration David Watkins and White House aide Matthew Moore.⁴⁵ The White House then released some of the documents and issued a privilege log for material still subject to a privilege assertion. The documents confirmed that Clinton did ask for an FBI investigation into one of the employees—an act for which he later apologized. He also pardoned two former powerful Democratic congressmen, Dan Rostenkowski and Mel Reynolds.

Clinton also invoked executive privilege over the investigation into the FBI-DEA drug policies. He would also invoke over the investigation into the pardoning of the FLAN defendants, a move that critics charged was calculated to help first lady Hillary Clinton in her effort to win the New York Senate seat by appealing to Puerto Rican voters. Congress ultimately held hearings but did not litigate the question. It was notable that this investigation into abuse of the pardon power was followed that year with one of the greatest abuses of pardon authority by a sitting President. On January 20, 2001, Clinton pardoned his own brother, Roger Clinton. He also pardoned Marc Rich, a wealthy Democratic donor who was a fugitive from justice and widely viewed as one of the least worthy recipients of a pardon in history. He also pardoned his former friend, Susan McDougal, who was convicted in the Whitewater scandal involving both Clintons but never implicated them.

George W. Bush joined Clinton in proving, to quote Oscar Wilde, that “nothing succeeds like excess” when it comes to executive privilege. Bush invoked executive privilege repeatedly, including in response to a congressional investigation of the decision of former Attorney General Jane Reno to block the appointment of a Special Counsel to investigate campaign finance violations by the 1996 Clinton presidential campaign. Assertions were also made over corruption allegations in the Boston office of the FBI and decisions of the Environmental Protection Agency on regulating greenhouse gases. Two other controversies are closer to the current conflicts. One was to block material related to the public disclosure of the identity of Central Intelligence Agency Valerie Plame and the investigation of the removal of various United States Attorneys. Notably, on the FBI investigation both Republicans and Democrats opposed the assertions of executive privilege. Eventually, the Committee was allowed to see six of ten documents. On the Plame scandal, the Bush Administration invoked deliberative process privilege but refused to produce even a privilege log. Nevertheless, the Democratic majority allowed the privilege assertion to stand unchallenged in court.

⁴⁴ *Committee to Vote on Contempt of Congress Resolution in Travel Office Matter*, Government Press Releases, FEDERAL DOCUMENT CLEARING HOUSE (May 8, 1996), 1996 WL 8786618.

⁴⁵ H.R. REP. NO. 104-598 (1996).

The controversy over the forced resignations of the United States Attorneys involved allegations of political manipulation of the Justice Department—analogous to some of the allegations being raised in this Administration. Again, the former White House Counsel Harriet Miers was asked to give testimony as well as Chief of Staff Joshua Bolten. Bush invoked executive privilege over all of the evidence to protect the internal deliberations of the Executive Branch and “to protect fundamental interests of the Presidency.”⁴⁶ Miers and Bolten were held in contempt and the cases referred to the Justice Department for prosecution. As I have discussed in prior testimony,⁴⁷ the Justice Department followed its long and troubling pattern of simply disregarding such referrals and refusing to present them to grand juries.

The Miers/Bolten matter illustrated how presidents can use excessive privilege assertions to run out the clock on Congress. Faced with the refusal of the Administration to submit the case to the grand jury, the House Judiciary Committee filed a civil suit to compel the testimony of Miers and the production of the evidence by Bolten. The Administration lost its claims before the district court which found no support for the Bush assertions of privilege. The Administration then appealed and the D.C. Circuit issued a temporary stay of the district court order to produce the evidence and testimony. It noted that the matter would likely be moot due to the end of that Congress. In doing so, it spared the Bush Administration a major judicial loss. The Administration then reached an accommodation with Congress.

The Obama Administration ramped up executive privilege fights even further over the course of eight years of conflicts with congressional committees. Various oversight committees have objected to the withholding of documents and witnesses in various investigations related to areas ranging from the Internal Revenue Service’s alleged targeting of conservative organizations to the Bergdahl prisoner swap. The most notable and abusive was the decision to withhold evidence in the “Fast and Furious” scandal—a controversy that resulted in Attorney General Eric Holder being held in contempt. Fast and Furious is a prototypical example of a program that is legitimately a focus of congressional oversight authority. A federal agency was responsible for facilitating the acquisition of powerful weapons by criminal gangs, including weapons later used to kill United States Border Patrol Agent Brian Terry in December 2010. Congress has investigated not only the “gunwalking” operation, but also what it saw as concealment and obstruction, by the Administration, in its efforts to investigate the operation. Second, Congress had ample reason to expand its investigation after the Justice Department sent a letter on February 4, 2011 stating categorically that no gunwalking had taken place.⁴⁸ It was not until December 2011 that Attorney General

⁴⁶ *Comm. on the Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53, 56 (D.D.C. 2008).

⁴⁷ See generally United States House of Representatives, House Judiciary Committee, Regulatory Reform, Commercial and Antitrust Law, “*Examining The Allegations of Misconduct of IRS Commissioner John Koskinen*” June 22, 2016 (testimony and prepared statement of Jonathan Turley).

⁴⁸ In the letter, Assistant Attorney General Ronald Weich wrote to Senator Grassley: “[T]he allegation . . . that [ATF] ‘sanctioned’ or otherwise knowingly allowed the sale of assault weapons to a straw purchaser who then transported them into Mexico — is false.

Holder informed Congress that it had been given false information and the letter was formally withdrawn. Congress responded by expanding the investigation into the false information and the months of delay in notifying Congress of the misrepresentation of the facts underlying Fast and Furious.

It is worth noting that the Administration in litigation over these claims presented the most extreme possible claims: not only refusing documents to investigatory committees in violation of legitimate legislative authority but contesting that a court can even rule on such a conflict in rejection of judicial authority.⁴⁹ As Judge Amy Berman Jackson wrote,

“In the Court’s view, endorsing the proposition that the executive may assert an unreviewable right to withhold materials from the legislature would offend the Constitution more than undertaking to resolve the specific dispute that has been presented here. After all, the Constitution contemplates not only a separation, but a balance, of powers.”⁵⁰

As I have previously testified,⁵¹ Judge Jackson was, if anything, restrained in her reaction. The Justice Department’s position was conflicted and, in my view, incoherent from a constitutional standpoint, particularly after its admission of giving false information to Congress.⁵² After the House issued a subpoena for documents generated before and after February 4, 2011 only a partial production of documents was made by the Justice Department. Rather than recognizing the added burden of disclosure

ATF makes every effort to interdict weapons that have been purchased illegally and prevent their transportation to Mexico.”

⁴⁹ *Comm. on Oversight & Gov’t Reform v. Holder*, 979 F. Supp. 2d 1, 2-3 (D.D.C. 2013). The Department has adopted a position at odds with long-standing and some more recent precedent out of the D.C. Circuit. See *United States v. AT&T*, 551 F.2d 384, 390, 179 U.S. App. D.C. 198 (D.C. Cir. 1976) (“the mere fact that there is a conflict between the legislative and executive branches over a congressional subpoena does not preclude judicial resolution of the conflict.”); see also *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008).

⁵⁰ *Holder*, 979 F. Supp. 2d at 3.

⁵¹ *Confirmation Hearing for Attorney General Nominee Loretta Lynch: Hearing Before the S. Comm. on the Judiciary*, 114th Cong. (2015) (prepared statement of Jonathan Turley)

⁵² The Administration did prevail recently in the case of *Electronic Frontier Foundation v. U.S. Department of Justice*, where the D.C. Circuit ruled that the Administration could withhold an OLC Opinion that allegedly authorized the FBI to obtain telephone records from service providers under certain circumstances without a “qualifying emergency.” The D.C. Circuit ruled that, since the FBI did not adopt the recommendation, the opinion was not “working law” that would have to be turned over under the Freedom of Information Act. Yet, under FOIA, agencies must disclose their “working law,” i.e. the “reasons which [supplied] the basis for an agency policy actually adopted.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 152-53 (1975). However, once again, this is not the same standard that applies to Congress. Moreover, even if the standard were the same, the fights with Congress involved documents that were withheld for months but later recognized to be unprivileged.

following its admitted false statement to Congress, the Department refused to produce clearly relevant documents. Then, in a June 20, 2012 letter, Deputy Attorney General, James M. Cole, informed Congress that the President had asserted executive privilege over documents dated after February 4, 2011. The stated rationale was that their disclosure would reveal the agency's deliberative processes—a clearly overbroad and unsupportable assertion over the requested evidence. Indeed, the Justice Department seemed hopelessly or intentionally unclear as to the scope of deliberative privilege, particularly in the distinction between this exception under FOIA and the common law versus its meaning under constitutional law.⁵³ In his June 20, 2012 letter, Deputy Attorney General Cole stated:

[T]he President, in light of the Committee's decision to hold the contempt vote, has asserted executive privilege over the relevant post-February 4 documents. The legal basis for the President's assertion of executive privilege is set forth in the enclosed letter to the President from the Attorney General. In brief, the compelled production to Congress of these internal Executive Branch documents generated in the course of the deliberative process concerning the Department's response to congressional oversight and related media inquiries would have significant, damaging consequences. As I explained at our meeting yesterday, it would inhibit the candor of such Executive Branch deliberations in the future and significantly impair the Executive Branch's ability to respond independently and effectively to congressional oversight. Such compelled disclosure would be inconsistent with the separation of powers established in the Constitution and would potentially create an imbalance in the relationship between these two co-equal branches of the Government.

I remain unclear about what the Justice Department believed is a more troubling "imbalance" than its denial to Congress of clearly material evidence needed for oversight. Congress was investigating the Department's false statement and withholding of clearly unprivileged documents from the oversight committee. The position of the Department was that it could unilaterally withhold material that might incriminate its own conduct and officers through a largely undefined claim of deliberative process.

This confusion deepened further when the Department later admitted that virtually all of the documents withheld for months were unprivileged. On November 15, 2013, the Attorney General stated in court filings that he was withholding documents responsive to the Holder Subpoena that "do not . . . contain material that would be considered deliberative under common law or statutory standards."⁵⁴ The notion of a deliberative process privilege claim over non-deliberative documents was also made in the letter of General Holder to President Obama seeking a sweeping claim of executive privilege: "[b]ecause the documents at issue were generated in the course of the deliberative process concerning the Department's responses to congressional and related media inquiries into Fast and Furious, the need to maintain their confidentiality is heightened.

⁵³ 5 U.S.C. § 552(d) (FOIA "is not authority to withhold information from Congress"); *Murphy v. Dep't of the Army*, 613 F.2d 1151 (D.C. Cir. 1979) (holding that deliberative process and FOIA exemptions are inapplicable to Congress).

⁵⁴ Def.'s Mot. For Certification of This Ct.'s Sept. 30, 2013 Order for Interlocutory Appeal . . . at 8-9 (Nov. 15, 2013).

Compelled disclosure of such material, *regardless of whether a given document contains deliberative content*, would raise ‘significant separation of powers concerns.’”⁵⁵

In addition to a hopelessly confused notion of deliberative process, the Justice Department failed to explain why it was clearly within the authority of Congress to demand production of documents to determine whether officials knew that the Department was giving false information to Congress in the February 4, 2011 letter, but somehow Congress had no such authority to material showing whether and when officials know of the falsehood after February 4, 2011. Both sets of material concerned allegations of lying to Congress as well as the American people. Under the claims advanced by the White House, not only would courts be closed to challenges of presidents withholding evidence but also any material deemed in any way responsive to congressional inquiries would be per se privileged and capable of being withheld at the discretion of the Department.

This history has now culminated with sweeping assertions of executive privilege in the Trump Administration. For those of us who have long been critical of executive privilege assertions, President Trump took a commendable position in waiving executive privilege to the full extent of the public released report. This report was hundreds of pages of potentially privileged material. In doing so, Trump set a high standard for transparency. That high ground however was lost when the White House responded to an array of subpoenas with sweeping privilege assertions. Given this Committee’s recent vote of contempt, I will focus on the demand for evidence related to the Special Counsel’s investigation.

B. The Assertion of Privilege Over Undisclosed Material From The Mueller Report

On May 8, 2019, the Trump Administration invoked a “protective assertion of executive privilege” in a letter from Assistant Attorney General Stephen E. Boyd to Judiciary Chairman Jerrold Nadler. The assertion cites the 1996 opinion of Attorney General Janet Reno⁵⁶ and states that “this protective assertion of executive privilege ensures the President’s ability to make a final decision whether to assert privilege following a full review of these materials.” The assertion is not to the full Mueller Report as erroneously claimed. The White House has already been waived as to the hundreds of pages in the public report. The protection assertion is only to the “subpoenaed material” which demands redacted and supporting material.

⁵⁵ Letter of Attorney General Eric Holder To President Barack Obama, June 19, 2012 (citing *WHCO Documents Assertion*, 20 Op. O.L.C. at 3) (emphasis added) (available at http://www.justice.gov/sites/default/files/olc/opinions/2012/06/31/ag-ff-exec-priv_0.pdf) (citing *WHCO Documents Assertion*, 20 Op. O.L.C. at 3). The letter based this view on the claim that such disclosure to Congress would “significantly impair” its “ability to respond independently and effectively to matters under congressional review.” *Id.*

⁵⁶ See *Protective Assertion of Executive Privilege Regarding White House Counsel’s Office Documents*, 20 Op. O.L.C. 1 (1996) (opinion Attorney General Janet Reno).

Courts have long recognized that the President may decline “when asked to produce documents or other materials that reflect presidential decision-making and deliberations and that the President believes should remain confidential.”⁵⁷ Clearly, much of the evidence gathered by the Special Counsel concerns such presidential communications directly with him or his key advisers. Such key advisers are also covered by the presidential communications privilege.⁵⁸ As a threshold matter, the investigation clearly touched on protected areas of communications from Trump’s exchanges with key staff and government officials to memoranda generated as part of the deliberations in the White House and the Executive Branch. As such, a presumptively valid claim exists and courts will ordinarily consider specific communications and documents to weigh the privilege arguments against the value of disclosure.

There are a variety of privileges raised by the Special Counsel investigation, including attorney-client privilege, deliberative process privilege, and presidential communications privilege. Valid claims under all three privileges can be made in this context, but this testimony focused on the latter two privileges as species of executive authority. In the foundational *Nixon* case, there was little distinction evident between the deliberative process privilege and the presidential communications privilege. However, the D.C. Circuit in *Espy* did draw the distinction.⁵⁹ The deliberative process privilege is the broadest protection for “decision-making of executive officials generally.” The “presidential communications privilege” is narrower but more readily defended to offer presidents a level of confidentiality for his own decision-making with his aides and staff. *Espy* established that Agriculture Secretary Alphonso Michael Espy should be considered as still part of presidential communications because “the public interest is best served by holding that communications made by presidential advisers in the course of preparing advice for the President come under the presidential communications privilege, even when these communications are not made directly to the President.”⁶⁰ That would mean that President Trump can invoke privilege for not just his direct communication with aides and other officials but that the communications of aides and officials along themselves can be covered by the presidential communication privilege. However, as shown in *Judicial Watch v. Department of Justice*, the presidential communication privilege can be lost if communications concern officials or offices not in immediate communications with the White House.⁶¹ Those communications may however still be subsumed within the deliberative process privilege so long as the Administration can show that they are pre-decisional and deliberative communications.

As with the basic congressional demand, the privilege assertion by the White House is squarely in line with past cases and practices. The issue therefore becomes whether a waiver has been made and, ultimately, the merits in any balancing of the respective interests of the two branches.

⁵⁷ *In re Sealed Case (Epsy)*, 121 F.3d 729, 744 (D.C. Cir. 1997).

⁵⁸ *See, e.g., U.S. Dep’t of Treasury v. Pension Benefit Guar. Corp.*, 249 F. Supp. 3d 206, 209 (D.D.C. 2017).

⁵⁹ *Espy* at 737-38.

⁶⁰ *Id.* at 751-52.

⁶¹ *Judicial Watch v. Dep’t of Justice*, 365 F.3d 1108, 1120 (D.C. Cir. 2004).

IV. There Was No Blanket Waiver of Executive Privilege

Various members of Congress and commentators have declared that the White House has already waived executive privilege by allowing White House officials to testify and allowing the Special Counsel to review hundreds of thousands of documents.⁶² This argument however might have more foundation if Robert Mueller was an Independent Counsel outside of the Justice Department. He is instead a Special Counsel who is not only part of the Executive Branch but part of the Justice Department subject to the supervision of both the Attorney General and Deputy Attorney General. From the perspective of the White House, revealing information to Mueller was akin to the Executive Branch speaking with itself.

Before the release of the report, I wrote about an emerging privilege strategy where the White House allowed full cooperation with Mueller while opposed disclosures to Congress.⁶³ I have previously stated that I believe that the White House failed to properly assert privilege in instructing witnesses not to answer congressional questions in anticipation of possible assertions of privilege. However, a clear line was maintained by the White House between disclosures to Mueller as opposed to Congress.

The White House distinction is well-founded in existing precedent. A leading case on this question is again the *Epsy* case. The case has some obvious analogies to the current controversy. There was a public report issued by the White House on its investigation into the alleged wrongdoing by the former Secretary of Agriculture. The underlying evidence supporting the public report was sought by the Office of Independent Counsel. The case resulted in a standard *in camera* review and the court ruled in favor of White House. After an appeal by the OIC alleging a waiver due to the public release of the report, the D.C. Circuit ruled not only in favor of the executive privilege assertion but against the claim of waiver. The Court reaffirmed that “Since executive privilege exists to aid the governmental decision-making process, a waiver should not be lightly inferred.”

A more difficult question is raised with regard to a waiver of some material not because of the disclosure to the Special Counsel but to personal counsel. President Trump is known to have maintained a large array of lawyers with differing functions from White House counsel to personal counsel. This mixing of teams is a dangerous and ill-advised practice, but there appear to have been a few “walls” maintained by the Trump legal team. As a result, an argument can be made that documents reviewed by personal or private counsel constitutes a waiver in the same way that attorney-client privilege can

⁶² Indeed, some commentators like former Gov. Chris Christie and former Clinton Chief of Staff Raoul Emanuel have argued that President Trump was too cooperative and transparent with the Special Counsel. Jonathan Turley, *Christie and Emanuel: Trump Should Not Have Allowed Staff To Speak Freely With Mueller*, May 13, 2019 (available at <https://jonathanturley.org/2019/05/13/christie-and-emanuel-agree-that-trump-should-not-have-allowed-staff-to-freely-speak-with-mueller/>).

⁶³ Jonathan Turley, *A Question of Privilege: How Trump Could Still Gut The Mueller Report*, The Hill, March 16, 2019.

be lost with disclosure to third parties.⁶⁴

Once again, *Epsy* is instructive. The D.C. Circuit noted that, while waiver can occur with privileges through third party disclosures, a blanket approach would be inappropriate in the context of executive privilege:

“It is true that voluntary disclosure of privileged material subject to the attorney-client privilege to unnecessary third parties in the attorney-client privilege context ‘waives the privilege, not only as to the specific communication disclosed but often as to all other communications relating to the same subject matter.’ . . . But this all-or-nothing approach has not been adopted with regard to executive privileges generally, or to the deliberative process privilege in particular. Instead, courts have said that release of a document only waives these privileges for the document or information specifically released, and not for related materials. . . . This limited approach to waiver in the executive privilege context is designed to ensure that agencies do not forego voluntarily disclosing some privileged material out of the fear that by doing so they are exposing other, more sensitive documents. . . .”⁶⁵

The court found waiver as to the specific documents shared with third parties but not a general waiver.⁶⁶ Of course, there still raises the question of whether a disclosure to one’s own counsel would constitute a waiver to the specific evidence or documents under review. An inquiry into the scope of such a waiver would delve deeply into attorney-client communications, but a court could make such an inquiry *in camera*. Likewise, in *Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Justice*,⁶⁷ the D.C. District court ruled the office of the Vice President Dick Cheney did not waive executive privilege in disclosing material to a special counsel.

Recently, the U.S. District Court for the District of Columbia explored the waiver of the deliberative process privilege due to an inadvertent disclosure by the D.C. government. It drew a distinction between waiver of privileges tied to the government’s interests (deliberative process privilege) as opposed to that of a person (attorney-client privilege) in ruling against waiver: “Unlike the public release of a document, an inadvertent disclosure does not reflect an intent to abandon a privilege. Making waiver the automatic consequence of such a mistake would undermine the important interests that the deliberative process privilege serves.”⁶⁸

⁶⁴ *In re Sealed Case*, 121 F.3d at 741; see, e.g., *Heffernan v. Azar*, 317 F. Supp. 3d 94, 120 (D.D.C. 2018); *Elec. Frontier Found. v. U.S. Dep’t of Justice*, 890 F. Supp. 2d 35, 46 (D.D.C. 2012).

⁶⁵ *In Re Sealed Case*, 121 F.3d at 741.

⁶⁶ *United States v. Wells Fargo Bank, NA.*, No 12-ev-7527 (JMF), 2015 U.S. Dist. LEXIS 143814, 2015 WL 6395917, at *1 (S.D.N.Y. Oct. 22, 2015) (“[C]ourts have overwhelmingly (if not uniformly) held that the release of a document only waives the deliberative process privilege for the document that is specifically released, *and not* for related materials.”).

⁶⁷ 658 F. Supp. 2d 217 (D.D.C. 2009).

⁶⁸ *Mannina v. District of Columbia*, 2019 U.S. Dist. LEXIS 76260 at 24-25.

A challenge on this issue could well make new law but it is not clear what law Congress would want to make in this regard. The implications of such a waiver would weigh heavily with a court and should weigh heavily with Congress. If such a disclosure to personal counsel constitutes a waiver of executive privilege, would members of Congress be stripped of their privileges in the same way in conferring with private counsel? The material in question is not simply one's individual records or interest. The privilege—and underlying material—rest with the public office. A waiver rule would mean that public officials cannot seek legal advice for their own protection even when private counsel is bound by confidentiality not to release the information. Moreover, we do not know potentially relevant information like whether private counsel signed non-disclosure agreements (NDAs) or other confidentiality agreements with the Executive Branch.

To rule in favor of waiver in this case, no president could discuss underlying evidence in an investigation that has implications for him or her as both an individual and an officeholder. It would create a serious conflict of interest for a president who would have to waive executive privilege in order to protect his own interests. Congressional investigations often raise such dual implications with officials routinely hiring private counsel to assist them in protecting their own rights. Additionally, former officials (like many involved in the current controversies) have lingering liability issues in appearing before Congress and may have to discuss information still held by the Executive Branch as privileged. If any such communications with counsel constitute a waiver, the important protections of the office, highlighted by these courts, would be compromised. Moreover, there is the question of who can waive such privileges in speaking with counsel. The documents secured by the Special Counsel are relevant to a host of officials, including many with private counsel. This would seem the less intrusive option for both members of the legislative and executive branches. There are a variety of government contractors who may have access to a document, but are also subject to confidentiality as is a private attorney. The alternative is to allow confidential disclosure to private counsel under the auspices of the White House Counsel's office. Whatever approach a court chooses, it is likely to adopt the narrowest scope of such waivers. As a result, even if a court finds disclosure to private counsel is a waiver, a court would require document-specific review under current controlling precedent—a detailed review that would require difficult disclosures of attorney-client communications and preparations.

V. The Balancing Of Legislative And Executive Interests

The analysis thus indicates that both Congress and the White House have valid threshold claims and that the White House has the advantage on the issue of waiver. Even if there is a waiver, it would likely be confined as part of a document-specific analysis over the course of a judicial in camera review. That leaves the merits on a balancing of interests between the executive and legislative branches.

As previously noted, the House of Representatives has elected to litigate these issues as a matter of oversight authority rather than the stronger grounds of an impeachment inquiry. In so doing, the House is curiously playing the same hand that it

lost in *Senate Select Committee v. Nixon*.⁶⁹ In that case, the United States Senate Select Committee on Presidential Campaign Activities sought to force President Nixon to comply with its subpoena duces tecum, directing him to produce “original electronic tapes” of five conversations between the President and his former Counsel, John W. Dean, III. The district court ruled against the Committee, and the D.C. Circuit upheld the decision. The Committee (like this one) was proceeding under oversight authority, and the D.C. Circuit ruled: “There is a clear difference between Congress’s legislative tasks and the responsibility of a grand jury, or any institution engaged in like functions. While fact-finding by a legislative committee is undeniably a part of its task, legislative judgments normally depend more on the predicted consequences of proposed legislative actions and their political acceptability, than on precise reconstruction of past events.”

The treatment afforded the House under its impeachment authority was sharply different. The court noted:

“Since passage of that resolution, the House Committee on the Judiciary has begun an inquiry into presidential impeachment. The investigative authority of the Judiciary Committee with respect to presidential conduct has an express constitutional source.³⁸ Moreover, so far as these subpoenaed tapes are concerned, the investigative objectives of the two committees substantially overlap: both are apparently seeking to determine, among other things, the extent, if any, of presidential involvement in the Watergate ‘break-in’ and alleged ‘cover-up.’ And, in fact, the Judiciary Committee now has in its possession copies of each of the tapes subpoenaed by the Select Committee. Thus, the Select Committee’s immediate oversight need for the subpoenaed tapes is, from a congressional perspective, merely cumulative. Against the claim of privilege, the only oversight interest that the Select Committee can currently assert is that of having these particular conversations scrutinized simultaneously by two committees. We have been shown no evidence indicating that Congress itself attaches any particular value to this interest. In these circumstances, we think the need for the tapes premised solely on an asserted power to investigate and inform cannot justify enforcement of the Committee’s subpoena.”

The court clearly noted that the request would be cumulative given the disclosure to the House. However, the overall thrust of the opinion was that an oversight demand will be less compelling in a conflict with the executive branch than a demand made as part of an impeachment proceeding. Impeachment proceedings are viewed as having a quasi-judicial element. In *United States v. Nixon* (*Nixon I*), the Court upheld a judicial subpoena request by a special prosecutor for the Nixon tapes. The Court determined that “absent a [] need to protect military, diplomatic, or sensitive national security secrets,” the President’s “generalized interest in confidentiality” is outweighed by the “demonstrated, specific need for evidence in a pending criminal trial.”

As an oversight function, the House will have to show that that “the subpoenaed evidence is demonstrably critical to the responsible fulfillment of the [investigating] Committee’s functions.” At the same time, privilege is not absolute and the position of the White House is diminished in investigations raising criminal or impeachment

⁶⁹ 498 F.2d 725 (D.C. Cir. 1974).

offenses. Of course, there was not a finding of criminal conduct in the Special Counsel Report, though the Special Counsel expressly said that he was not exonerating the President on obstruction and declined to reach a conclusion. As I have previously stated, the Special Counsel's refusal to reach a conclusion (despite being asked to do so by both the Attorney General and Deputy Attorney General) is baffling. While I will not delve into the suggested rationales (including the claim that the Justice Department policy against indicting a sitting president compelled the decision), the decision of the Special Counsel is in my view entirely incomprehensible. Nevertheless, the record stands as rejecting criminal acts by President Trump by the Justice Department. Special Counsel Mueller determined that there was not evidence to support a criminal charge on collusion/conspiracy (Volume I) and both Attorney General Barr and Deputy Attorney General Rosenstein concluded that there was not enough evidence to support a charge of obstruction. Congress may still claim that it is investigating possible criminal conduct, but will do so within the context of this record and without the imprimatur of an impeachment inquiry. It may also pursue evidence related to abusive conduct or actions relevant to legislative reforms.

The House still has a valid interest in much of this evidence. However, it has undermined its position further with some of its initial challenges. I have previously discussed why the contempt sanction against General Barr was a mistake. It conspicuously did not include the oft-repeated and little supported claim of perjury. Instead, it was based on the failure to turn over the full and unredacted report—an act that he could not do as a matter of law. As I stated in the Barr confirmation hearing when members demanded an assurance that the still unfinished report would be publicly released without redactions, such demands are contrary to federal law and unlikely to receive a favorable reception in federal court. If this Committee was serious about bringing a civil contempt action to federal court, it could not take a less promising course of action in the current controversies. Indeed, this is a time where I sincerely hope that that the Committee action was never truly intended for a submission to federal court. If the Committee carries out its promise to submit the case to a federal court, it will succeed in playing literally the worst card in a strong hand against the Administration.

A. The Grand Jury Material

Since his confirmation hearing, members have demanded that Barr release the “full and unredacted report.” He has declined to do so, citing the federal law prohibiting the release of information from grand juries, which in turn has highlighted a bizarre disconnect between congressional demands and the requirements of federal law. Members of this Committee also demanded the release of the full and unredacted report.

Later in March, the House passed a resolution calling for the public release of the report “except to the extent the public disclosure of any thereof is expressly prohibited by law.”⁷⁰ But it too demanded the release of “the full release to Congress of any report, including findings, Special Counsel Mueller provides to the Attorney General”—again with with no exception for Rule 6(e) material in violation federal law. Later, the

⁷⁰ H. Con. Res. 24 (available at <https://www.congress.gov/bill/116th-congress/house-concurrent-resolution/24/text>).

Committee again demanded the release of the full and unredacted report in its subpoena and public statements. This time, it further claimed that that “neither Rule 6(e) nor any applicable privilege barred disclosure of these materials to Congress.”⁷¹

As the former counsel representing the Rocky Flats Grand Jury, I fought hard to establish that grand jury material could be released in matters of great public significance.⁷² We lost after years of litigation. Recently, the D.C. Circuit issued a decision reaffirming the secrecy of grand jury proceedings even in matters of great public interest. In *McKeever v. Barr*,⁷³ the D.C. Circuit affirmed the denial of a district court in refusing to release grand jury information concerning a 1957 indictment of a federal FBI agent. Despite the passage of time and great public interest, the court rejected the argument that such unsealed of grand jury information fell within the exceptions to Rule 6(e). The court adopted the narrow view of others circuits like the Sixth and Eighth Circuits that the interests of grand jury secrecy outweigh such demands for disclosure in the public interest. See *In re Grand Jury 89-4-72*, 932 F.2d 481, 488 (6th Cir. 1991) (“Rule 6(e)(3)(C)(i) is not a rule of convenience; without an unambiguous statement to the contrary from Congress, we cannot, and must not, breach grand jury secrecy for any purpose other than those embodied by the Rule.”); *United States v. McDougal*, 559 F.3d 837, 840 (8th Cir. 2009). In adopting its narrow view of the exceptions, the Court stated:

“That the list of enumerated exceptions is so specific bolsters our conclusion. For example, the first of the five discretionary exceptions in Rule 6(e)(3)(E) permits the court to authorize disclosure of a grand jury matter ‘preliminarily to or in connection with a judicial proceeding.’ Rule 6(e)(3)(E)(i). The second exception allows for disclosure ‘at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury.’ Rule 6(e)(3)(E)(ii). The other three exceptions provide that a court may authorize disclosure to certain non-federal officials ‘at the request of the government’ to aid in the enforcement of a criminal law. Rule 6(e)(3)(E)(iii)-(v); those provisions implicitly bar the court from releasing materials to aid in enforcement of civil law. Each of the exceptions can clearly be seen, therefore, as the product of a carefully considered policy judgment by the Supreme Court in its rulemaking capacity, and by the Congress, which in 1977 directly enacted Rule 6(e) in substantially its present form. See *Fund for Constitutional Gov’t*, 656 F.2d at 867. In interpreting what is now Rule 6(e)(3)(E)(i), for example, the Supreme Court stressed that the exception ‘reflects a judgment that not every beneficial purpose, or even every valid governmental purpose, is an appropriate reason for

⁷¹ This position was repeatedly stated by the Committee including in its resolution to hold General Barr in contempt. See e.g., *Resolution Recommending That The House of Representatives Find William P. Barr, Attorney General, U.S. Department of Justice, In Contempt of Congress for Refusal To Comply With A Subpoena Duly Issued By The Committee On The Judiciary*, 116th Cong. 1st. Sess. (available <https://judiciary.house.gov/sites/democrats.judiciary.house.gov/files/documents/FINAL%20BARR%20Contempt%20Report%20Barr%205.6.19.pdf>)

⁷² *In Re Special Grand Jury 89-2*, 2004 U.S. Dist. LEXIS 3942.

⁷³ *McKeever v. Barr*, 2019 U.S. App. LEXIS 10061 at *6.

breaching grand jury secrecy.’ *United States v. Baggot*, 463 U.S. 476, 480, 103 S. Ct. 3164, 77 L. Ed. 2d 785 (1983).”

This is a narrower view than some other circuits, including a recent decision by the Eleventh Circuit.⁷⁴ However, even under the more liberal reading of the rule, General Barr does not possess the authority claimed by the Committee to release grand jury material to Congress.

Notably, the D.C. Circuit in *McKeever* interpreted a key decision on grand jury material from the Watergate period in an equally narrow fashion. In *Haldeman v. Sirica*,⁷⁵ the plaintiff was seeking the release as a matter of the inherent discretion of a federal court as opposed to the specific enumerated exceptions. Judge Srinivasan, the dissenting judge in *McKeever*, objected that the majority was reading the decision of Judge Sirica in releasing the grand jury material as based solely on the view that an impeachment proceeding is a quasi-judicial proceeding. Sirica himself referenced the House Judiciary Committee in Watergate as acting as “a body that in this setting acts simply as another grand jury.”⁷⁶ The D.C. Circuit however was not clear on the question in the earlier decision. The recent decision would seem to limit any disclosure to the exceptions and that would make the decision of this Committee to proceed as a matter of oversight, rather than impeachment, a potentially determinative choice in any challenge on this issue.

Recently, this Committee acknowledged that such an order may be necessary but insisted that General Barr should ask for the disclosure. Presumably, therefore, any act of contempt does not include the withholding of the estimated two percent of material stemming from grand jury proceedings. Since 98 percent of the report was disclosed to key members, it is assumed that the two percent is Rule 6 (e) material. That would leave just six percent withheld in the public report.

B. Evidence of On-Going Investigations or Prosecutions

Most of the redactions in the publicly released report fall into the category of evidence tied to ongoing investigations or prosecutions. This is a standard basis for redaction and, more importantly, is likely to include material under court seal in cases like the prosecution of Roger Stone. Like Rule 6(e) information, this information would require a separate court order if under seal from a federal judge. It is unlikely that another federal judge would rule against General Barr for complying with standing orders of a federal court.

General Barr could indeed seek court orders for the release of this limited material, including Rule 6(e) material. However, there are countervailing interests for the Department that are anchored in long-standing Justice Department policies. Instead of seeking such disclosure, Barr made the disclosures to key members who are in a position to review the relatively small percentage of redactions and raise specific issues of

⁷⁴ *Pitch v. United States*, 915 F.3d 704 (11th Cir. 2019).

⁷⁵ 501 F.2d 714 (D.C. Cir. 1974).

⁷⁶ *In re Report & Recommendation of June 5, 1972 Grand Jury*, 370 F. Supp. 1219, 1230 (D.D.C. 1974).

redaction with Barr. That is likely to be viewed as a responsible approach to a federal court. The alternative approach would sweep too broadly. Congress would have to ask the court for a ruling that the Justice Department must release sealed or confidential information in criminal cases upon congressional demand. Since this is not an impeachment proceeding, Congress has already reduced the compelling case for such an exception. It is also worth noting that such a rule could create a slippery slope for courts since Congress could force disclosures related to criminal cases against favored parties outside of the scope of the Rules of Criminal Procedure. If courts decline to order such disclosure of Rule 6(e) and the material linked to ongoing cases, the vast majority of redactions would be upheld and Congress will have succeeded in creating new precedent against itself.

C. Intelligence Methods and Sources

A third cited category was the standard protection of intelligence methods and sources. This category prompted few redactions but even in criminal cases defendants are often denied such information. Once again, this information appears to have been made available to select members of Congress. If any of this small number of redactions can be contested after review, it seems highly unlikely that such redaction would materially change the conclusions or weight of the evidence of the Report.

It is possible for Congress to prevail on individual redactions after an in-camera review. It is also possible that the Justice Department could “run the table” on these redactions and saddle this Committee with a new and countervailing precedent for future investigations.

D. Supporting Evidence

A fourth area of demand is for the underlying documents and evidence to be made available to the Special Counsel and his investigators. The deadline for production in my view was unreasonable and I do not expect that a federal court would impose such a schedule on the Justice Department given the representation made to the President in General Barr’s May 8th request for a protective assertion of executive privilege: “The Committee . . . demands all of the Special Counsel’s investigative files, which consist of millions of pages of classified and unclassified documents bearing upon more than two dozen criminal cases and investigations, many of which are ongoing.” As noted earlier, privilege reviews normally require document-by-document determinations of privilege. Indeed, General Barr has told Congress that it is impossible to do such privilege reviews on millions of pages in a matter of a couple weeks.

Presumably, the ongoing review by the Justice Department will result in the release of many of these documents in light of the waiver over the hundreds of pages of the Special Counsel Report. Litigation will force such a review to occur in the context of a federal proceeding. That could well slow rather than speed the process. The court is likely to demand a declaration on the scope of the material and eventually an index of all such documents. With an investigation of this length and scope, it will be a massive enterprise and it is unlikely that a court will view the position of the Justice Department as unreasonable given the size of the record. Indeed, going through such a record is like

invading Russia in winter—it is unlikely to be a warm or speedy process for Congress. However, either through the Justice Department review or a court-ordered review, Congress has a strong claim to much of this matter and will likely prevail in getting much of this material in full or redacted form.

E. Witnesses

The final area of conflict concerns whether certain key witnesses can be prevented from appearing before Congress. The President has stated publicly that he opposes the appearance of witnesses like Robert Mueller and Don McGahn. For his part, Attorney General Barr has stated that he believes that Mueller should testify. But regardless of the position taken on these witnesses, Congress is again in a strong position to demand their appearance. It would prevail ultimately in any litigation and this is a fight that would be excellent ground for litigation on the part of the legislative branch.

The more difficult issue will be what these witnesses can address in such testimony. There are no compelling grounds to prevent the witnesses from testifying within the scope of previously waived material in the Report. However, Congress is not calling Robert Mueller to read from his report. It will want to ask him questions about what led to certain conclusion and the context for those conclusions. That would necessarily involve reliance on material that was not published in the report, including documents and evidence not included in the Report. As noted earlier, the White House has a valid claim that it did not waive material by simply allowing Mueller and his staff to review it within the Justice Department.

While Congress is likely to prevail on compelling the appearance of witnesses, it could face a mixed result on the scope of the testimony. A court is unlikely to declare that a witness is under no obligation to protect undisclosed executive privileged material. Moreover, a court would not be able to predict questions or answers. In an ordinary case, Congress and the White House would work out areas of interest and core documents to be addressed by witnesses. Both documents and witnesses can then be cleared in advance. There does not appear to be that level of conferral in this case. However, federal courts do not generally offer advisory opinions on future possible conflicts. Rather, witnesses will likely have to appear and a record created on areas of claimed privilege. The Administration could seek some basic protections in such a hearing. At a minimum, it is likely that a court would allow the Justice Department to be present to advise witnesses not to answer questions.

A court is likely to give witnesses like Mueller some “room at the elbows” in answering questions within the scope of the Report. The Report is a massive waiver of privilege and offers a wide berth for testimony. The leeway is likely to be substantially less for witnesses like McGahn whose communications with Trump occurred in the very nucleus of privileged presidential communications. Congress could well argue that the extent of disclosure made in the Special Counsel Report should result in a finding of a general implied waiver. In some civil privilege cases, courts have found a waiver extends to other undisclosed documents.⁷⁷ That is highly unlikely in the context of executive

⁷⁷ Under Rule 502(a) of the Federal Rules of Evidence, the disclosure of privileged information or communications in a federal proceeding, or to a federal office or agency,

privilege. First, it would effectively lift protections from millions of pages of evidence. Second, it would create a disincentive in the future for presidents to release information in the public interest. Finally, it would create an artificial construct. The Mueller Report remains relatively focused on the two issues of conspiracy/collusion and obstruction. The documents and potential testimony would likely extend well beyond those confines. For example, many of these documents were generated in the context of other issues or functions but remained material to the Special Counsel investigation. A sweeping general waiver holding is unlikely to occur and even more unlikely to be upheld.

VI. Conclusion

In *Paradise Lost*, Milton once described a “Serbonian Bog ... where Armies whole have sunk.”⁷⁸ Privilege fights represent the same danger for Congress. Even in a strong challenge, these conflicts can get bogged down in a document-by-document process of indexing, redacting, and releasing of evidence. In the worst case, your whole case can sink into the Article II bog if you choose your ground and your fight unwisely.

As a longtime advocate for congressional authority, I am concerned about the current posture of this Committee in pushing forward on issues like the Barr subpoena and contempt fight. There are strong claims to be made and those stronger positions should be given priority. The Judiciary Committee of the 116th Congress owes a debt to the Committees that came before it and an obligation to the committees that will come later. As with the Hippocratic oath, your first commitment must be to “do no harm.” Some 230 years since the first Congress, this body is facing new and serious threats of defiance and circumvention. It will need to jealously protect not only its inherent powers but its existing precedent to meet that challenge. Some of these challenges could do real harm to precedent regularly relied upon to compel cooperation and disclosures to Congress.

Given the commendable waiver of executive privilege over the public Special Counsel Report and the redaction of only eight percent of the material (and virtually no redactions in the obstruction material), there would seem to be ample basis for conferral and compromise. Absent such compromise, the Committee should focus on compelling the appearance of key witnesses and establishing the record for any executive privilege claims. That is the high and best ground for litigation. Alternatively, if Congress flails about in every direction in this bog, it will find itself with less progress and even less time to pursue its legitimate oversight concerns.

Thank you again for the honor of testifying before you today. I am happy to answer any questions that you may have.⁷⁹

constitutes a waiver to the information disclosed. However, such a waiver extends to other undisclosed communications or information only if: “(1) the waiver is intentional; (2) the disclosed and undisclosed communications or information concern the same subject matter; and (3) they ought in fairness to be considered together.” Thus, there is a general fire stop on implied general waivers that sweep away all privilege in most cases.

⁷⁸ John Milton & Isaac Asimov, *Asimov’s Annotated Paradise Lost* 88 (1974).

⁷⁹ As discussed above, I have been asked to include some of my relevant scholarship: Jonathan Turley, *A Fox In The Hedges: Vermeule’s Optimizing*

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Constitutionalism For A Suboptimal World, 82 U. CHI. L. REV. 517 (2015); Jonathan Turley, *Madisonian Tectonics: How Form Follows Function in Constitutional and Architectural Interpretation*, 83 GEO. WASH. L. REV. 305 (2015); Jonathan Turley, *Recess Appointments in the Age of Regulation*, 93 B.U. L. REV. 1523 (2013); Jonathan Turley, *Constitutional Adverse Possession: Recess Appointments and the Role of Historical Practice in Constitutional Interpretation*, 2013 WIS. L. REV. 965 (2013); Jonathan Turley, *Paradise Lost: The Clinton Administration and the Erosion of Presidential Privilege*, 60 MD. L. REV. 205 (2000) (Symposium); Jonathan Turley, "From Pillar to Post": *The Prosecution of Sitting Presidents*, 37 AM. CRIM. L. REV. 1049 (2000); Jonathan Turley, *A Crisis of Faith: Congress and The Federal Tobacco Litigation*, 37 HARV. J. ON LEGIS. 433 (2000); Jonathan Turley, *Through a Looking Glass Darkly: National Security and Statutory Interpretation*, 53 SMU L. REV. 205 (2000) (Symposium); Jonathan Turley, *Senate Trials and Factional Disputes: Impeachment as a Madisonian Device*, 49 DUKE L.J. 1 (1999); Jonathan Turley, *The "Executive Function" Theory, the Hamilton Affair and Other Constitutional Mythologies*, 77 N.C. L. REV. 1791 (1999); Jonathan Turley, *Congress as Grand Jury: The Role of the House of Representatives in the Impeachment of an American President*, 67 GEO. WASH. L. REV. 735-790 (1999) (Symposium); Jonathan Turley, *Reflections on Murder, Misdemeanors, and Madison*, 28 HOFSTRA L. REV. 439 (1999) (Symposium); Jonathan Turley, *Dualistic Values in the Age of International Legisprudence* 44 HASTINGS L.J. 145 (1992).

Chairman NADLER. Thank you. Professor Kinkopf.

TESTIMONY OF NEIL KINKOPF

Mr. KINKOPF. Thank you, Chairman Nadler, Ranking Member, and, more importantly, fellow Georgian, Mr. Collins. It's a real honor to be here today. This is an auspicious time for a hearing into executive privilege and congressional oversight given the range of current disputes over executive privilege between Congress and the executive branch. These disputes involve a clash between constitutional interests.

The Constitution vests Congress with an inherent power of inquiry. As the Supreme Court has stated, "The scope of the power of inquiry is as penetrating and far reaching as the potential power to enact and appropriate under the Constitution." The President also has a legitimate interest in confidentiality that's constitutionally rooted. The President's decision-making process requires that he be able to receive candid and robust advice from his advisers, and that advice, human nature tells us, would be tempered if it couldn't be given in confidence. Neither of these constitutionally-based interests overwhelms or trumps the other. Instead, they need to be balanced, and in the first instance, that balance is to be struck by the political branches themselves through a process of negotiation and accommodation.

Attorney General William French Smith, who served under President Ronald Reagan, put it this way: "The courts have referred to the obligation of each branch to accommodate the legitimate needs of the other. The accommodation required is not simply an exchange of concessions or a test of political strength. It is an obligation of each branch to make a principled effort to acknowledge and, if possible, to meet the legitimate needs of the other branch." This approach has been the standard model adhered to by administrations and congresses of both political parties. It stands in stark contrast to President Trump's recent declaration of a blanket intention to oppose all the subpoenas.

When privilege disputes have gone to court, the courts have repeatedly emphasized that the balancing of constitutional interests should not be done in the abstract, but instead should be done on a case-by-case basis that takes account of the concrete facts and circumstances presented by the particular issue. The subpoenas that this committee has issued involve an inquiry into Russian interference in our elections. In the concrete factual setting of these subpoenas, Congress' interest is of the highest constitutional order.

First, Congress has authority to enact statutes to safeguard our elections from foreign interference. The sound exercise of that authority is fundamental to our democracy, and the threat to the integrity of our electoral system is not abstract or speculative. Russia has interfered in our elections, and, according to our intelligence services, it will continue to do so.

Second, the Constitution assigns Congress the primary role for addressing presidential misconduct. The Mueller report details exhaustive and voluminous evidence of presidential misconduct and of Russian attempts to interfere in the election. It details the President endeavoring to obstruct the investigation into Russian interference with the election. The report itself refrains from drawing

a conclusion as to whether or not the President committed obstruction of justice in the sense of the Federal statute. It refrains because of the special counsel's specific determination that he does not wish to preempt the political branches, Congress, from their primary role in addressing presidential misconduct. So Congress has overwhelming constitutional interests in receiving the material that it has subpoenaed in order to inform its judgment about safeguarding our elections and about how to respond to significant allegations of presidential misconduct.

On the other side of the balance is the President's interest in confidentiality. The President has not, however, sought to specify within the factual setting of this particular dispute why it is that the discreet documents that he's withholding are within his authority to withhold. I won't go through all of the specificity that Professor Shaw, I think, so well covered. But I would say the balance of the interest, Congress' very weighty interest, and, at least to this point, the President's only general and vague assertions, do not overcome Congress. And in the balance, Congress should prevail.

[The statement of Mr. Kinkopf follows:]

Statement of Neil J. Kinkopf
Professor of Law, Georgia State University, College of Law*
Before the Committee on the Judiciary
United States House of Representatives
Hearing on Executive Privilege and Congressional Oversight
May 15, 2019

It is an honor to be asked to testify before this Committee on the subject of executive privilege and congressional oversight. In this statement, I will provide a brief overview of the constitutional foundations for Congress' authority to conduct investigations and oversight and the use of subpoenas to enforce that authority, as well as the President's authority to assert executive privilege. I will then apply these precepts to some of the current privilege disputes between this Committee and the Executive Branch.

I. Constitutional Background

The Legislative Power of Inquiry. The Congress has long been understood to have a wide-ranging authority to conduct investigations and oversight. That power allows Congress to make reasoned and considered judgments regarding how to use its legislative powers. As the Supreme Court has put it:

“The power of inquiry has been employed by Congress throughout our history, over the whole range of the national interests concerning which Congress might legislate or decide upon due investigation not to legislate; it has similarly been utilized in determining what to appropriate from the national purse, or whether to appropriate. The scope of the power of inquiry, in short, is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.”¹

Indeed, the Supreme Court has specifically elaborated on the power of inquiry, holding that it extends to investigation into the abuse of power within the executive branch: the power of inquiry “includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.”²

* Affiliation is listed for identification purposes only. The views expressed are the author's own and do not reflect the position of Georgia State University.

¹ *Barenblatt v. United States*, 360 U.S. 109, 111 (1959).

² *United States v. Watkins*, 354 U.S. 178, 187 (1957). Professor William Marshall has offered an important rationale for this use of the power of inquiry:

Congress's power to investigate plays a critical role in the checks and balances of U.S. democracy. Congressional investigations serve as a deterrent to wrongdoing. Without some outside check on the Executive Branch, there would be little to discourage unscrupulous officials from acting in their own, and not in the nation's, best interests.

William P. Marshall, *The Limits on Congress's Authority to Investigate the President*, 2004 U. Ill. L. Rev. 781, 798.

To make this power effective, the Supreme Court has recognized that Congress may issue subpoenas to compel witnesses to testify or to submit documents and records.³ As a means of enforcing this power, Congress holds inherent authority to hold in contempt anyone who defies its compulsory process.⁴

Executive Privilege. Over the course of our constitutional history, Presidents have from time to time asserted executive privilege against this inherent legislative power of inquiry. It is somewhat misleading to refer to executive privilege as if it were a discrete legal doctrine. It is more accurate to think of executive privilege as a collection of doctrines justifying the executive in withholding information from the other branches of the federal government – both Congress and the Judiciary. These include privileges relating to military and national security secrets, and likely diplomatic communications, as well.⁵ In addition, the executive has asserted a general presidential communications privilege, asserting that all communications with the President are privileged, and a deliberative process privilege that extends beyond direct communications with the President.⁶

³ See *Watkins*, 354 U.S. at 187-97; *McGrain v. Dougherty*, 273 U.S. 135 (1927). The Supreme Court, in *Barenblatt*, cautioned against reading this power of inquiry too broadly:

Broad as it is, the power is not, however, without limitations. Since Congress may only investigate into those areas in which it may potentially legislate or appropriate, it cannot inquire into matters which are within the exclusive province of one of the other branches of the Government. Lacking the judicial power given to the Judiciary, it cannot inquire into matters that are exclusively the concern of the Judiciary. Neither can it supplant the Executive in what exclusively belongs to the Executive. And the Congress, in common with all branches of the Government, must exercise its powers subject to the limitations placed by the Constitution on governmental action

360 U.S. at 111-112. As discussed below, however, Congress has pervading interests in this matter (including its legislative authority over federal elections and its impeachment power) such that the concern about invading spheres of authority from which Congress is excluded is inapposite.

⁴ *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821).

⁵ See *United States v. Nixon*, 418 U.S. 684, 706 (1974); see also *United States v. Reynolds*, 345 U.S. 1 (1953); *Totten v. United States*, 92 U.S. 105 (1875).

⁶ “[T]he deliberative process privilege reaches beyond conversations with the President to protect other communications among executive branch officials ‘crucial to fulfillment of the unique role and responsibilities of the executive branch.’ [In re: *Sealed Case (Espy)*, 121 F.3d 729, 7-36-37 (D.C. Cir. 1997)]. This privilege ‘allows the government to withhold documents and other materials that would reveal advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.’ *Id.* at 737.” *Committee on Oversight and Government Reform v. Lynch*, 156 F. Supp. 3d 101 (D.D.C. 2016).

The Constitution does not expressly grant any privilege or immunity⁷ to the President. The Supreme Court nevertheless has interpreted the constitutional doctrine of separation of powers as implicitly ordaining executive privilege, including a general privilege respecting communications between the President and his or her close advisors.⁸ This general communications privilege is designed to protect the legitimate executive branch interest in securing for the President the ability to receive candid, unvarnished advice. “Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process.”⁹ The deliberative process privilege also enjoys broad judicial acceptance.¹⁰

Synthesis. The Supreme Court has held that the general presidential communications privilege is qualified rather than absolute.¹¹ This means the Court will balance the President’s need to maintain confidentiality against the constitutional interests and need of the institution seeking disclosure.¹² The same is true of assertions of deliberative process privilege.¹³ As the D.C. Circuit has formulated the inquiry, “This need determination is to be made flexibly on a case-by-case, ad hoc basis. ‘Each time [privilege] is asserted the district court must undertake a fresh balancing of the competing interests’”¹⁴ Given this emphasis on ad hoc, case-by-case determination, it is not surprising that there is very little in the way of governing precedent that dictates that either disclosure or confidentiality is compelled or prohibited. Instead, the courts

⁷ Presidents have been held absolutely immune from civil liability for actions taken within the scope of their office, at least absent legislation to the contrary. *See Nixon v. Fitzgerald*, 457 U.S. 731 (1982). Presidents are not immune from civil suit in federal court for liabilities arising from activities undertaken before becoming President. *See Clinton v. Jones*, 520 U.S. 681 (1997). There is no judicial ruling regarding the President’s liability to criminal prosecution while in office. The Department of Justice has taken the position that a President may not be criminally indicted or prosecuted while in office. *See A Sitting President’s Amenability to Indictment and Criminal Prosecution*, 24 Op. O.L.C. 222 (2000).

⁸ *See United States v. Nixon*, 418 U.S. 684 (1974).

⁹ *Id.* at 705.

¹⁰ *See, e.g.*, cases cited *supra* note 5.

¹¹ *See Nixon*, 418 U.S. at 707-713.

¹² In *Nixon*, the Court considered the interests of the judiciary in enforcing a subpoena in the context of a criminal proceeding. The President’s privilege claim is also qualified and subject to balancing in the face of a congressional subpoena. *See, e.g., Senate Select Committee v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974)(en banc).

¹³ *See In re: Sealed Case (Espy)*, 121 F.3d at 737.

¹⁴ *Id.* at 737-38 (quoting *In re Subpoena Served Upon the Comptroller of the Currency*, 967 F.2d 630, 634 (D.C. Cir. 1992). The same balance governs in the context of law enforcement investigations as well. *See Tuitt v. Henry*, 98 F.3d 1411 (D.C. Cir. 1996). Even outside the context of privilege assertions, the Supreme Court has noted the pragmatic approach it takes to Congress’ power of inquiry: “The congressional power of inquiry, its range and scope, and an individual’s duty in relation to it, must be viewed in proper perspective.... The power and the right of resistance to it are to be judged in the concrete, not on the basis of abstractions.” *Barenblatt*, 360 U.S. at 112.

have mostly emphasized that each branch has a constitutional duty to negotiate in good faith and to accommodate the legitimate constitutional interests of the other branch.¹⁵

II. Application to Congressional Subpoena for the Unredacted Mueller Report and Supporting Documents

A. The Process of Negotiation and Accommodation

On March 22, 2019, Attorney General Barr notified, as required by regulation,¹⁶ the House and Senate Judiciary Committees that he has received Special Counsel Mueller's report entitled, "Report on the Investigation into Russian Interference in the 2016 Presidential Election."¹⁷ On April 18, 2019, the Attorney General released a redacted copy of the Muller Report to Congress and the public. Prior to this date, the Chairman of the House Judiciary Committee joined with the chairs of several other congressional committees addressed a number of communications to the Attorney General to express their interest in receiving the full report with no redactions except those required by law. These communications expressed Congress' willingness to accommodate the executive's legitimate in maintaining the confidentiality of this material. At the time the Mueller Report was publicly released, the Attorney General and the Assistant Attorney General for Legislative Affairs offered to allow a select group of members of Congress to view a less redacted, but still not full, copy of the Mueller Report under fairly tight restrictions.¹⁸ On April 19, 2019 the House Judiciary Committee issued a subpoena for "(1) the full Mueller Report, including any exhibits or attachments; (2) all materials referenced in the Mueller Report; and (3) all materials obtained or produced by the Special Counsel's office."¹⁹

On April 22, 2019, the House Judiciary Committee issued a subpoena to former White House Counsel Donald F. McGahn II. The subpoena lists 36 categories of documents to be produced to the Committee by May 7, 2019. The subpoena also requires McGahn to appear and testify on May 21, 2019. On May 7, 2019, the current White House Counsel Pat Cipollone submitted a letter to Judiciary Committee Chairman Nadler declaring that "White House records remain legally protected from disclosure under longstanding constitutional principles, because they implicate significant Executive Branch confidentiality interests and executive privilege." The

¹⁵ In this connection, the President's recent declaration of a blanket intention to "oppose all the subpoenas" is unprecedented and contrary to the process that the courts have regarded as the constitutional duty of the executive and Congress. As the Supreme Court has stated

It is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action. It is their unremitting obligation to respond to subpoenas, to respect the dignity of the Congress and its committees and to testify fully with respect to matters within the province of proper investigation.

Watkins, 354 U.S. at 187-188.

¹⁶ 28 CFR 600.9(a)(3).

¹⁷ Hereinafter, The Mueller Report.

¹⁸ See Amendment in the Nature of a Substitute to the Committee Report for the Resolution Recommending that the House of Representatives Find William P. Barr in Contempt of Congress, at 15.

¹⁹ *Id.*

letter also asserts that “Mr. McGahn does not have the legal right to disclose these documents to third parties”

B. Balancing the Interests of Congress and the President

Congress’ Interest. Congress’ interest in receiving the subpoenaed documents is of the highest order. The redacted Mueller Report shows that the Russian government interfered extensively in the 2016 presidential election. Specifically, the Russian government “carried out a social media campaign” and “conducted computer-intrusion operations” designed to benefit “presidential candidate Donald J. Trump and disparage[] presidential candidate Hillary Clinton.”²⁰ In addition, “the investigation established that the Russian government perceived it would benefit from a Trump presidency and worked to secure that outcome, and that the [Trump] Campaign expected it would benefit electorally from information stolen and released through Russian efforts.”²¹ The Mueller Report also establishes the extensive efforts President Trump undertook to obstruct the investigation into Russian interference in the 2016 election.²²

Congress’ interest in this matter is of elemental importance. The possibility that a foreign power might interfere with a presidential election poses an existential threat to our democracy. The Russian scheme to manipulate our elections is real and continuing.²³ Assessing Congress’ interest, as the Supreme Court has urged, in the concrete rather than in the abstract, it is clear that Congress has several legislative interests of the most compelling nature. First, Congress must consider how to safeguard upcoming elections from Russian interference. In order to devise an effective legislative response to the threat of Russian interference, it must know the full extent and details of Russia’s operations—which appears to be the subject of many of the redactions in Part I of the Mueller Report.

Second, Congress has a compelling interest in responding to the President’s attempts to obstruct the investigation into Russian interference with the 2016 presidential election. Based on the redacted Mueller Report alone, it is clear that the President has engaged in conduct that satisfies the predicate for impeachment. At the outset, I want to be clear that even though President Trump’s obstruction is *impeachable* it does not necessarily follow that the House should undertake to impeach him. That step, as I discuss below, is a momentous one that involves sensitive discretionary considerations. Congress’s interest in access to all the information that might assist in its exercise of that discretion is of the highest order.

²⁰ Mueller Report, vol. I, at 1.

²¹ *Id.* at 1-2.

²² *Id.* vol. II.

²³ Martin Matishak, *Intelligence Heads Warn of More Aggressive Meddling in 2020*, Politico (Jan. 29, 2019), available at <https://www.politico.com/story/2019/01/29/dan-coats-2020-election-foreign-interference-1126077>; Karen Yourish & Troy Griggs, *8 U.S. Intelligence Groups Blame Russia for Meddling, but Trump Keeps Clouding the Picture*, New York Times (Aug. 2, 2018), available at <https://www.nytimes.com/interactive/2018/07/16/us/elections/russian-interference-statements-comments.html>.

The Constitution authorizes the House of Representatives to impeach the President (or any civil officer) for committing “treason, bribery, or other crimes and misdemeanors.”²⁴ The Constitution does not define this phrase and, indeed, it is clear that the phrase is not meant to refer to specifically codified crimes. Rather, the predicate for impeachment is the commission of an act that threatens public harm on the order of treason or bribery regardless of whether the act satisfies each technical element of a codified crime.²⁵ The framers understood and meant for impeachment to serve as a political remedy for official misconduct that inflicts severe harm to the nation. As such, the Constitution, by vesting the impeachment power in the House, enjoins upon the House the duty not only to determine whether the President or any civil officer has engaged in serious misconduct, but to make a political judgment as to whether the misconduct is such that the officer should be removed. The delicacy and solemnity of this judgment is magnified when, as here, the officer in question is the President. The President is alone the head of the Executive branch, constitutionally vested with “the executive power.”²⁶ Moreover, the President is the only civil officer (other than the Vice President) who takes office by virtue of election. To contemplate impeaching the President implicates unparalleled disruption of the functioning of the government and supplanting the will of the electorate, as filtered through the electoral college.

With respect to President Trump, Congress’ interest in possible impeachment is serious and imminent. The Mueller Report details the measures President Trump took to obstruct and undermine the Special Counsel’s investigation into Russian interference with the 2016 election. Because the Department of Justice holds the position that a sitting President may not be indicted or prosecuted, Mueller did not make a formal conclusion. It is worth noting, nonetheless, that over 700 former federal prosecutors have concluded that the Mueller Report establishes sufficient evidence to conclude beyond a reasonable doubt that President Trump committed the crime of obstruction of justice.²⁷ Indeed, the Mueller Report itself identifies as one reason for not prosecuting a sitting President that doing so would “potentially preempt constitutional processes for addressing presidential misconduct.”²⁸ A footnote identifies that constitutional process as “impeachment.”²⁹ The Mueller Report establishes a powerful record of impeachable conduct. Whether to take that step involves, as discussed above, the exercise of a delicate and solemn political judgment. As the Department of Justice’s Office of Legal Counsel has pointed out, the Constitution deliberately vests the exercise of that judgment in Congress because it is politically accountable. In order for Congress to fulfill its constitutional role, it must have access to all relevant information.

²⁴ U.S. Const. art. II, sec. 4.

²⁵ See Neil Kinkopf, *The Scope of the Impeachment Power: What Are “High Crimes and Misdemeanors”?*, available at <https://constitutioncenter.org/interactive-constitution/articles/article-ii/the-scope-of-the-impeachment-power/clause/49>.

²⁶ U.S. Const. art. II, sec. 1, cl. 1.

²⁷ See Statement by Former Federal Prosecutors (May 6, 2019), available at <https://medium.com/@dojalumni/statement-by-former-federal-prosecutors-8ab7691c2aa1>

²⁸ *Id.* vol. II, at 1.

²⁹ *Id.* at 1 n.2.

Even if the House declines to pursue impeachment, it has a legitimate interest informing the public of the Trump Administration's extraordinary abuses of power. As President Woodrow Wilson once wrote:

It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of government, the country must be helpless to learn how it is being served . . . and must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct. The informing function of Congress should be preferred even to its legislative function [T]he only really self-governing people is that people which discusses and interrogates its administration.³⁰

The President's Interest. The President has made a protective assertion of executive privilege in response to the committee's subpoena for the unredacted Mueller Report and accompanying documents. Such protective assertions are legitimate where a congressional demand for information is made in a manner so precipitous that the executive branch does not have sufficient time to make more specific and targeted privilege determinations.³¹ The validity of such an assertion depends on a good faith assessment of the facts and circumstances surrounding it. It bears noting that such an assertion is valid only as a brief, temporary measure to allow the executive branch to review the subject documents for privilege. For example, the protective assertion made in 1996 was followed by the production of a detailed and specific privilege log just fifteen days later.³²

Balance. In this instance, Congress has a compelling and urgent interest in the documents it has subpoenaed. A good faith protective assertion of privilege might serve to justify deferring the demand for a very brief period. It is not clear, however, that the blanket assertion of privilege is justified in this instance. The Department of Justice has been in possession of the Mueller Report for months and has carefully analyzed every word in order to make decisions regarding redactions. It is difficult to fathom that the Department needs additional time to identify which redacted portions might be the subject of a privilege claim. With respect to the underlying documents – those cited in the Mueller Report or produced by the Special Counsel's office – the claim of need for time to review may be reasonable. Under Department of Justice practice, this review should be completed within a very short time frame, along the lines of the fifteen days it took the Department to review the documents at issue in the 1996 precedent. Delay beyond fifteen days would not appear to be justified in light of Congress' compelling and urgent interest in the subpoenaed materials.

³⁰ Woodrow Wilson, *Congressional Government* 303 (1913).

³¹ See, e.g., *Protective Assertion of Executive Privilege Regarding White House Counsel's Office Documents*, 20 Op. O.L.C. 1 (1996).

³² See *Assertion of Executive Privilege Regarding White House Counsel's Documents* (May 23, 1996), available at <https://www.justice.gov/file/20031/download>

III. Subpoena for Testimony and Document Production by Don McGahn

The subpoena to Mr. McGahn implicates the same compelling legislative interests as the subpoena for the Mueller Report and related documents. The President has a legitimate, constitutionally-based interest in the confidence of his communications with his closest aides and advisors. The D.C. Circuit has, however, rejected an absolute privilege with respect to the White House Counsel.³³ Given the extraordinary weight of the Judiciary Committee's interest in the matter, the precedent of the D.C. Circuit squarely supports the Committee's authority to compel the testimony of Mr. McGahn.

With respect to the demand for the production of documents, it is difficult to know what to make of the May 7 Cipollone letter. The letter itself does not purport to assert executive privilege. Instead, it objects to the production of documents because "they implicate ... executive privilege." First, it is basic law in this area that only the President may assert executive privilege. Nothing in the letter purports to be communicating a determination that the President has made. Second, the indefinite category of records that implicate executive privilege would appear to be much broader than the category of documents that actually are privileged. Third, the document makes no attempt to identify which responsive documents are privileged (or even implicate privilege) or to set forth the basis for the assertion specific to each document. Finally, it is possible that any privilege that might pertain has been waived by providing the documents to Mr. McGahn's private attorney.³⁴ On the basis of the bare one-page Cipollone letter, it is difficult to assess, much less credit, the legal basis for withholding the documents from the Committee.

Conclusion

Congress' power of inquiry is fundamental to our constitutional system. That system also comprehends that the President's legitimate confidentiality interests be accommodated. In order for that accommodation to occur, the Constitution requires Congress to articulate its need for information and requires the President to specifically assert his reasons for maintaining confidentiality. With respect the Mueller Report and related documents and with respect to its subpoena to Donald F. McGahn, Congress holds the most compelling of constitutional interests. The President has failed to articulate countervailing interests. In this setting, it is straightforwardly clear that Congress is entitled to the documents and testimony it seeks.

³³ *Committee on Judiciary v. Miers*, 542 F.3d 909 (D.C. Cir. 2008); cf. *In re Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998).

³⁴ The D.C. Circuit held in *In re Sealed Case (Espy)* that the White House had waived executive privilege with respect to a document that it provided to Espy's outside counsel. See 121 F.3d at 740.

Chairman NADLER. Thank you very much. I will open up the questioning by recognizing myself first.

Professor Turley, this committee issued a subpoena to former White House Counsel Don McGahn for records provided to him by the White House in the course of his cooperation with the special counsel investigation. The current White House counsel, Pat Cipollone, has instructed him not to respond on the grounds that these records “implicate significant executive privilege confidentiality interests and executive privilege.” Do you agree that those White House records are still legally protected from disclosure to Congress because they may implicate executive branch confidentiality interests?

Mr. TURLEY. Thank you, Mr. Chairman. It is a tough question. I am going to give you middle-of-the-road answer, if you don’t mind. First of all, the problem with calling Don McGahn, and, first of all, I think you have absolutely every right to call Don McGahn. The problem with the documents from McGahn is that his office sits at the very nucleus of presidential communication privilege. He is the really high-value witness for you to call in terms of the triggering of the constitutional fight.

The material that he showed to the special counsel, in my view, is not waived because that is a conversation occurring within the executive branch. It is actually even within the Justice Department.

Chairman NADLER. That was my next question.

Mr. TURLEY. Yeah. I think the courts have already pretty much weighed in on that. I don’t think they are going to view the documents that were not disclosed in the report as waived because it was shown to Mueller and because he is not an independent counsel. He is a special counsel.

Chairman NADLER. What about those shown to McGahn’s attorney?

Mr. TURLEY. That I deal with in my testimony, and I say that is actually the most difficult question of all of these privilege fights. The courts are not clear whether if you show documents to an attorney it waives executive privilege. And what I caution about in my testimony is I think that if you force this to a court, it is mostly likely that the court is going to find an accommodating rule because, as I explained in my testimony, I can’t thread this issue without having sort of rippling effects, not just on the executive privilege, but on you in the legislative branch.

For example, if members of Congress have an issue that could affect them personally and they speak to an attorney, does that waive congressional privileges? This is a very difficult question for a court to have to deal with, and I think it is likely the court will run home and say, you know what? As long as there are restrictions on confidentiality, like NDAs, or non-disclosure agreements, or agreements with the White House counsel staff, that I think a court is more likely to say there is no waiver.

Chairman NADLER. Thank you. Professor Kinkopf, you testified that you thought we had the right to these materials, as I interpreted what you said, the redacted materials of the highest constitutional order.

Mr. KINKOPF. That is correct.

Chairman NADLER. And that would disagree with what Professor Turley said. Now, do you agree with Professor Turley that in terms of obtaining these documents and other documents, we would have much better odds in court if we were to label this an impeachment inquiry?

Mr. KINKOPF. I don't think the label matters, right, because you have to decide whether or not to start an impeachment inquiry. And impeachment, particularly impeachment of the President, is a grave step. It is not one that should be taken recklessly. It would be irresponsible without first having information that the allegations of wrongdoing against the President—

Chairman NADLER. All right. Whether we should do it or not is a different question. But my question is, would it put us in a stronger position in court in arguing for a revelation of various materials?

Mr. KINKOPF. I think it is enough that you say you are trying to decide whether or not to pursue impeachment. I don't think you have to actually invoke impeachment, and I don't think that the House has to actually form an impeachment committee.

Chairman NADLER. You are in complete disagreement with Professor Turley in everything. Mr. Rosenzweig, when Independent Counsel Ken Starr transmitted his report to the House of Representatives, he also included 18 boxes of underlying evidence. Can you describe why Judge Starr thought it was important to provide that underlying evidence to Congress?

Mr. ROSENZWEIG. His view at the time, with which I agreed, was that that underlying information was essential to this body to perform the functions of its responsibility under Article I, namely, to determine what, if anything, should happen thereafter with respect to President Clinton. It was obviously a slightly different context in the sense that that was a direct referral for impeachment purposes as opposed to purely for oversight purposes. But the fundamental thought that lay behind this was that it should not be incumbent upon this body to redo all of the work that he had done, nor should this body be forced to rely on what he thought was a good summary.

Chairman NADLER. So in other words, you are saying it should not be incumbent on us now to redo all the work that Mr. Mueller did—

Mr. ROSENZWEIG. That would be my view as well. In parimateria, it is exactly what we said with respect to President Clinton, yes.

Chairman NADLER. Thank you. Finally, Professor Shaw, well, do you agree with previous testimony on the question of waiver; that is to say, whether the White House waived executive privilege when it gave information either to Mueller or to McGahn's attorney?

Ms. SHAW. I think I agree with Professor Turley that it is actually a quite difficult question. Certainly all the public materials, any privilege has been waived as to those publicly released, the report itself.

Chairman NADLER. By "publicly released," you mean given to McGahn's attorney?

Ms. SHAW. No, I mean, you know, the redacted version of the report. No, the transmission to both McGahn and to his counsel, you

know, I think that McGahn sharing with the special counsel is arguably an intra-executive transmission. That does not necessarily waive privilege. That is all still within the executive branch. You know, I would want to know, the White House counsel in his letter to you of—sorry—May 7th—sorry—suggests that Mr. McGahn, there was a clear understanding that records remain subject to the control of the White House for all purposes. I would kind of want to know the circumstances in which that understanding was communicated. That seems to be sort of a relevant factual question.

I think as to the sharing of the documents with Mr. McGahn's outside counsel, there would be a close legal question. You know, the D.C. Circuit decision from 1999 sort of takes a mixed view of this. There is a little bit of waiver when they are sharing with a third party, but not waiver in any blanket sense. So I think it is close. I would agree with Professor Turley.

Chairman NADLER. Thank you very much. My time has expired. The gentleman, the Ranking Member, Mr. Collins.

Mr. COLLINS. Thank you, Mr. Chairman. I want to go through several things, and I appreciate this. Again, we were up here before talking about this is back to law school, and we have law professors and 2-and-a-half opinions. So it is pretty interesting to see, and this is good. I mean, I like it.

But I do have one just sort of a yes/no question, Mr. Rosenzweig. When you worked with the Ken Starr investigation, was it not under a different, it was actually under a statute, correct? The independent counsel statute.

Mr. ROSENZWEIG. Ken Starr was authorized to investigate by the Independent Counsel Act.

Mr. COLLINS. Exactly. And Mr. Mueller was not, correct?

Mr. ROSENZWEIG. He was authorized by the special counsel regulations.

Mr. COLLINS. Which are different, correct?

Mr. ROSENZWEIG. Yes.

Mr. COLLINS. Okay. And they also have different reasons on what they were to release and what they were not to release, correct? Yes.

Mr. ROSENZWEIG. I am not sure I agree with that.

Mr. COLLINS. Well, when actually—

Mr. ROSENZWEIG. The special counsel regulations give Attorney General Barr plenary discretion to release whatever he feels is appropriate in the public interest. The special counsel regulations provide that Mr. Mueller's report is actually to Mr. Barr. So in my judgment at least, Attorney General Barr, in consultation with the White House, could release almost all of the report, save for those portions that are prohibited by lawful release.

Mr. COLLINS. Or in the reverse, he could release nothing and say this is what the Mueller report came out with, correct?

Mr. ROSENZWEIG. He could certainly have limited himself to a much lesser release if he had chosen to do so.

Mr. COLLINS. Thank you. One quick thing, and I actually had this handed out to you because I think what was said by several of you is the actual issue of congressional, and are we actually, and I understand the majority's desire to move this forward. I mean, I do not deny the political aspect of this. But when you do, and I

think Professor Turley and several of you have talked about the role and the authority of Congress, which I do truly believe in, there is such a thing as moving too fast where you actually undercut your own authority.

I have handed you the subpoena that was issued for General Barr. You have time to read it. You can talk about it. If you want to take a second. Show me in here anywhere where there is an exception for 6(e). There is not. I will help you out. There is not. So to say that we are asking for the something the Attorney General can do is not. And I understand the intent that was said from this dais, well, the intent was that we will go to court and we will work it out together, sort of the Ken Starr a-la-model, which was a little bit different. But there is nothing in this subpoena right here that a judge would look at and say, no, you asked for 6(e) information, which he cannot do. It is illegal for him to do.

The constitutional crisis here would be to say, Attorney General, break the law because we want it. That is standing in the middle of the aisle and just jumping up and down and pitching a fit. This is what this subpoena is. Now, the question comes back, and, by the way, GSU, I am so glad—go Dogs. But Mark Becker and you all, the Panthers are great and have amazing growth and the law school is amazing down there. It is good to have you all here.

But the disagreement we have looked at, as we go back through the issue, and especially where you said, and, Mr. Turley, I am going to ask this question, but I want to acknowledge, is that you all both had disagreements. When he said that opening an inquiry, an impeachment inquiry, which by the way has not been said. The only issues that have been said from this committee are where there is an assault on the rule of law, that is more of an enforcement mechanism, that we are looking into election security, that we are concerned about overreach of the Administration. We have never said, well, we are doing this specifically for impeachment.

Mr. Turley, is it not true, though, the courts have ruled that if a judicial proceeding, would they consider an impeachment proceeding a judicial proceeding?

Mr. TURLEY. That is true, the extent of some of the case law. This is where we differ. The Senate Select Committee v. Nixon in 1974 drew the distinction the chairman was referring to. In that case, Congress lost because it was proceeding under oversight authority. This body is actually playing the worst card in its hand. It has a very good card to play in terms of initiating an impeachment inquiry. But in that case, the court did draw the distinction that you asked my colleague about and actually said that it was determinative.

I would simply encourage this: be aware of close calls. This is not horseshoes and grenades. This body needs to litigate when it can be certain it can take down the executive branch. You have those issues, but be aware of close calls because that is where you lose precedent.

Mr. COLLINS. And just reclaiming my time here for the last few minutes because like I said, we will go over this. I appreciate it. You know, the discussion has been interesting to hear already in a sense, but is an interesting issue when you have close calls, when

you have, you know, Professor Shaw, your discussion with Professor Turley just now. There are issues.

My concern is overriding, and this is my bigger concern. And you are here, in all fairness, to start a foundation for what was lacking last week and lacking in previous hearings where we go straight to subpoenas, straight to contempt, straight because we are so fast to get to the end of the day. But the concern that I have here is just expressed there, and some of you have expressed this because we do agree in the sense. And, Mr. Rosenzweig, you said you have been here for Republicans. The reason you are here today is to prop up really a bad argument, and I appreciate you being here, and the others are here for that. And this is why we are here.

But my concern is past the Chairman and Ranking Member. This body. Look at the paintings on the wall. There is history here. This is beyond the moment of right now, and one day the two of us will not be here. My friend from New York and myself will be back in Georgia and be back in New York, and there will be other people in this chair. But if we have actually degraded the role of this committee by rushing to court, by rushing to conclusions, then we have actually taken the authority that we say that we are applying, and we have undercut it. And we have made it harder for future Congresses and future Judiciary Committees to actually exercise their constitutional power. That is my concern with it.

But it is good to hear you all today. I am glad we are having this discussion I guess as we go forward. And I appreciate the time, and I yield back.

Chairman NADLER. The gentleman yields back. The gentleman from Georgia.

Mr. JOHNSON of Georgia. Thank you, Mr. Chairman, and thank the witnesses for being here today. We are at a crucial juncture in our Nation's history, and it is important that experts like yourselves help us clarify areas of the law that the Administration and perhaps some of my friends on the other side of the aisle may be unclear about. We are in the early stages of a constitutional crisis. The flaunting of congressional subpoenas and the willful attempts to conceal information rightfully requested by the Congress shows an underlying disrespect for the co-equal branch of government that is the legislative branch. And it is imperative that Congress be allowed to continue its investigation into foreign interference in American elections.

Special Counsel Mueller was appointed because of material concerns that the Russian government had inappropriately meddled in our presidential elections. After well over a year of careful fact gathering and meticulous research, he and his team produced a 440-page report. And what did Congress get initially? A 4-page summary that included conclusions that Mueller did not find obstruction. Attorney General Barr essentially told us to move on, nothing to see, but that is not what the Mueller report said.

We later learned that Mueller himself was concerned about misunderstandings about the report's contents that were perpetrated by the Attorney General. How can we trust when the Attorney General of the United States is prioritizing helping the President save face over the true facts of this matter? So we asked for the full report, and in response to our very valid request, the President

claimed blanket executive privilege after the Attorney General stonewalled attempts to reach a reasonable accommodation. He just claimed a blanket executive privilege on the entire report and all of the underlying documents.

Professor Shaw, what, if any, legitimate interest does the President have in protecting the confidentiality of White House communications or documents that may contain evidence of misconduct?

Ms. SHAW. So where there is evidence of misconduct, Congressman, any Article II-based interest in protecting confidentiality is quite weakened. I would say that as a general matter, there may well be legitimate instances in which specific discreet documents in the possession of the special counsel would well be candidates for a viable privilege assertion. Some of the discussions between the President and advisers, even those that touch, you know, matters of the investigation, you know, so long as they are not tainted by misconduct. Presumably they were discussing how to respond to inquiries from the Special Counsel's Office, and some of those discussions might well qualify as the kinds of considered deliberation between the President and his advisers that establish—

Mr. JOHNSON of Georgia. It is not a blanket—

Ms. SHAW. Sorry. So all that, I think, would potentially qualify, but we don't know yet because they haven't given any specifics. As to those documents that might well be tainted by misconduct, I think any executive privilege interest would be quite weak.

Mr. JOHNSON of Georgia. Professor Turley, you would agree with that, would you not?

Mr. TURLEY. I'm not too sure in terms of where it's on the spectrum, in terms of the executive privilege interests raised by this. There's no question that when this body is investigating crimes, for example, the assertion of privilege is at its weakest. But just as the other—

Mr. JOHNSON of Georgia. And let me interrupt you also.

Mr. TURLEY. Yes.

Mr. JOHNSON of Georgia. If we are using our oversight power to investigate crime, that is within our legislative prerogative, is it not?

Mr. TURLEY. It is, but just—

Mr. JOHNSON of Georgia. We don't have to limit ourselves to an impeachment inquiry in order to ferret out criminal misconduct?

Mr. TURLEY. Well, you don't have to, but the problem you're going to have in this—and well, a prior witness noted that the finding of no criminal conduct worked against the White House. This is where it works against the committee.

The record, as it stands—

Mr. JOHNSON of Georgia. Well, we know that that was unsupported, though. We know that that assertion by Attorney General Barr was unsupported by the Mueller report. Wouldn't you agree with that, Professor Rosenzweig?

Mr. ROSENZWEIG. Well, yes, Congressman. I joined a letter signed by I think it's almost 1,000 former prosecutors now, suggesting that in our professional judgment, the Attorney General's determination was not supported by the evidence.

Mr. JOHNSON of Georgia. And with that, Mr. Chairman, I will yield back.

Chairman NADLER. I thank the gentleman.

The gentleman from Ohio, Mr. Chabot.

Mr. CHABOT. Thank you, Mr. Chairman.

You know, this is the Judiciary Committee, a committee that was once chaired by Daniel Webster, and we could be, should be, using our time in important, productive ways. We could be working, for example, on improving control at our borders, and it is a real problem. Some had tried to say, oh, this is just a made-up issue, a made-up crisis. More and more, they are coming around and realizing that it is not at all a made-up crisis.

At the very least, we ought to be able in a bipartisan manner to do something about the very flawed asylum system right now that we have. We have people coming up principally from Honduras and Guatemala and El Salvador, some on caravans. They are coming to our borders. They are told by the drug cartels, who they have paid thousands of dollars to, the magic words to say that they fear they are sent back, and so they don't get sent back.

They come into the country. They are given a court date. They are put on a bus. They disappear somewhere in the continental United States, into communities from members on this committee and all over the place. Almost never come back for their court date, and essentially just disappear into the population.

It is not good for the country. The American taxpayers are paying for this, and this committee ought to be working on that. We have jurisdiction over that.

We could be working on the record number of opioid deaths in this country, 70,000 over the last year alone. When Ronald Reagan was President, he and the First Lady started their "Just Say No" campaign to try to do something about it because we had 10,000 deaths due to overdoses, 10,000. Now it is 70,000, 7 times what it was.

And in Congress' defense, we have done some things. We passed CARA a few Congresses back, and we passed the SUPPORT Act in the last Congress. And that does make progress, but there are so many other things we could be doing. We have—we have jurisdiction, oversight over the DEA, the Drug Enforcement Administration, in this committee, over the FBI, law enforcement. Yet we are having hearings on this.

We could be talking about reforming our prison system. Now, yes, we did do some second-chance legislation. That is a good first step, and we did it in a bipartisan manner, which we ought to do a lot more in this committee than we do. But these folks that are behind bars right now are going to be out some day, most of them, and if they have a skill, if we can actually do something with them so they have a skill, there is much less chance when they get out that they are going to be breaking into your house or hijacking your car or selling drugs to your kids.

We ought to be working on that in this committee, but we are not. We are doing this.

Anti-Semitism is a growing problem. We have talked about it. But we have got literally Members of our own institution who can't get out of their own way. They have demonstrated their own anti-Semitism. So what do we do? We pass this legislation that says all

hate is wrong, you know, but we didn't focus on what the real problem was because it was too embarrassing.

We have got over \$20 trillion debt hanging over our heads. Now we are not the Budget Committee, but we do have jurisdiction over constitutional amendments. I was for 6 years the chairman of the Constitution Subcommittee in Judiciary, and my ranking member for those 6 years was none other than the current chairman of this committee, Mr. Nadler. And we worked together on some issues, and we need to balance that budget.

Twenty trillion dollars, it is like every American pays a mortgage on a second home, and yet they are getting nothing out of that home. That is what the balance—lack of a balanced budget amendment does. We have introduced it again. We have got 36 Republican cosponsors, 0 Democrat cosponsors.

So we could be doing a lot more on these and many other issues, but Democrats are focused on something that has essentially already been dealt with in the Mueller report that found that this President had not colluded with the Russians, and Attorney General Barr indicated no obstruction. But our Democratic colleagues just can't leave it alone. So today, we are wasting this committee's valuable time on executive privilege and blah, blah, blah.

Professor Turley, let me ask you this. You had an article in *The Hill* recently, and in that article, you said the Democrats wanted to manufacture a conflict, and they have succeeded in doing so. What did you mean by that?

Mr. TURLEY. Well, that was a column on the contempt action against Attorney General Bill Barr. And for full disclosure, I testified at his Senate confirmation. I've known him for years. I believe that the contempt action of this committee was unfounded, but I also believe that if it goes to a Federal court, this is another area where I think that this committee could lose.

The issue of Rule 6(e) was addressed during the confirmation hearing, when Senators asked me why won't he commit to releasing the full and unredacted report? And I said because that would be a crime. You're asking him to commit to an act to secure confirmation that would violate the Federal law.

If he had said that, despite our friendship, I would have opposed his confirmation because that would be unethical. So there's no question that he cannot release that Rule 6(e) information.

I was counsel on the Rocky Flats case. That's the largest Rule 6(e) case I know of. We spent years trying to get that special counsel report released. So I'm not a fan of Rule 6(e), but we lost. And if you take a look at the McKeever case, which was just handed down by the D.C. Circuit, you are heading into a world of hurt. If you go to the D.C. Circuit and argue that you could order Barr, that Barr could unilaterally release Rule 6(e) information, they just adopted a narrow view of Rule 6(e).

And by the way, their view—and I agree with the dissent in that case—raises serious questions about how they're interpreting *Haldeman v. Sirica*. So you could open up that fight if you bring that case back to the D.C. Circuit. I'd encourage you not to because I happen to like *Haldeman v. Sirica*.

But right now, the D.C. Circuit is not a hospitable place. They've adopted the narrower approach of a couple of circuits like the Eighth Circuit in interpreting those exceptions under Rule 6(e).

Mr. CHABOT. Thank you. My time has expired, Mr. Chairman.

Chairman NADLER. The gentleman from Florida, Mr. Deutch?

Mr. DEUTCH. Thank you, Mr. Chairman.

Mr. Chairman, on April 18th, an hour before releasing the Mueller report, the Attorney General held an unusual, misleading press conference to spin Mueller's findings in the President's favor, and he said, and I quote, "The White House provided unfettered access to campaign and White House documents, directing senior aides to testify freely, and asserting no privilege claims. And at the same, the President took no act that, in fact, deprived the special counsel of the documents and witnesses necessary to complete his investigation. Accordingly, no material has been redacted based on executive privilege."

Professor Shaw, the President had multiple opportunities to assert executive privilege over materials collected during the investigation, but he did not. Is that correct?

Ms. SHAW. That's correct.

Mr. DEUTCH. And the Attorney General sought to make a point—he sought to point out the decision to waive privilege, the decision to waive privilege to make it appear that the President was being fully transparent with the American people. Is that correct?

Ms. SHAW. I think that's a fair characterization of the press conference, yes.

Mr. DEUTCH. And the Attorney General said nothing in the Mueller report was redacted for executive privilege?

Ms. SHAW. That's correct.

Mr. DEUTCH. Professor Kinkopf, in the course of the investigation, what third parties would have access to information and documents collected?

Mr. KINKOPF. I'm sorry. Could you—

Mr. DEUTCH. During the course of the investigation, which third parties would have access to the information and documents collected? Like investigators, for example, or private attorneys or staffers, would they have access?

Mr. KINKOPF. Would they have access to the special counsel's—

Mr. DEUTCH. To the information—to the information collected during the investigation?

Mr. KINKOPF. No. The internal staff would.

Mr. DEUTCH. Right. Right.

Mr. KINKOPF. Yes, yes.

Mr. DEUTCH. Exactly. Are those individuals the sort of close advisers to the President that executive privilege is meant to protect?

Mr. KINKOPF. No.

Mr. DEUTCH. Right. So given that the White House made no executive privilege claims at all, at all, during the special counsel's investigation, including witness testimony or over the publication of the report itself, should that information still be considered privileged?

Mr. KINKOPF. Certainly not presidential communications.

Mr. DEUTCH. Right. So to be clear, the President waived—Professor Shaw, I will come back to you. The President waived execu-

tive privilege over these materials when he gave them to third parties and allowed them to be published publicly. Correct?

Ms. SHAW. Congressman, the counterargument that I would offer is just that because these were all executive branch officials to whom these documents were shared without any interposition of an objection on the basis of executive privilege, that does not necessarily mean the President wouldn't later assert executive privilege as to another branch.

Mr. DEUTCH. When the document was released, the Attorney General went out of his way to talk about transparency in the process and made no mention of executive privilege.

Ms. SHAW. I agree that that—that that seems misleading in retrospect.

Mr. DEUTCH. Right. So, in fact, it seems to me that the D.C. Circuit decided this exact issue when it held that the White House “waives its claims of privilege in regard to specific documents that it voluntarily reveals to third parties outside the White House.” That is the Espy case.

So the Attorney General has also claimed that he is prohibited by law from disclosing the report's underlying evidence, including investigative files. Mr. Rosenzweig, based on your experience, is the Department of Justice prohibited from giving Congress law enforcement files?

Mr. ROSENZWEIG. It's not prohibited by law, except to the limited extent of matters that are actually occurring before the grand jury, which is actually a very narrow case. My own experience—

Mr. DEUTCH. How was your own experience?

Mr. ROSENZWEIG. Well, my own experience 20¹ years ago was an investigation conducted by former chairman John Dingell into a specific case in which the Department turned over essentially the entire investigative file, save for the grand jury materials, and I personally sat for several hours of depositions on the matter.

Mr. DEUTCH. And in fact, Professor Shaw and Professor Kinkopf, in your time serving as attorneys in the executive branch, is it standard practice to refuse to disclose law enforcement information to Congress? Is that standard practice?

Mr. KINKOPF. Yes.

Mr. DEUTCH. Professor Shaw, standard practice to refuse to disclose law enforcement information to Congress?

Ms. SHAW. I would say—

Mr. DEUTCH. As a whole.

Ms. SHAW. In a blanket way, I would say no. I think as to specific materials, it is sometimes, of course—

Mr. KINKOPF. I would agree with that, in a blanket way, no. But as to specific investigations—

Mr. DEUTCH. Thank you, Professor Kinkopf. Right. Thanks.

So there is not a basis to withhold this information across the board. It is just not—that is just not the case. But the Attorney General and President are still claiming a blanket privilege over all of the Mueller report and all of the underlying materials, material that has been shared by the special counsel, shared with investigators on his team, shared with fact witnesses, former White House

¹Mr. Rosenzweig requested this be changed to 27 years.

employees, shared with private attorneys. Shared, in fact, with the ranking member of this committee.

So, additionally, I reviewed White House Counsel Cipollone's letter from last night. It leaves me with the same impression that the Assistant Attorney General did in his letter last week. The blanket protective privilege claim wasn't grounded in the law. It was pay-back because the White House and DOJ didn't want to comply with the subpoena, didn't want to negotiate compliance, and didn't want the Attorney General to be held in contempt for refusing to comply.

It is important to note what is going on here, Mr. Chairman. The Attorney General came out in front of the American people and claimed transparency that the President didn't hold any documents back. He didn't assert a privilege. The President waived it. He said he didn't need it.

The Attorney General boasted about it, and then he tried to claw it all back. Not because the law says he can't, but in retaliation against this committee because we demanded compliance with our subpoena and moved forward with contempt. It is too late for a privilege claim now.

The President's decision to use it as a cover-up has thrown this system of checks and balances out the window. Yes, the President has a limited qualified privilege to enable him to do his job. It is not a blanket cloak of secrecy to cover up his own wrongdoing, to make it impossible for Congress to protect the American—Americans' healthcare, ensure we aren't committing human rights abuses at our border, protect our national security from vulnerabilities when security clearances are inappropriately given to family members.

There is no cover-up privilege in our law. Mr. Chairman, the Constitution law and precedent say that Congress has a right to this information. We will go to court if we have to get it. The President cannot prevent Congress from investigating obstruction of justice by obstructing this Congress.

And I yield back the balance of my time.

Chairman NADLER. I thank the gentleman for yielding back.

The gentleman from Texas, Mr. Gohmert.

Mr. GOHMERT. Thank you, and I appreciate my 6½ minutes time I will have.

First of all, I know it is difficult these days because schools teach to the federally mandated tests. So they don't include civics. But anyway, and I know surveys have shown that more college students and recent college graduates can identify the Three Stooges more so than they can identify the three branches of government, but let me help in that regard.

When the President of the United States tells the Attorney General that he is going to waive executive privilege with regard to things that he has used his White House counsel for and met with him and shared things with, that does not waive the executive privilege outside the executive branch. Because, see, we are a legislative branch, one of those three.

And so the executive privilege can be contained within the executive branch without waiving it to another branch. So I know it is an acute difference, but it is worth noting, especially if you are

going to go before a court that does know the difference between the three branches.

And by the way, just for what it is worth, we have had a couple of weeks of hearings on what was called the Equality Act. We are supposed to—the majority is going to pass that out apparently this week. First bill in 25 years where you cannot have a religious freedom defense.

So if you, for example, advise a synagogue, you may want to tell them that if they try to hire—if they refuse to hire a biological woman who says she is a man and wants to be their rabbi, they are looking at a lawsuit, and they cannot claim religious freedom in doing so. There is a lot of changes coming if that bill becomes law. So just a heads-up on that.

Now we are living in a time right now that history is going to document. I don't know how much more this little experiment in self-government is going to go, but history will document what is now coming out. You had a former member of the Trump campaign who was lured overseas to meet with an FBI or DoD—apparently gets money from different sources—person who invited him. He is set up to meet another foreign official who tells him the Russians have Hillary Clinton's emails, and so that when he shares that with another set-up, then that is used to go get a FISA warrant to spy on a campaign.

We are in an historic area. And what we are seeing in this committee as—and I know this was with regard to a different thing, but Professor Turley, we are flailing—this committee is flailing after the gates opened and the evidence has started coming out.

Now I have seen the chairman react when he feels like things are going unfairly, and he forgets some of the rules and misapplies some of the rules. And I get the impression if this chairman had been set up the way the Trump administration and the Trump campaign were by an intel community abuse, a FISA court abuse, a DOJ FBI abuse, then I have a feeling that this chairman would be reacting far more in the flailing area than the Trump administration has been acting.

They have been done terribly wrong, and I am hopeful we will get to the bottom of this. Because if we don't, then this will continue. We should have gotten a clue when the FISA court order, the application affidavit were released through WikiLeaks, letting us know they are using applications with no regard for the Fourth Amendment, no particularity as to what is to be searched or the things to be provided.

They just wanted all the information Verizon had on everybody, and the judge said, oh, okay, and he signs off. Here, you can get everything they have got. That should have been the clue. We have got to start having hearings on the FISA courts. And I would love to get this same group back and have a good discussion on the abuses of the FISA court.

I am about to come to the conclusion we may need to just get done, get rid of them altogether. They have become so abusive, and the fact that no FISA court has reacted violently to having a fraud committed on the court raises the issue that perhaps if we had a FISA judge or more who were part of this scam to take down a duly elected President.

So this is a very important time. Everybody's questions will be part of the record, and you need to know that someday, after all of this has continued to come out and we get all of the truth, what side of history are you on? Were you continuing to flail at a candidate you didn't want elected, or are you going to help restore a Department of Justice and a court system that used to be the envy of the world? Because we are sure not right now.

I yield back.

Chairman NADLER. I thank the gentleman for yielding. I would observe that this Chairman could not be so set up because this Chairman never ran a political campaign that had 180 contacts with a foreign power.

The gentlelady from Texas is recognized.

Ms. JACKSON LEE. Mr. Chairman, thank you so very much.

And as a member of the Homeland Security Committee since the heinous act of 9/11, I can assure you that the FISA court, although there needs to be firewalls, have over the years protected this Nation from heinous and horrific terrorist acts. It is a fixture that is important, and it has done work that is valuable to saving lives in this country.

Let me, Mr.—Professor Kinkopf—and let me also say to each and every one of you, thank you so very much. As a member of this committee, hearing your constitutional perspectives is much appreciated.

Let me indicate that recognizing the executive privilege as a fixture now in the law, not a constitutional. It is not so stated in Article II, but would you say, Mr. Kinkopf, that the recognizing executive privilege, it cannot be used, however, to interfere with the constitutional prerogatives of the United States Congress?

Mr. KINKOPF. I think that's right. It has to be balanced with Congress' authority.

Ms. JACKSON LEE. Thank you.

Professor Turley, yes or no?

Mr. TURLEY. I'm afraid it can. Because a point of privilege is that it will sometimes trump committee requests, and so courts do balance, but at times that balance favors the White House.

Ms. JACKSON LEE. But it is not an absolute bar?

Mr. TURLEY. Oh, absolutely. Yes, that's true. Yes.

Ms. JACKSON LEE. And there are potentials where it does not act in place? There are potentials? Yes?

Mr. TURLEY. Yes. And in fact, this committee and the Congress overall prevails in many of these fights.

Ms. JACKSON LEE. I thank you. I need to proceed with my questions. Thank you so very much.

Let me read this, please. "A final area of conflict concerns whether certain key witnesses can be prevented from appearing before Congress. The President stated publicly that he opposes the appearance of witnesses like Robert Mueller and Don McGahn. For his part, Attorney General Barr has stated he believed that Mueller should testify.

"But regardless of the position taken on these witnesses, Congress is again in a strong position to demand their appearance. It would prevail ultimately in any litigation, and this is a fight that

would be excellent ground for litigation on the part of the legislative branch.”

Based on these words, Professor Kinkopf, do you agree that nothing should prevent Mr. McGahn from appearing before this committee or that the President should not be able to prevent that?

Mr. KINKOPF. Yes, I agree.

Ms. JACKSON LEE. As you well know, Professor Turley, these are your words in your testimony. Do you agree that nothing should prevent Mr. McGahn from appearing before this committee?

Mr. TURLEY. I'd have to agree with that excellent testimony that you read, yes. [Laughter.]

Ms. JACKSON LEE. It is good to have scholars in the house.

Let me also share with you words that were said in July 16, 2014, and I will ask each of you yes or no. This is testimony given, and Professor Turley and I would consider each other at least Judiciary Committee friends. We have seen each other in this room for a very long time.

“The fact that a majority in Congress,” testimony before the Rules Committee, “can remain silent or acquiesce to unconstitutional actions is regrettably nothing new to our country. However, such failure of principle does not change the character of an unconstitutional act.”

Professor Shaw.

Ms. SHAW. I would agree with that statement, yes.

Ms. JACKSON LEE. Professor—forgive me.

Mr. ROSENZWEIG. It's okay. Rosenzweig.

Ms. JACKSON LEE. I will get it. Rosenzweig. Just the glasses are not strong enough.

Mr. ROSENZWEIG. I agree with that testimony.

Ms. JACKSON LEE. Professor Turley.

Mr. TURLEY. Yes, I think that's true.

Ms. JACKSON LEE. Professor Kinkopf.

Mr. KINKOPF. Yes.

Ms. JACKSON LEE. There has been no legislation that has dealt with the executive privilege. We have taken it in a sacred manner that it works collegially with Article I and Article II. In light of our present atmosphere, not that we should be raging against this document, but Professor Shaw, what legitimate interest does the President have in protecting the confidentiality of White House communications or documents that may contain evidence of misconduct?

Now this is being used. Would you answer both that and the idea of some sort of congressional framework given to this use—seemingly unfettered power of executive privilege?

Ms. SHAW. Well, so the general underlying sort of theory is that the President has a need for and entitlement to unvarnished advice from advisers and that it would chill the sort of free flow of that advice to too lightly tread into sort of those confidential communications.

But as I said, when there is some threshold showing that the materials sought might reveal misconduct, any legitimate claim to secrecy I think is quite eroded if not, you know, vitiated.

In terms of the framework, you know, I think it's a difficult framework to encapsulate in a couple of sentences. I think there

are very strong, legitimate, constitutionally grounded interests on both sides of the balance, and so it's a really fact-specific kind of an inquiry and a balance, which is, I think, what is so problematic about the kind of blanket assertion that we see here. It's impossible to evaluate the strength of the White House's legitimate need and balance it against the strength of Congress' legitimate need.

In the abstract, it needs to be sort of a document by document and event by event sort of analysis. But at the end of the day, I don't think a blanket assertion of the sort we have seen here can possibly withstand scrutiny.

Ms. JACKSON LEE. Which is what is acting and going on at this point.

Quickly, Professor Kinkopf, could you just comment on that?

Mr. KINKOPF. Sure. I completely agree with Professor Shaw. And so, normally, what would happen is the executive branch would produce a privilege log that lists the documents being withheld and lists specifically as to each document the rationale for its withholding. That allows then the process of negotiation and accommodation. It allows a court to assess if there's an impasse in that negotiation process.

And the blanket assertions of privilege that we've seen from the Trump administration just do not facilitate that process.

Ms. JACKSON LEE. I thank you very much. I think that has been enlightening for all of us, and I may be judicious in looking at legislation dealing with this question.

Thank you. Thank you very much.

Chairman NADLER. I think all members of the Judiciary Committee should be judicious. [Laughter.]

Chairman NADLER. Thank you. I now recognize the gentleman from Colorado, Mr. Buck.

Mr. BUCK. Thank you, Mr. Chairman.

We are here today because my colleagues on the other side of the aisle are throwing a tantrum over information they want, but know they cannot have. Not because Donald Trump says so, not because Attorney General William Barr says so, but because the law says so.

It is important to understand that there is no constitutional crisis, as the chairman asserted last week. My friends on the other side of the dais can only blame themselves for the current stalemate with the administration—the unreasonable demands, lack of accommodation, and bad faith subpoenas.

I want to highlight three reasons we are faced with the current impasse. First, the majority rejected an effort to work with Republicans to tailor a subpoena most likely to lead to the production of documents that Democrats say they want. On April 18th, the chairman issued a subpoena for the full, unredacted Mueller report. This subpoena presented the Attorney General with two terrible and unfair choices, violate Federal law and disclose grand jury information to comply with the subpoena or uphold the law and only partially comply with the subpoena.

At the subpoena markup, I offered an amendment to carve out grand jury materials from the chairman's subpoena. This would give the Attorney General a subpoena he could legally comply with and would have resulted in the production of documents. So how

did Democrats respond to that common sense approach? The chairman spoke against my amendment. Democrats voted in lock step with their chairman. And my amendment was defeated on a party-line vote.

What is ironic here is the Democrats' remarkable flipflop on this issue. They voted to protect grand jury materials on March 14th, when they voted for the chairman's resolution on the floor, but then voted against the same protection in committee.

Attorney General Barr predictably could not comply with the issued subpoena. That was not his choice. It is the law. The blame for this lies with the majority.

The second reason we have an impasse is because of the chairman's unreasonable demands in terms of timing. It took Special Counsel Mueller and his team 22 months to conduct their investigation. That is 675 days. He had the assistance of 19 prosecutors and 40 FBI agents. His team issued 2,800 subpoenas. They executed 500 search warrants. They conducted 500 witness interviews.

They received court orders for 50 pen registers, had contact with 13 foreign governments, conducted 2 predawn SWAT raids, spent \$35 million, and reportedly produced over 1.4 million pages of documents. How much time did the chairman give the Attorney General to comply with the subpoena, to review over 1.4 million pages of documents? Thirteen days. Thirteen days. That is it.

If Democrats were acting in good faith, you would have asked only for what you knew the Attorney General could legally provide, and you would have given the Attorney General sufficient time to process the request. Before the oversight counsel noticed a markup to hold Eric Holder in contempt of Congress, Mr. Holder was given 174 business days to comply with a subpoena. Congress even gave him a second chance by issuing another subpoena. How many business days did Chairman Nadler wait before noticing a markup to hold Attorney General Barr in contempt? Three business days.

When the majority uses unreasonable timeframes in a subpoena and then moves so quickly toward contempt, it shows the motive. It is not to obtain information, but rather to pick a fight.

Finally, my friends are to blame for the current impasse because the chairman and the majority are playing fast and loose with the facts and misrepresenting precedent. Professor Turley, the Judiciary Committee issued a subpoena to Attorney General Barr. Is that correct?

Mr. TURLEY. Yes.

Mr. BUCK. And when considering the subpoena, does the Attorney General have to comply with the Federal Rules of Criminal Procedure 6(e) and how to handle grand jury material?

Mr. TURLEY. Yes.

Mr. BUCK. If the Attorney General released grand jury material to this committee without a court order allowing him to do so, who would be liable for that action?

Mr. TURLEY. Well, he would be in violation of Federal law. Also, some of this material beyond Rule 6(e) dealing with ongoing cases may involve prosecutions like that of Roger Stone. Some of that material may be under court order not to be released because they're ongoing prosecution. So, once again, to release that informa-

tion, he has to go to a different judge to ask if the information can be released.

Now all of that states the obvious, and that is he's between the horns of a dilemma here if the choice is to comply with Congress and violate standing court orders or Rule 6(e). And I think that's what caused this—this obvious conflict between two branches.

Mr. BUCK. And I heard earlier one of my colleagues on the other side of the aisle mentioned the President waiving executive privilege by saying that he wants to be transparent. Is that a waiver of executive privilege?

Mr. TURLEY. No, the waiver—the Mueller—public Mueller report itself is a giant waiver—

Mr. BUCK. No, I am just saying if he holds a press conference and says “I want to be transparent,” has he waived executive privilege?

Mr. TURLEY. No, it's not. But I also don't believe that the administration is claiming that the public report itself is subject to executive privilege. What they're claiming is that the subpoenaed material, the stuff that was not published or released, is subject to this preventive executive privilege assertion.

Mr. BUCK. Have you ever reviewed 1.4 million documents?

Mr. TURLEY. Well, my tenure piece was pretty long, but not quite that long. Yeah.

Mr. BUCK. Okay. All right. Thank you.

I yield back.

Chairman NADLER. I thank the gentleman for yielding.

I now recognize the gentlelady from California, Ms. Bass.

Ms. BASS. Thank you, Mr. Chair.

This is a question to the entire panel. The President recently declared that he is fighting all subpoenas issued by Congress, and I wanted to know in all of your different government experiences, have you ever heard a President say or do something like that?

Ms. SHAW. If I should start, Congresswoman? No, I have not. I will say that I do think that background fact is relevant to this committee's task, but equally relevant, if not more relevant, I think, is the conduct of the executive branch vis-a-vis this committee's request. And that conduct does seem to have been quite consistent with that sort of baseline decision to essentially resist completely cooperation with this committee's oversight undertakings.

Ms. BASS. Thank you.

Mr. ROSENZWEIG. I would agree it is a unique—a unique circumstance. Kerry Kircher, who was the general counsel of the House under Speaker Boehner and Speaker Ryan, and before that deputy general counsel in both Republican and Democratic administrations, said nobody likes—in the executive branch likes congressional oversight. But heretofore, everybody recognized it had its place. You mostly argued about degrees.

Now we're not arguing about degrees anymore. We're arguing all or nothing, and that's a significant escalation. This is a unique circumstance.

Ms. BASS. Thank you.

Mr. TURLEY. I would have a little more nuanced view on this because this is not the first time a White House has defied Congress. During the Obama administration, during the Clinton administra-

tion, there was defiance of this body. In my view, they were wrong in their position——

Ms. BASS. Well, the question is all subpoenas.

Mr. TURLEY. No, no. I've already been critical that I think that that—the assertion is wrong-headed. It cannot be sustained in its current force. What they're relying on is an opinion by Janet Reno that made a similar type of preventive type of assertion. That's never been tested in court.

Ms. BASS. Thank you.

Mr. KINKOPF. That preventive assertion was with respect to a specific subpoena. Never before has there been a blanket assertion that an administration will stonewall all subpoenas and all requests for documents. And when I think of a word to describe that, the only one that comes to my mind is contemptuous.

Ms. BASS. Can executive privilege be invoked because the President believes Congress has a political agenda? So have you ever seen executive privilege invoked because of that opinion?

Mr. KINKOPF. Me?

Ms. BASS. Yes.

Mr. KINKOPF. So, no. If Congress' only motive is a political motive, that's not a legitimate legislative interest. But the fact that Congress might have political motives in addition to legislative motives is not only—not only doesn't vitiate, it's not surprising. It is the premise of the Constitution that both Congress and the President will have political motives when they act.

So that motive alone doesn't tell us anything. The only question is do you have a legitimate interest as well? And in this instance, you do.

Ms. BASS. And Mr. Rosenzweig, I would ask you the same question as well. Can executive privilege and have you seen it in your experience be invoked because of a President believing that Congress has a political agenda?

Mr. ROSENZWEIG. No. That—that would be most unusual. As Mr. Kinkopf said, Congress always has some political motive. That, after all, is what you're here for. But here, the committee clearly has legitimate interests both in, as the Chairman said, in examination of Russia's role in the 2016 election, what to do about it in the future, the President's interactions with the Department of Justice. All of those are perfectly legitimate legislative matters.

The fact that they—in addition, this occurs in a political environment is simply the necessary consequence of the fact that government is run by politicians.

Ms. BASS. So as we said, ordinarily, Congress tries to avoid resorting to subpoenas in the first place, but we have seen a troubling pattern with this administration, where our requests for information are just ignored altogether.

For example, the administration has repeatedly refused to respond to our document requests on topics like its refusal to defend the Affordable Care Act in court, its failure to enforce the Voting Rights Act, or its cruel policy of separating children from their parents at the border.

Professor Shaw, would that have been normal behavior in the White House counsel's office, and can you recall any other example similar to that?

Ms. SHAW. I would say absolutely not. I think it is certainly customary for White Houses to attempt to narrow requests, to sometimes find themselves unhappy with requests, but to just ignore repeated requests from congressional committees is something that I don't believe there is any precedent for, no.

Ms. BASS. Well, I think my colleagues on the other side of the aisle suggested that maybe the administration didn't have enough time to respond, that there were a lot of documents. And so how long generally would be reasonable to respond?

Ms. SHAW. So I agree that this committee has moved quickly beyond the initial sort of request stage to subpoena, to then the contempt vote. But I think—but that was and is, to a degree, justified by the total lack of response from the administration.

So I think that some fairly dramatic step on the part of the committee was appropriate to counter what I view as a very dramatic step of complete noncompliance. Responding to try to narrow requests is absolutely customary, but a failure totally to respond and to produce any sorts of documents, that, I think, is a quite extraordinary step and I think largely does justify an escalation on the part of the committee.

Ms. BASS. Mr. Rosenzweig? Oh, is my time up?

Go ahead. Could you—

Chairman NADLER. The gentlelady's time has expired. The witness may answer the question.

Mr. ROSENZWEIG. I would agree with the professor, and I would also add that, of course, in cases of large volume, this committee and criminal investigations as well often receive documents on a rolling basis in which you begin your production and you explain that there are a lot. It will take us a few weeks to do it or a few months. And that sort of accommodation would also be very reasonable.

My understanding, it, too, has not been put on the table by the Department.

Chairman NADLER. The gentlelady's time has expired.

The gentleman from Arizona, Mr. Biggs.

Mr. BIGGS. Thank you, Mr. Chairman.

Thank you to all the witnesses for being here today.

Executive privilege is a critical protection for the executive branch in our separation of powers scheme. And if presidential advisers know that their candid advice is subject to subpoena by political opponents, the effect will be that advisers are less willing to give candid advice, as Professor Shaw has previously testified today.

However, invoking privilege preventing access to documents should be done sparingly and err on the side of transparency. But nonetheless, congressional overreach in the form of abusing the oversight process and using the legal process for political purposes is also a genuine and legitimate concern, and that is exactly what this chairman has been doing.

I am concerned with the effect of the chairman's actions on this institution. As I iterated last week, there are so many other things that could have been brought before this committee rather than a contempt hearing and citation. Open hearings with Mr. Barr, who was willing to come and testify, who testified in the Senate. Mr.

Rosenstein or Mr. Mueller, a closed hearing with Barr, Rosenstein, and Mueller, et cetera.

Well, by submitting a sloppy subpoena, a subpoena that was overly broad, unenforceable demands, the chairman has risked doing lasting and real damage to the Judiciary Committee in the House of Representatives because bad facts make bad law. So I also want to comment on something that Ms. Shaw just testified to, and she was kind of ameliorating something that she said in her written statement.

She said, “One of the categories of information—” This is from page 10 of her statement. “—presently sought by the committee appears so broad as to put the executive branch officials to a nearly impossible task. The third item on the committee’s subpoena consists of all documents obtained and investigative materials created by the special counsel’s office.”

And we know that the investigation involved more than 2,800 subpoenas, 500 warrants, 250 communication records orders, and over 500 witnesses. What she doesn’t mention is that it also produced 1.4 million documents.

“In light of this volume, the committee cannot in good faith expect compliance. Accordingly, the burden is on the committee to substantially narrow this aspect of its request.”

Contrary to what Mr. Rosenzweig just testified to, Ms. Shaw has written that the burden is on the committee to substantially narrow this aspect of its request. If this committee were willing to accept rolling, rolling submission of documents, why did it not so state and why did it pull the plug on accommodation negotiations with Mr. Barr and his office?

This committee—Ms. Shaw continues, “The committee appears to believe that the executive branch has essentially withdrawn from the process of negotiation, providing affirmative authorization for Congress to do the same by moving quickly to subpoena and then contempt vote. These developments do not, however, relieve the committee of its obligation to continue to negotiate, to frame requests with specificity and care and, where possible, narrowly, both to potentially achieve some sort of resolution outside the courts and to allow the courts to adjudicate a narrow dispute if and when one party invokes their jurisdiction.”

We have rushed instead in this body—as my colleague from Colorado, Mr. Buck, so eloquently stated, we have rushed to invoke the court’s jurisdiction by hurriedly issuing a poorly drafted and overbroad subpoena, which, by the way, this committee in its hearing last week attempted to narrow the scope of the subpoena by amending the motion to hold in contempt.

Think about that. You have given Mr. Barr a subpoena. You have demanded all documents. And then, when it comes time to hold him in contempt, you say, well, we didn’t mean this type of information. Well, then how in the world do you think he could be held in contempt?

Using the committee’s oversight authority and subpoena authority for partisan political reasons, refusing to work with DOJ to narrow the request for information that is legitimately within our jurisdiction, and putting on show hearings demanding that the AG

submit to staff questions and then later holding him in contempt damages the credibility of this committee.

Issuing a subpoena that is overtly overly broad and attempting to narrow it when you are holding the person in contempt not only is sloppy, but it shows that this is being done for a partisan purpose to undermine, to pick a fight, and not to get the documents, not to get at the truth, especially when this chairman refuses to go down and look at the documents that have been provided to him with only 2 percent of the documents even being redacted.

With that, my time has expired.

Chairman NADLER. The time of the gentleman has expired.

The gentleman from New York, Mr. Jeffries.

Mr. JEFFRIES. Thank you, Mr. Chair.

Mr. Rosenzweig, in your opinion, does the House Judiciary Committee have a legal basis for seeking disclosure on a confidential basis of the grand jury materials that are subject to Rule 6(e)?

Mr. ROSENZWEIG. I believe it does. I believe that would be strengthened if impeachment proceedings were to begin. But I believe that the McKeever case is distinguishable on the grounds of this—this committee's superior legislative interests.

Mr. JEFFRIES. Now separate and apart from the question of impeachment proceedings, the chairman has previously announced that this committee will pursue an inquiry on three different subjects. One, obstruction of justice; two, abuse of power from the administration; three, the culture of corruption that could possibly exist at 1600 Pennsylvania Avenue.

Do those three independent subjects provide a basis for which we should have a firm foundation to seek this grand jury material?

Mr. ROSENZWEIG. In my judgment, yes. I would say that all of those are suitable and cautious preliminary steps in anticipation of the possibility of considering impeachment. And therefore, this committee has not only a legitimate oversight interest, but one of the highest constitutional moment.

Mr. JEFFRIES. Thank you.

Professor Shaw, does executive privilege cover communications the President has with private citizens who do not work at the White House?

Ms. SHAW. I don't believe so. No, Congressman.

Mr. JEFFRIES. Does anyone on the panel disagree with that position?

Mr. TURLEY. Well, I'm not too sure how I'd answer that. In my testimony, I get into the question of attorneys, private attorneys, and that's a difficult issue that I discuss in the testimony. A court could very well create new law that this committee would not welcome if you push that issue.

Mr. JEFFRIES. Okay. Professor Turley, would the assertion of executive privilege cover communications between the President and Corey Lewandowski, who is not an attorney?

Mr. TURLEY. No, I think that would be a disclosure to a third party. Although as I mentioned in my testimony, when it comes to waivers to third parties, the courts have been somewhat restricted in how far they'll allow that waiver to go.

The Espy case was referred recently. The court said quite clearly they will not “lightly infer” a waiver when it comes to executive privilege.

Mr. JEFFRIES. Roger Stone is not an attorney. Correct?

Mr. TURLEY. I have no idea, unfortunately.

Mr. JEFFRIES. Okay. We can stipulate that he is not. So I would assume that executive privilege does not blanketly cover communications with Roger Stone.

Is Donald Trump Jr. an attorney?

Mr. TURLEY. Once again, I have knowledge of their background.

Mr. JEFFRIES. We can stipulate that he is not. I would assume that a blanket assertion of executive privilege does not apply with any degree of reasonable force to Donald Trump Jr.

Is Paul Manafort an attorney?

Mr. TURLEY. Once again, I don’t know.

Mr. JEFFRIES. Okay. Let us stipulate that he is not. I would assume that the assertion of executive privilege does not in a blanket fashion cover communications with Paul Manafort.

Chris Christie is no longer a practicing attorney. Is that correct?

Mr. TURLEY. I—once again, I have no idea what his practice is.

Mr. JEFFRIES. Okay. Yeah, I would assume that the assertion of executive privilege does not apply in a blanket fashion to him either.

Now, Professor Shaw, in the context of this question of waiver, it does appear that several White House employees talked to Bob Mueller and his investigators in the context of the preparation of the Mueller report without the administration asserting executive privilege. Is that right?

Ms. SHAW. I believe that’s right, yes.

Mr. JEFFRIES. And so Hope Hicks talked to the Mueller investigators without the assertion of executive privilege. Correct?

Ms. SHAW. That’s correct.

Mr. JEFFRIES. And Sarah Sanders talked to the Mueller investigators without the assertion of executive privilege. Is that correct?

Ms. SHAW. That’s correct.

Mr. JEFFRIES. And I even think that Don McGahn, the White House counsel, talked to the Mueller investigators without the assertion of executive privilege. Is that correct?

Ms. SHAW. Yes, also correct.

Mr. JEFFRIES. And so what impact, if any, does the fact that the administration did not see fit to assert executive privilege in the context of an incredibly public investigation that the President tweets about every other day, but failed to assert executive privilege and now after the fact want to put forth this blanket assertion?

Ms. SHAW. You know, again, I think it’s a difficult question. I think the argument would be that to choose not to assert executive privilege in the context of an investigator inside the executive branch, which, of course, Special Counsel Mueller was inside the Department of Justice, is different and doesn’t necessarily waive the opportunity to at a later date assert the executive privilege as against, say, Congress.

As I said, I don’t—I am not predicting that the White House would absolutely prevail in that argument, but I do think that it

is a close legal question. And it is not at least evident that by failing to object at this earlier juncture that the White House has for all time it necessarily waived privilege as to all the contents of those communications when a body like this committee is seeking them.

Mr. JEFFRIES. Okay. Seventeen different intelligence agencies concluded that Russia attacked our democracy as part of an effort to try and artificially place someone at 1600 Pennsylvania Avenue. Does Congress have a strong public interest in getting a full understanding of what happened, how it happened, and how we can figure out how to prevent that from happening again?

Ms. SHAW. I would say absolutely. An incredibly strong interest, yes.

Mr. JEFFRIES. Thank you. I yield back.

Chairman NADLER. I thank the gentleman for yielding.

The gentleman from Virginia.

Mr. CLINE. Thank you, Mr. Chairman.

Well, here we are again at the latest installment of the dramatic miniseries, the impeachment by any other name but impeachment. Masking as oversight, this committee has continued to drag on with questions about the Mueller report, what is behind the redactions, and the lack of attention to the actual issues that the American people are concerned about—securing our borders and addressing the immigration crisis, the opioid epidemic, as was addressed earlier, and as my colleague just mentioned, Volume 1 of the Mueller report spells out in detail just how Russia tried to influence our elections.

The previous administration didn't do anything to address it. The current administration and this Congress need to work together to address it.

But what we have instead is this committee, driven by animosity for the President, pushing to see what is behind the redactions, and yes, I would love to see what is behind the redactions, in compliance with the law, but that is not what the subpoena said. The subpoena said the entire Mueller report must be made available, in violation of Federal law.

So we are waiting to see how that works itself through the courts. And as was testified to by Mr. Turley, we have played our weakest hand. So what is happening now?

Well, now we are starting to hear that the Attorney General wisely has started to ask if we got it so wrong on the collusion question, then what actually did happen with the FISA court? What actually did happen with the investigation? And he has appointed U.S. Attorney Durham to investigate what exactly happened through that process. It is very appropriate that he has done that.

But instead of supporting a U.S. attorney who has done work in previous administrations on both sides of the aisle, what we see is this committee trying to take the reputation of a good man, this Attorney General, and drag it through the Washington mud, claiming that by not releasing grand jury testimony, he is somehow in contempt of Congress.

Well, he is actually complying with the law, not trying to thwart the enforcement of it. And this committee should be appreciating

rather than trying to muddy up the reputation of the Attorney General.

So I want to focus on an example of just how ridiculous this whole process has become. Mr. Chairman, you laid out—in the case for contempt, you raised three complaints against Barr, and these were outlined, Mr. Turley, in your article in *The Hill*, and I would ask you to elaborate on them.

The complaints are a failure to release an unredacted report, which you have addressed and which is in the contempt citation, even though he is prohibited by law from doing so; making false statements; and his refusal to follow a subpoena. Can you expand on why those two were left out of the contempt citation?

Mr. TURLEY. No, I don't know why the committee left out the common allegation that General Barr lied repeatedly to the committee. I disagree with those allegations. I don't see where perjury occurred.

In terms of his record, I believe that he fulfilled his commitment to the Senate Judiciary. He said he would release as much as possible as fast as possible. In his testimony to the Senate, he said that he asked Mueller to identify grand jury material so that they could rapidly release the report.

I'm still quite surprised that that request made by both Mueller's superiors was effectively ignored. The report came without identification of grand jury material, and that slowed the process. But in the end, the public report was 92 percent unredacted. To be honest, I thought that was a remarkably high percentage, given the nature of this material. A report given to select Members was 98 percent unredacted.

My assumption then is that the grand jury material represents about 2 percent of the redactions. On that material, I can't imagine a court agreeing with some of the statements made here about his ability to release it. I tell my students all the time that only bad gamblers and bad lawyers focus on the prize and not the cards in their hand. This is not a good card to go to a court with.

Mr. CLINE. Thank you, Mr. Chairman. I yield back.

Chairman NADLER. I thank the gentleman.

The gentleman from California, Mr. Lieu.

Mr. LIEU. Thank you, Mr. Chair.

Let me just clarify that the Trump administration is not just denying requests from this committee. It is every single committee. So they are hiding information on every issue.

Right now, we have got a committee trying to seek information on why the President and Bill Barr are suing to eliminate healthcare coverage for people with preexisting conditions. We can't get that information. So let us just be clear of what is going on.

So, Professor Turley, I have a question for you about the waiver of executive privilege. Attorney General Bill Barr gave some Members of Congress, including the Republican ranking member of this committee, access to 98 percent of the report. I cannot see 98 percent of the report.

Has the privilege been waived because Bill Barr clearly let Members of Congress actually see a lot more of this report than I could? So would that have waived executive privilege?

Mr. TURLEY. No, it's an excellent question. We haven't really seen a test on that because it's sort of a conditional waiver. It allows for some access. We see that in other cases involving classified evidence, for example.

The question I would pose to the committee, the caution I would give them is to not look at this through your eyes or the President's eyes, but look through the eyes of a judge. When she sees this, how is she likely to draw this line? Judges are loathe to create new law in this area.

My guess is that the court will find that that is a conditional waiver for those Members, that it's the lesser is contained in the greater. But honestly, this has not been tested in court, so you can't say for certain how it would come out.

Mr. LIEU. Thank you.

And then just want to make sure that are you aware that we held Bill Barr in contempt not because he didn't provide Rule 6(e) materials? You are aware of that, right? Because that action excluded Rule 6(e). We are very aware of how it works.

The way—because I am a former prosecutor, right? The way you do subpoenas is you have a broad subpoena, and then the opposing side said, okay, well, I can provide documents A, B, and C, but with respect to documents X, Y, and Z, here are the reasons we can't provide it. And then you go forward.

So what if a judge actually looked at what we actually negotiated and tried to ask for versus just what the actual subpoena says?

Mr. TURLEY. Again, that's—again, that's a reasonable point to make. I must confess that if I were the judge, I would not be so inclined. What I would see is that in March of this year, this body did put forward a resolution that had two conditions. One, the first one was written nicely and said you should release publicly the report as much as possible. The second condition said we want the full report given to Congress, with no distinction for Rule 6(e).

This committee has also repeatedly said it wants a full and unredacted report. And these questions are so close that you have to be careful in your language. I think the subpoena was a mistake the way it was drafted, honestly, because I think a court is going to look very closely at that and say, look, there's been this mantra that you want the full and unredacted report.

And also the time you gave Barr, I have to tell you, I think judges are not going to like. They're going to see over a million pages of documents. They're going to see over a dozen cases ongoing that were involved, and I think that most of those judges would say I would not give him that limited amount of time.

And judges deal with these issues all the time. They produce indexes. They do reviews. I think the time you gave Barr will be viewed by Federal judges as insufficient.

Mr. LIEU. Thank you.

And Mr. Rosenzweig, I would like to ask you some questions about obstruction of justice. You are a former Federal prosecutor. Correct?

Mr. ROSENZWEIG. Yes.

Mr. LIEU. And you were the former Republican investigative counsel on the House Transportation and Instructure Committee. Correct?

Mr. ROSENZWEIG. Yes.

Mr. LIEU. And then you also signed on to a letter now with over 900 former prosecutors saying that if anybody else in America had been faced with this evidence on obstruction of justice, they would have faced multiple felony charges if they weren't Donald Trump?

Mr. ROSENZWEIG. I signed that letter, yes.

Mr. LIEU. Okay. And that is because under the obstruction of justice statute, it is really quite broad, right? You don't actually have to complete an obstruction of justice act. You just have to endeavor to try to obstruct justice?

Mr. ROSENZWEIG. That's exactly right. The statute says endeavor to obstruct, and typically, such obstructions fail. Otherwise, we wouldn't—if they succeeded, we wouldn't know about them.

Mr. LIEU. So it wouldn't really matter that Don McGahn said no. What mattered is if Donald Trump gave the order to obstruct justice?

Mr. ROSENZWEIG. That's exactly right, sir.

Mr. LIEU. Secondly, under the obstruction of justice statute, there is no requirement you have to commit a second underlying crime in order to be guilty of the crime of obstruction of justice. Isn't that right?

Mr. ROSENZWEIG. That's right. Many people would be very surprised to learn of that requirement since they languish in jail right now on that ground.

Mr. LIEU. And in fact, lots of people get prosecuted for obstruction of justice because they want to protect a family member or a friend, or they are afraid of embarrassment from the investigations?

Mr. ROSENZWEIG. Or political reasons as well, yes.

Mr. LIEU. Okay. So, really, Bill Barr's theory that the President had to have actually committed criminal conspiracy with Russia is pretty cockamamie when it comes to obstruction of justice.

You don't have to answer that. I want to ask you one more question on obstruction of justice—

[Laughter.]

Mr. ROSENZWEIG. Okay. I didn't want to characterize it.

Mr. LIEU [continuing]. Which is the President would not have known if Michael Flynn, Paul Manafort, or others may have committed underlying crime. So with respect to stopping investigation against them, that clearly would have been obstruction of justice, whether or not the President believed he, himself, had done anything wrong? Is that—

Mr. ROSENZWEIG. That's correct. You can obstruct justice by obstructing an investigation into a third party. It's not only limited to obstructing an investigation of your own conduct.

Mr. LIEU. Thank you. I yield back.

Chairman NADLER. Would the gentleman yield? Would the gentleman yield?

Mr. LIEU. I will yield to the chair.

Chairman NADLER. Thank you.

Just, Professor Rosenzweig, you were shaking your head vigorously a moment ago when Professor Turley was answering questions from the gentleman from California about how a judge would regard the contempt with reference to the fact that 6(e) was in the

original—not the contempt citation but in the original subpoena, but we would not have asked for it because we made clear that we were just seeking his cooperation in getting it. Could you comment on what you were shaking your head about?

Mr. ROSENZWEIG. Yes. I guess my thought is that I don't think that this Committee's subpoena, it was poorly drafted or in any way unusual from the hundreds of subpoenas I have seen in my own practice as a prosecutor. You write them broadly, you include, as this Committee did in its instructions, a provision allowing the recipient to assert a privilege, and you define a privilege, as this Committee did, as withheld from production pursuant to any law, statute, rule, or policy. So in my view, it would have been perfectly appropriate for—

Chairman NADLER. So that—so that subpoena was not asking the attorney general to break a law?

Mr. ROSENZWEIG. Yeah, I don't believe it was. He would have been perfectly within his rights to respond—here is everything I can give you but there is this Rule 6(e) piece that I am not going to give you, and I am going to assert that pursuant to your own instructions to him.

Chairman NADLER. Thank you very much. Who is next?

The gentleman from North Dakota, Mr. Armstrong, is recognized.

Mr. ARMSTRONG. Thank you, Mr. Chairman, and I think sometimes we might not—these aren't always ideological difference. As somebody who practiced criminal defense in both state and federal court for a decade I have a drastically different impression of subpoenas being issued than prosecutors necessarily do.

So I just—we just had that discussion about the subpoena and about Rule 6(e), so I would start—because I do think context matters. So I would start with Professor Turley. Do you agree with that back-and-forth analysis we just heard?

Mr. TURLEY. No, I don't. I think it is a mistake to compare subpoenas used in conventional practice with a subpoena issued by a congressional committee. They are different creatures. Yes, subpoenas that are issued in litigation are often too broad, they are often setting the table for fights. This is not some litigant in a state court fighting over a subpoena. You have to tie your requests carefully to your authority to demand information.

What I would suggest to my friend is that if Bill Barr had actually complied with the subpoena as written he would have violated federal law.

Mr. ARMSTRONG. Thank you.

Mr. TURLEY. And this Committee also said, by the way, that they believed that Rule 6(e) did not bar Attorney General Barr from releasing the information. I think that is also not true.

Mr. ARMSTRONG. Well, and I have two points to add too, because, I mean, this is a political body for various reasons, so there are a lot of people on both sides of the aisle that have spoken up, in print, on TV, and all of those things. And I can tell you that up until the day of the contempt hearing, there is nobody out there saying that 6(e) information is not supposed to be disclosed. I mean, the narrative and the way this was working was the entire unredacted Mueller report.

So I am just going to do this really quickly. Professor Shaw, if Attorney General Barr would have provided a complete non-redacted report, would he have violated the law?

Ms. SHAW. I think the law protects grand jury material. Yeah, I would agree with that, yeah.

Mr. ARMSTRONG. Mr. Rosenzweig, do you agree with that?

Mr. ROSENZWEIG. I agree, though I would say that nothing in the statute prevents him from asking a court for permission to provide that Rule 6(e) material.

Mr. ARMSTRONG. I agree with that but nothing in the statute or authority compels him to do that, and a subpoena surely doesn't compel him to go to court.

Mr. ROSENZWEIG. A subpoena surely does not compel him to go to court.

Mr. ARMSTRONG. Professor Kinkopf, do you agree with that?

Mr. KINKOPF. Sure.

Mr. ARMSTRONG. Okay. So, and then, so I think it is important, I mean, this blanket assertion of privilege happened the morning of a contempt hearing. I mean, we—this protective assertion of privilege happened the morning we were going to hold Attorney General Barr in contempt for information that he could not provide in compliance to the subpoena, by law.

And one of the reasons I bring that up, because we have talked about this, Professor Turley cited, I think, the total report is 98.5 percent available to certain members. Of the obstruction side I think it is like 99.9 percent. And the reason I am saying this is because when I read all these cases, whether it is Holder or Oversight v. Holder, and we are dealing with all this, a big portion of the analysis is on research, or on accommodation and negotiations.

And I think Professor Turley talked to it about, you know, the questions about conditional waivers. And so we talk like if the people on this Committee who have access to that, in a secured setting, like that becomes the end of it, but that is typically where we would start having this negotiation and accommodations, and that is what has happened in prior cases. That is what happened in Holder, that is how we worked our way through this. And, I mean, when you have one party controlling one branch of government and one party controlling the other branch of government, there is going to be combat. There is going to be back-and-forth. There is going to be those. We saw it in the Holder case, and eventually they went to court, and there had been documents provided over the course of months and months and months.

But that didn't happen here, and outside of everything else, there was no time for that to happen here. This all happened in a span of—I mean, a very, very short period of time.

So how do you deal with the negotiation and accommodation part of this after you have held a contempt order on a person who can't comply with your subpoena?

And so I will start with Professor Shaw.

Ms. SHAW. Well, I think the process continues. I think that accommodation can be ongoing today and next week, and that was true before the Committee contempt vote and I think it remains true. So I think that it is incumbent on both this Committee and the White House to attempt to, you know, de-escalate if possible.

I think it is only possible if there is meaningful attempt to provide information to the Committee which, as I understand it, although I agree that the timeline is short, in some ways I presume the decision was made that it doesn't matter how much time you give to a party that is providing no information. You may as well proceed quickly to the next stage of negotiation if there is absolutely no cooperation forthcoming.

Mr. ARMSTRONG. And I don't necessarily disagree with that. My point would be that there was no cooperation on either side. I mean, we were saying, "You are providing the whole thing," and he is saying, "I can't provide the whole thing." And I think—I am out of time so I would just say that the negotiation and accommodation part would work a lot better if the contempt order wasn't in place, and to quote somebody on the panel from a hearing we had earlier, I think Congress has met the enemy and sometimes it is us. This was in a different context but I think we are fully aware of what we are doing, how we are doing it, and why it is not the most effective way to accomplish our goals. Thank you.

Mr. RASKIN [presiding]. Ms. Garcia.

Ms. GARCIA. Thank you, Mr. Chairman. First of all, thank you to all the witnesses for being here. I think most of you here will agree that executive privilege serves as a vital function in our government's ability to make laws and protect our national interests. Without it, presidents and the privacy required to make decisions of great national interest would be severely limited. Frankly, I don't think any one of us here at the table would want to do that, and unlike some of the statements that have been made by my colleagues across the aisle, we are not here because of animosity to the President. We are not here, you know, on the self-described by the President, a witch hunt. We are really here to get to the bottom of the truth and to take the facts where they lead us.

I know, for me, as a former judge and a lawyer, there is nothing more important in our country than the rule of law, and that is what we are here fighting about.

I wanted to start first, though, to just kind of dispel some of the comments that have been made from across the aisle that somehow they think we are just all sitting here trying to think about impeachment or investigation, some ways to get back at the President, and we are not taking care of business.

This Committee has already heard, in past, the For the People Act, which protects our vote and is about election reform and ending corruption in government. We have already passed a bill about preventing gun violence, protecting dreamers and TPS recipients, another bill reauthorizing the Violence Against Women Act. We have also looked at the state of competition in the health care markets. We have looked at the history and enforcement of the Voting Rights Act. We looked at the lack of diversity among patent holders.

We have looked at the Equality Act, protecting all LGBTQ community. We looked at the Equal Rights Amendment, at hate crimes and the rise of white terrorism. We also have been looking at the family separation policy, because, yes, there is a crisis at the border, but it was created by this President. We have looked at the National Emergencies Act. We have looked at the proposed Sprint/

T-Mobile merger and the oversight of the U.S. Patent and Trademark Office.

We have been working but we also don't lose sight of the responsibility that we have under the Constitution, legally and ethically, to have oversight over the actions of this Administration. So it really concerns me that some would like to twist what we are trying to do, because, frankly, if we don't do it then who will? And for me I take that responsibility very, very highly.

And, Ms. Shaw, I wanted to start with you, because you made a comment in your testimony that kind of intrigued me. You said that there may not be a waiver of executive privilege in intra transfers among the executive branch. What does that actually mean and how broad is that?

Ms. SHAW. So when the comment is made that the President didn't assert executive privilege to prevent, say, his White House counsel from cooperating with the special counsel, I think there is an open question whether he would even need to assert executive privilege. Instead, you know, he could have just directed his White House counsel not to cooperate.

Ms. GARCIA. You are talking just about the counsel.

Ms. SHAW. Just his immediate staff members or any executive branch official.

Ms. GARCIA. Having been in government many years, when you say intra-agency I just wanted to make sure that the public, who is listening, who may not understand the complexities of the bureaucracy, if you will, everything from the White House on down. And you don't mean any agency.

Ms. SHAW. Well, so I think as an intra-executive, right, just within the executive branch, so allowing an executive branch official to talk to another executive branch official—

Ms. GARCIA. Does that include Department of Justice lawyers?

Ms. SHAW. Yeah. So that would be—

Ms. GARCIA. Does that include the investigators we have talked about earlier?

Ms. SHAW. Yes, I believe so. So I think my point was that talking to all of those categories of individuals who are all executive branch officials of some sort presents different questions than allowing the dissemination to another branch of government of the same information.

Ms. GARCIA. Okay. You also say, in your written testimony, that our third category of requested information in our subpoena is too broad. The Committee has offered to narrow its request exactly as you suggest, including negotiations, and again, in its May 10th letter. Do you believe that it is an appropriate accommodation?

Ms. SHAW. Thank you for the opportunity to address that, and yes, I did, in my opening statement, or in my written statement, suggest that that Category 3 was, in my view, too broad, but I now understand that the Committee has if not—I think it may have actually abandoned its request for documents in that third category in favor of just the documents referenced in the report, as opposed to the entire universe of documents, and as to that I think that is a perfectly appropriate accommodation.

And if I might just comment on the general exchange about the kind of propriety of the breadth of the initial subpoena, my view

is that it is quite appropriate in that this is an iterative process and courts understand that and all the participants understand that, that broad requests always get narrows, and that, in fact, is the whole game. And so I don't think there is anything inappropriate in the face of the subsequent narrowing that this Committee has been willing to make, in having made an initially broad request.

Ms. GARCIA. Okay, thank you, and I yield back. I think I am out of time, Mr. Chairman.

Chairman NADLER [presiding]. I thank the gentlelady for yielding.

Before I recognize the next member I ask unanimous consent to introduce into the records these excerpts from a report by the Project on Government Oversight, entitled "When Congress Comes Calling: A Study on the Principles, Practices, and Pragmatics of Legislative Inquiry."

Without objection.

[The information follows:]

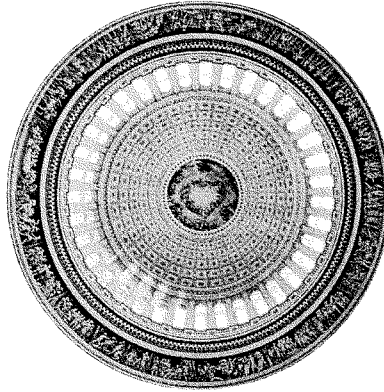
**CHAIRMAN NADLER FOR THE OFFICIAL
RECORD**



In light of the House Judiciary Committee's important hearing today on executive privilege and Congressional oversight, we have excerpted portions of *When Congress Comes Calling*, The Constitution Project at the Project On Government Oversight's study on legislative inquiry. The author of *When Congress Comes Calling*, Morton Rosenberg, served for over 35 years at the Congressional Research Service.

As these sections explain, while executive privilege has an important place in the separation of powers, history and case law show that it is far from absolute, and that Congress can, and has in the past, overcome many claims of privilege.

The following excerpts outline the legal and practical balance between Congressional access and executive prerogatives, discussing the presidential communications, attorney-client, and deliberative process privileges. They also examine the merits, or lack thereof, of other executive branch objections to Congressional inquiries, particularly in the context of oversight of the Department of Justice.



When Congress Comes Calling

★ ★ ★ ★ ★

A Study on the
Principles,
Practices, and
Pragmatics
of Legislative
Inquiry

Morton Rosenberg
Constitution Project Fellow

THE CONSTITUTION PROJECT

★ ★ ★ ★ ★ ★ ★ ★ ★ ★

Safeguarding Liberty, Justice & the Rule of Law

5. The Breadth of Congress's Authority to Access Information in Our Scheme of Separated Powers

Overview

Congress's broad investigatory powers are constrained both by the structural limitations imposed by our constitutional system of separated and balanced powers and by the individual rights guaranteed by the Bill of Rights. Thus, the president, subordinate officials, and individuals called as witnesses can assert various privileges, which enable them to resist or limit the scope of congressional inquiries. These privileges, however, are also limited.

The Supreme Court has recognized the president's constitutionally based privilege to protect the confidentiality of documents or other information that reflects presidential decision-making and deliberations. This presidential executive privilege, however, is qualified. Congress and other appropriate investigative entities may overcome the privilege by a sufficient showing of need and the inability to obtain the information elsewhere. Moreover, neither the Constitution nor the courts have provided a special exemption protecting the confidentiality of national security or foreign affairs information. But self-imposed congressional constraints on information access in these sensitive areas have raised serious institutional and practical concerns as to the current effectiveness of oversight of executive actions in these areas.

With regard to individual rights, the Supreme Court has recognized that individuals subject to congressional inquiries are protected by the First, Fourth, and Fifth Amendments, though in many important respects those rights may be qualified by Congress's constitutionally rooted investigatory authority.

A. Executive Privilege

Executive privilege is a doctrine that enables the president to withhold certain information from disclosure to the public or even Congress. The doctrine is based upon constitutional principles of separation of powers, and it is designed to enable the president to receive candid advice from advisers, as well as to safeguard information the disclosure of which might threaten national security.

1. The Presidential Communication Privilege: A Summary of the State of the Law

The presidential communications privilege is a subcategory of executive privilege that protects the core communications of advisers closest to the president. There is a great deal of confusion about the actual scope of the presidential communications privilege. Various opinions and pronouncements from the Justice Department's Office of Legal Counsel and the White House Counsel's Office have described a very broad scope and reach of the presidential privilege. However, recent court opinions have reflected a much narrower understanding of the privilege, and no judicial ruling on the merits has upheld a claim of presidential privilege since the Supreme Court's 1974 ruling in *United States v. Nixon*, which recognized the qualified privilege but denied its efficacy in that case. In practice, many claims of executive privilege have been withdrawn in the face of adamant congressional resistance.

5. The Breadth of Congress's Authority to Access Information in Our Scheme of Separated Powers

The current state of the law of presidential privilege, described more fully below, may be briefly summarized as follows:

- The constitutionally based presidential communications privilege is presumptively valid when asserted.
- There is no requirement that the president must have seen or even been aware of the documents over which he or she claims privilege.
- The communication(s) in question must relate to a “quintessential and non-delegable presidential power” that requires direct presidential decision-making. The privilege is limited to the core constitutional powers of the president, such as the power to appoint and remove executive officials, the commander-in-chief power, the sole authority to receive ambassadors and other public ministers, and the pardon power. The privilege does not cover matters handled within the broader executive branch beyond the Executive Office of the President. Thus, it does not cover decision-making regarding the implementation of laws that delegate policymaking authority to the heads of departments and agencies, or which allow presidential delegations of authority.
- The subject communication must be authored or “solicited and received” by the president or a close White House adviser. The adviser must be in “operational proximity” to the president, which effectively limits coverage of the privilege to the administrative boundaries of the Executive Office of the President and the White House.
- The privilege remains a qualified privilege that may be overcome by a showing that the information sought “likely contains important evidence” and is unavailable elsewhere to an appropriate investigatory authority. The president may not prevent such a showing of need by granting absolute immunity to witnesses who would otherwise provide the information necessary to show that “important” evidence exists.

2. Evolution of the Law of Executive Privilege and Helpful Guidance from the Cases

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. In that year, 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 inter-branch disputes over access to information have reached the courts. The vast majority of such disputes are usually resolved through political negotiation.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 recognized by a court.³ It then became judicially established as necessary to protect the president’s status in our constitutional scheme of separated powers.

a. Nixon and Post-Watergate Rulings

The *Nixon* and post-Watergate cases⁴ established the broad contours of the presidential communications privilege. Under those precedents, the president can invoke the privilege, which is constitutionally rooted, when asked to produce documents or other materials or information that reflect presidential decision-making and deliberations that the president believes should remain confidential. If the president does so, the materials become presumptively protected from disclosure. The privilege, however, is qualified, not absolute, and can be overcome by an adequate showing of need. Finally, while reviewing courts

1. See Archibald Cox, *Executive Privilege*, 122 U. of Pa. L. Rev. 1383, 1395–1405 (1979). See generally, Mark J. Rozell, *EXECUTIVE PRIVILEGE: PRESIDENTIAL POWERS, SECRECY, AND ACCOUNTABILITY* (2nd Edition, Revised 2002); Mark J. Rozell, *Executive Privilege and Modern Presidents: In Nixon’s Shadow*, 83 MINN. L. REV. 1069 (1999).

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

3. *United States v. Nixon*, 418 U.S. 683 (1974).

4. There have been eleven court decisions involving claims of presidential executive privilege. *United States v. Nixon*, 418 U.S. 683 (1974); *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977); *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973); *Senate Select Committee v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974); *United States v. AT&T*, 551 F.2d 384 (D.C. Cir. 1976), *appeal after remand*, 567 F.2d 121 (D.C. Cir. 1977); *United States v. House of Representatives*, 556 F. Supp. 150 (D.D.C. 1983); *In re Sealed Case (Espy)*, 121 F.3d 729 (D.C. Cir. 1997); *In re Grand Jury Proceedings*, 5 F. Supp. 2d 21 (D.D.C. 1998); *Judicial Watch v. Department of Justice*, 365 F.3d 1108 (D.C. Cir. 2004); *Loving v. Department of Defense*, 550 F.3d 32 (D.C. Cir. 2008); *House Committee on the Judiciary v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008). Four have involved disputes between Congress and the executive (*Senate Select Committee, U.S. v. House of Representatives, AT&T and Miers*), two of which resulted in substantive rulings that resolved the disputes “on the merits” (*Select Committee and Miers*).

have expressed reluctance to balance 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.

Nixon and related post-Watergate rulings left important gaps in the law of presidential privilege. The significant issues left open included:

- Does the president need to have actually seen or been familiar with the disputed matter?
- Does the presidential privilege encompass documents and information developed by, or in the possession of, officers and employees in the departments and agencies of the executive branch?
- Does the privilege encompass all communications with respect to which the president may be interested, or is it confined to actual presidential decision-making? And, if the latter, is it limited to any particular type of presidential decision-making?
- Precisely what demonstration of need must be shown to justify release of materials that qualify for the privilege?

The Court of Appeals for the D.C. Circuit has addressed these issues in *In re Sealed Case (Espy)*,⁵ *Judicial Watch v. Department of Justice*,⁶ and *Loving v. Department of Defense*.⁷ A district court decision in *House Committee on the Judiciary v. Miers*⁸ provided further guidance on the scope of the privilege. Taken together, these decisions narrowed and clarified the limits of the privilege and drastically altered the legal playing field in resolving such disputes.

b. Espy

The *Espy* case arose out of an Office of Independent Counsel (OIC) investigation of former Agriculture Secretary Mike Espy. When allegations of improprieties by Espy surfaced in March 1994, President Clinton ordered the White House Counsel's office to investigate. That office prepared a report for the president, which was publicly released in October 1994. The president never saw any of the documents underlying or supporting the report.

Separately, a special panel of the D.C. Circuit, at the request of the attorney general, appointed an independent counsel, and a grand jury issued a subpoena for all documents that were accumulated or used in preparation of the White House counsel's report. In response, the president withheld 84 documents, claiming both the executive and deliberative process privileges for all documents. In ruling on the independent counsel's motion to compel, the district court upheld the privilege claims and quashed the subpoena. 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 and ordered that the documents be produced.

i. The Presidential Communications Privilege Is Constitutionally Based, but Qualified, and May Be Overcome by a Substantial Showing of Need and Unavailability

At the outset, the D.C. Circuit'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 (discussed in detail in Chapter 6) applies to executive branch officials generally and is not constitutionally based. It, therefore, can be overcome with a lesser showing of need and "disappears altogether when there is any reason to believe government misconduct [has] occurred."⁹

On the other hand, the court explained, the presidential communications privilege "is rooted in constitutional separation

5. 121 F.3d 729 (D.C. Cir. 1997).

6. 365 F.3d 1108 (D.C. Cir. 2004).

7. 550 F.3d 32 (D.C. Cir. 2008).

8. 558 F. Supp. 2d 53 (D.D.C. 2008).

9. 121 F.3d 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.'").

5. The Breadth of Congress's Authority to Access Information in Our Scheme of Separated Powers

of powers principles and the President's unique constitutional role" and applies only to "direct decision-making by the President."¹⁰ 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."¹¹ The presidential communications privilege applies to all documents in their entirety¹² and covers final and post-decisional materials as well as pre-deliberative ones.¹³

ii. The President Need Not Have Seen or Known of the Documents in Question, but They Must Have Been Received by a Close Adviser; Agency Head Review is Not Sufficient.

The presidential communications privilege must cover 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 need to provide sufficient elbow room for advisers to obtain information from all knowledgeable sources."¹⁴ Thus, the privilege applies "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."¹⁵

However, the privilege does not extend beyond close presidential advisers to reach communications with heads of agencies or their staffs. The court emphasized:

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 The presidential communications privilege should never serve as a means of shielding information regarding governmental operations that do not call ultimately for direct decision-making by the President.¹⁶

iii. The Privilege Applies Only to the "Quintessential and Non-Delegable" Powers of the President

The presidential communications privilege is limited to "direct decision-making by the President" and decisions regarding

10. *Id.* at 745, 752. See also *id.* at 753 ("... these communications nonetheless are intimately connected to his presidential decision-making"). The *Espy* court's standard is consistent with the showing required by *United States v. Nixon*, though somewhat more specific. It is inconsistent with the standard enunciated by *Senate Select Committee v. Nixon*, a court of appeals case decided several months before *United States v. Nixon*. There the panel held that the committee, which sought five tape recordings of presidential conversations relating to the Watergate break-in, had not met its burden of showing that "the subpoenaed evidence is demonstrably critical to the responsible fulfillment of the Committee's function." 498 F.2d at 730-31. It reasoned that since the House impeachment committee already had the tapes, "the Select Committee's immediate oversight need for the subpoenaed tapes is, from a congressional perspective, merely cumulative." *Id.* at 732. The court did not feel that the materials were "critical to the performance of [its] legislative functions" because "no specific legislative decision" can "responsibly be made without access to the materials" *Id.* at 733. The court's statement that the Watergate Committee's need for the tapes was "merely cumulative" has since been utilized by the executive as the basis for arguing that Congress's need for executive information is less compelling when a committee's function is oversight rather than when it is considering legislative proposals. See TODD GARVEY & ALISSA M. DOLAN, CONG. RESEARCH SERV., R42670, PRESIDENTIAL CLAIMS OF EXECUTIVE PRIVILEGE: HISTORY, LAW, PRACTICE AND RECENT DEVELOPMENTS 3 n. 20 (2012). The appeals court made it clear, however, that its ruling was limited to the unique nature of the case's factual and historical context: The committee was solely an investigative and reporting body with no legislative or impeachment authority; transcripts of the tapes had been publicly released; and the House impeachment committee already had copies of the tapes. The court concluded that "the need demonstrated by the Select Committee in the particular circumstances of this case, including the subsequent and on-going investigation of the House Judiciary Committee, is too attenuated and too tangential to permit a judicial judgment that the President is required to comply with the committee's subpoena." The Supreme Court has never made a 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. *Id.* at 2-5.

11. *In re Sealed Case (Espy)*, 121 F.3d at 754, 757.

12. 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. *In re Sealed Case (Espy)*, 121 F.3d at 737.

13. *Id.* at 745.

14. *Id.* at 752.

15. *Id.*

16. *Id.* (footnote omitted).

“quintessential and non-delegable Presidential power.”¹⁷ The *Espy* case itself concerned the president’s Article II appointment and removal power, which was the question upon which he sought advice. The court’s opinion distinguishes this specific appointment and removal power from general “presidential powers and responsibilities” that “can be exercised or performed without the President’s direct involvement, pursuant to a presidential delegation of power or statutory framework.”¹⁸

Based on the presidential powers actually enumerated in Article II of the Constitution, the category of “quintessential and non-delegable” powers would also include such powers as 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. On the other hand, the privilege would not cover decision-making based upon powers granted to the president by a statute, or decisions required by law to be made by agency heads.

Thus, communications regarding such matters as rulemaking, environmental policy, consumer protection, workplace safety, securities regulation, and labor relations would not be covered. Of course, the president’s role in supervising and coordinating decision-making in the executive branch remains unimpeded. But the president’s communications in furtherance of such activities would not be protected from disclosure by this constitutional privilege.

c. Judicial Watch

These limits in the scope of the presidential communications privilege were further clarified in the D.C. Circuit’s 2004 decision in *Judicial Watch, Inc. v. Department of Justice*.¹⁹ *Judicial Watch* involved requests for documents concerning pardon applications and grants reviewed by the Justice Department for President Clinton.²⁰ The president withheld approximately 4,300 documents 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”—namely, the exercise of the president’s constitutional pardon authority—they were protected from disclosure.²¹ However, the appeals court reversed on the grounds that the review did not involve the president or close White House advisers.

i. Agency Documents Not Solicited or Received by Close Presidential Advisers Are Not Covered by the President’s Privilege

In rejecting the claim of presidential communications privilege in *Judicial Watch*, the D.C. Circuit held 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.”²² The court emphasized that the “solicited and received” limitation from the *Espy* case “is necessitated by the principles underlying the presidential communications privilege, and a recognition of the dangers of expanding it too far.”²³ In rejecting the government’s argument that the privilege should be applicable to all departmental and agency communications related to the pardon recommendations for the president, the court held that:

17. *Id.* at 752.

18. *Id.* at 752–53. The reference the court uses to illustrate the latter category is the president’s Article II duty “to take care that the laws are faithfully executed,” a constitutional direction that the courts have consistently held not to be a source of presidential power but rather an obligation on the President to see to it that the will of Congress is carried out by the executive bureaucracy. *See, e.g.,* *Kendall v. United States ex rel. Stokes*, 37 U.S. 524, 612–13 (1838); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952); *Myers v. United States*, 272 U.S. 52, 177 (1926) (Holmes, J., dissenting); *National Treasury Employees Union v. Nixon*, 492 F.2d 587, 604 (D.C. Cir. 1974).

19. 365 F.3d 1108 (D.C. Cir. 2004). The panel split 2-1, with Judge Rogers writing for the majority and Judge Randolph dissenting.

20. 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.

21. *Judicial Watch*, 365 F.3d at 1109–12.

22. *Id.* at 1112, 1114, 1123.

23. *Id.* at 1114–15.

5. The Breadth of Congress's Authority to Access Information in Our Scheme of Separated Powers

Communications never received by the President or his Office are unlikely to 'be revelatory of his deliberations' ... nor is there 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 agency documents.²⁴

The *Judicial Watch* decision makes it clear that cabinet department heads will not be treated as part of the president's immediate personal staff or as some unit of the Executive Office of the President.²⁵ This requirement of proximity to the president confines the potentially broad scope of the privilege. Thus, for the privilege to apply, not only must the presidential decision at issue involve a non-delegable, core presidential function, but the operating officials must also be sufficiently close to the president and senior White House advisers.²⁶

d. Loving

In *Loving v. Department of Defense*, the D.C. Circuit affirmed the distinction between the deliberative process privilege and the presidential communications privilege that had been carefully delineated in *Espy* and *Judicial Watch*.²⁷ Loving had been court-martialed, convicted of murder, and sentenced to death. By law, the president must approve all such death sentences. Loving filed a FOIA request seeking disclosure of documents including a Defense Department memorandum containing recommendations to the president about his case and sentence. 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.²⁸ After noting the two distinct versions of the privilege,²⁹ the appeals court determined that the documents in question fell "squarely within the presidential communications privilege because they 'directly involve' the President."³⁰ The court also clarified that communications that "directly involve" the president need not actually be "solicited and received" by him or her. The mere fact that the documents were viewed by the president was sufficient to bring them within the ambit of the privilege.³¹

e. Miers

The 2008 district court ruling in *House Committee on the Judiciary v. Miers*³² sheds further light on the limits of the presidential communications privilege. The case involved subpoenas issued by the House Judiciary Committee to compel testimony by close presidential advisers in an investigation of the removal and replacement of nine U.S. attorneys. The Bush administration had invoked executive privilege and ordered the advisers not to appear, testify, or provide documents in response to the subpoenas. Although the case was settled in March 2009, after the change in administration and before the appeal was heard, the settlement provided that the district court decision rejecting the executive's broad privilege claims would stand as precedent.

As discussed in Chapter 3,³³ the district court rejected the executive's attempts to dismiss the case, finding that the House had the right to bring the lawsuit (the committee had both "standing" and an "implied cause of action") based upon Article I of the Constitution granting Congress the "power of inquiry." The court found that this power carries with it the "process to enforce it," and that "issuance of a subpoena pursuant to an authorized investigation is ... an indispensable ingredient of lawmaking."³⁴

24. *Id.* at 1117.

25. *Id.* at 1121–22.

26. *Id.* at 1118–24. In *Judicial Watch*, the deliberative process privilege was also found insufficient and the appeals court ordered the disclosure of the 4,300 withheld documents.

27. 550 F.3d 32 (D.C. Cir. 2008).

28. *Id.* at 37.

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

30. *Id.* at 39.

31. *Id.* at 40.

32. 558 F. Supp. 2d 53 (D.D.C. 2008).

33. See discussion *supra* Ch. III.

34. *Miers*, 558 F. Supp. 2d at 75, 77 (citing *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927), and *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 505 (1975)).

i. A Presidential Claim of Privilege Cannot Provide Absolute Immunity to Congressional Subpoenas

The executive argued to the district court that present and past senior advisers to the president are absolutely immune from compelled congressional process. The district court unequivocally rejected this position:

The Executive cannot identify a single judicial opinion that recognizes absolute immunity for senior presidential advisers in this or any other context In fact, there is Supreme Court authority that is all but conclusive on this question and that powerfully suggests that such advisers do not enjoy absolute immunity. The Court therefore rejects the Executive's claim of absolute immunity for senior presidential aides.³⁵

The court pointed out that the effect of a claim of absolute privilege for close advisers would be to enable the president to judge the limits of his or her own qualified privilege: "Permitting the Executive to determine the limits of its own privilege would impermissibly transform the presumptive privilege into an absolute one."³⁶

3. The Essential Elements of the Presidential Communications Privilege

Based upon the court decisions outlined above, the following elements are necessary to support a claim of presidential communications privilege:

- *The protected communication must relate to a "quintessential and non-delegable presidential power."* *Espy* and *Judicial Watch* involved the appointment and removal and the pardon powers, respectively. Other core presidential powers include the commander-in-chief power, the sole authority to receive ambassadors and other public ministers, and the power to negotiate treaties. This category does not include decision-making where laws delegate policymaking and administrative implementation authority to the heads of agencies.
- *The communication must be authored or "solicited and received" by a close White House adviser or the president.* An adviser must be in "operational proximity" to the president. This effectively means that the scope of the presidential communications privilege extends only to cover the Executive Office of the President and the White House.
- *The presidential communications privilege remains a qualified privilege that may be overcome.* The privilege can be overcome by showing that the information sought "likely contains important evidence," is sought by an appropriate investigating authority, and is unavailable elsewhere. The *Espy* court found an adequate showing of need by the independent counsel, and *Miers* held that privilege does not provide absolute immunity to enable the president to block witnesses from showing that "important" evidence exists.

4. Presidents are Subject to Compulsory Process: Presidential Appearances Before Judicial Tribunals and Congressional Committees

The president and his close advisers are subject to subpoenas and court enforcement of subpoenas. This was demonstrated most recently in the *Miers* case involving subpoenas by the House Judiciary Committee for close presidential advisers to testify. The court in *Miers* noted, first, that enforcement of a subpoena is "a routine and quintessential judicial task"; second, that the Supreme Court has held that the judiciary is the final arbiter of executive privilege; and third, that court enforcement of compulsory process is deeply rooted in the common law tradition going back to Chief Justice Marshall's 1807 opinion in *United States v. Burr*.³⁷ The *Miers* court commented that "federal precedent dating back as far as 1807 contemplates that even the Executive is bound to comply with duly issued subpoenas. The Supreme Court emphatically

35. 558 F. Supp. 2d at 99.

36. *Id.* at 103.

37. 25 F. Case 30 (C.C. Va. 1803). The question before the court in *Burr* was the enforceability of Burr's subpoena for documents against President Jefferson. The chief justice explained that "the obligation [to comply with a subpoena]... is general; and it would seem that no person could claim exemption from [it]." *Id.* at 34. "The guard" that protects the president "from vexatious and unnecessary subpoenas," in Chief Justice Marshall's view, "is ... the conduct of the court after these subpoenas have issued; not any circumstance which is to precede them being issued." *Id.* Any claim that compliance with a subpoena would jeopardize national security or privileged presidential information "will have its due consideration on the return of the subpoena," Marshall noted. *Id.* at 37.

reaffirmed that proposition in *United States v. Nixon* in 1974.”³⁸

Professors Ronald D. Rotunda and John L. Nowak have compiled a list of historical investigations in which sitting or former presidents have been subpoenaed and involuntarily appeared or produced evidence in judicial forums or before congressional committees.³⁹ These included Presidents Thomas Jefferson (1807), James Monroe (1818), John Quincy Adams and John Tyler (1846), Richard M. Nixon (1975, 1976, 1982), Gerald R. Ford (1975), Ronald Reagan (1990), and William J. Clinton (1996, 1998). President Harry S. Truman was subpoenaed by the House Un-American Activities Committee in 1953 after he had left office. Truman refused to comply and went on national television and radio to rebut the charges made by the committee. The committee never sought to enforce the subpoena.⁴⁰

Seven sitting or former presidents have made voluntary appearances in judicial forums and before congressional committees: Presidents Abraham Lincoln (1862), Ulysses S. Grant (1875), Theodore Roosevelt (1911, 1912), Richard M. Nixon (1980), Gerald R. Ford (1975, 1988), Jimmy E. Carter (1977, 1979, 1981), and William J. Clinton (1995).⁴¹ In December 2008, then President-elect Barack Obama voluntarily appeared for an interview with a U.S. attorney conducting a grand jury investigation of the Illinois governor's alleged attempt to “sell” the appointment to fill Obama's vacated Senate seat.⁴² A Congressional Research Service report indicates that between 1973 and 2007, at least 70 senior advisers to the president who were subject to subpoenas have testified before congressional committees.⁴³

38. *Miers*, 558 F. Supp. 2d at 72. *See also* *Clinton v. Jones*, 520 U.S. 681, 695 n. 23 (1997) (“[T]he prerogative [President] Jefferson claimed [in *Burr*] was denied him by the Chief Justice in the very decision Jefferson was protesting and this Court has subsequently reaffirmed that holding”).

39. *See* RONALD D. ROTUNDA AND JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE*, (4th ed. 2007).

40. *Id.* at 949–51.

41. *Id.* at 941–44.

42. *See* Peter Baker, *Obama Follows Tradition Testifying for Prosecutors*, N.Y. TIMES, December 25, 2008 at A1.

43. HAROLD C. RELYEA & TODD B. TATELMAN, CONG. RESEARCH SERV., RL31351, *PRESIDENTIAL ADVISER TESTIMONY BEFORE CONGRESSIONAL COMMITTEES: AN OVERVIEW* (2007), <http://www.fas.org/sgp/crs/misc/RL31351.pdf>.

6. Common Law Privileges Available in Court Do Not Shield Witnesses from Complying with Committee Information Demands

Overview

In court proceedings, there are a variety of “testimonial privileges” recognized by our legal system that enable witnesses to refuse to testify on certain subjects or about conversations with particular people. The most common of these is the attorney-client privilege, which protects conversations between lawyer and client as secret, and thus allows people to seek legal advice in confidence. In congressional proceedings, a committee may determine, on a case-by-case basis, whether to accept common law testimonial privileges. It can deny a witness’s request to invoke privilege when the committee concludes it needs the information sought to accomplish its legislative functions.¹ In practice, however, congressional committees have followed the courts’ guidance in assessing the validity of a common law privilege claim.

Examples of common law testimonial privileges include the attorney-client, work-product, and deliberative process privileges. The application of each of these doctrines in congressional hearings is discussed below.

A. The Attorney-Client Privilege and Work-Product Doctrine

1. Defining the Attorney-Client Privilege and the Work-Product Doctrine

As noted above, the attorney-client privilege enables people to seek confidential legal advice by protecting the secrecy of conversations between attorney and client. To prove that the attorney-client privilege should apply, the person claiming the privilege must establish: (1) a communication, (2) made in confidence, (3) to an attorney, (4) by a client, and (5) for the purpose of seeking or obtaining legal advice.² The party asserting attorney-client privilege has the burden of conclusively proving each element,³ and courts strongly disfavor blanket assertions of the privilege⁴ as “unacceptable.”⁵ In addition, the mere fact that an individual communicates with an attorney does not make the communication privileged.⁶

Courts have consistently emphasized that one of the essential elements of the attorney-client privilege is that the attorney

1. Glenn A. Beard, *Congress v. The Attorney-Client Privilege: A 'Full and Frank' Discussion*, 35 AM. CRIM. L. REV. 119 (1997); MORTON ROSENBERG, CONG. RESEARCH SERV., 95-464, INVESTIGATIVE OVERSIGHT: AN INTRODUCTION TO THE LAW, PRACTICE, AND PROCEDURE OF CONGRESSIONAL INQUIRY (1995).

2. See, e.g., 8 WIGMORE, EVIDENCE § 2292, at 554 (McNaughton rev. ed 1964); *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950).

3. See, e.g., *In re Grand Jury Investigation No. 83-2-35*, 723 F.2d 447, 450-51 (6th Cir. 1983).

4. *United States v. White*, 970 F.2d 328, 334 (7th Cir. 1992) (“A blanket claim of privilege that does not specify what information is protected will not suffice.”).

5. *SEC v. Gulf & Western Industries, Inc.*, 518 F. Supp. 675, 682 (D.D.C. 1981).

6. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997) (rejecting applicability of common interest doctrine to communications at a meeting with white house counsel’s office attorneys and private attorneys for the first lady).

6. Common Law Privileges Available in Court Do Not Shield Witnesses from Complying with Committee Information Demands

be acting as an attorney and that the communication be made to secure legal services. The privilege, therefore, does not apply to legal advice given by an attorney acting outside the scope of his or her role as attorney.⁷ The courts, when determining the underlying purpose of a communication, will take into account the difference between *outside* counsel retained with limited responsibilities to a corporate client and *in-house* counsel who have duties to provide both business and legal advice.⁸ Courts have also invited privilege logs as an acceptable means of establishing a valid claim of privilege, but such logs must be sufficiently detailed and specific in their description to prove each element of the claimed privilege.⁹

The work-product doctrine is a related concept that protects the confidentiality of certain documents created by an attorney as part of his or her representation of a client. The doctrine was recognized by the Supreme Court in 1947,¹⁰ and codified as Rule 26(b)(3) of the Federal Rules of Civil Procedure, and grants limited immunity to an attorney's work product from requests for disclosure. The rule allows for qualified immunity from civil discovery when the materials are: 1) "documents or tangible things," 2) "prepared in anticipation of litigation or trial," and 3) "by or for another party or for that other party's representative." To overcome the privilege, the party seeking the materials must show a substantial need and an inability to obtain the substantial equivalent without undue hardship.

On its face, the definition would not apply to Congress, which is not a court or administrative tribunal, or to a congressional investigative hearing, which does not afford witnesses the same discovery rights afforded during litigation in court. No court has held that the work-product doctrine applies to a legislative hearing, and pertinent federal court rulings support the proposition that it does not apply.¹¹

2. Legal Basis for Denying Attorney-Client and Work-Product Privilege Claims

Other than private persons, entities that often invoke claims of common law privilege include departments and agencies, the White House, and private organizations. However, their assertion of privilege does not necessarily provide a shield from congressional inquiry.

The legal basis for Congress's right to refuse to recognize assertions of attorney-client privilege comes from its inherent constitutional authority to investigate and the constitutional authority of each chamber to determine the rules of its proceedings.¹² Although the Supreme Court has not definitively ruled on the issue, a number of factors support the

7. "Acting as a lawyer encompasses the whole orbit of legal functions. When he acts as an advisor, the attorney must give *predominantly* legal advice to retain his client's privilege of non-disclosure, not solely, or even largely, business advice." *Zenith Radio Corp. v. Radio Corp. Of America*, 121 F. Supp. 792, 794 (D. Del. 1954) (emphasis added).

8. The courts have recognized that the dual responsibilities of in-house counsel may overlap significantly and the purpose of various communications with others may begin to blur. Thus, courts have closely scrutinized communications to and from in-house counsel and held that they may be sheltered by the attorney-client privilege "only upon a clear showing that [in-house counsel] gave [advice] in a professional legal capacity." In order to ascertain whether an attorney is acting in a legal or business advisory capacity, the courts have held it proper to question either the client or the attorney regarding the general nature of the attorney's services to his client, the scope of his authority as agent, and the substance of matters which the attorney, as agent, is authorized to pass along to third parties. *Colton v. United States*, 306 F.2d 633, 636, 638 (2d Cir. 1962); *United States v. Tellier*, 255 F.2d 441 (2d Cir. 1958); *J.P. Foley & Co., Inc. v. Vanderbilt*, 65 FRD 523, 526-27 (S.D.N.Y. 1974). Indeed, proper invocation of the privilege may be predicated on revealing facts tending to establish the existence of an attorney-client relation. See, e.g., *In re John Doe, Esq.*, 603 F. Supp. 1164, 1167 (E.D.N.Y. 1985) and *In re Arthur Treachers Franchise Litigation*, 92 FRD 429 (E.D. Pa. 1981), cases illustrating how probing the questioning may be to determine whether an attorney was in fact "acting as a lawyer."

9. *Bowne of New York City v. AmBase Corp.*, 150 F.R.D. 465 (S.D.N.Y. 1993). See also *United States v. Construction Products Research*, 73 F.3d 464, 473-74 (2d Cir. 1996) (logs with cursory descriptions of, and comments on, documents "simply do not provide enough information to support the privilege claim, particularly in the glaring absence of any supporting affidavits or other documentation"); *von Bulow v. von Bulow*, 811 F.2d 136, 146-47 (2d Cir. 1987), cert. denied, 107 S.Ct. 1891 (1988) (logs which rely on conclusory or *ipse dixit* assertions are normally required to be supported by affidavits from individuals with personal knowledge of the relevant facts); *International Paper Co v. Fibreboard Corp.*, 63 FRD 88, 94 (D. Del. 1974) (Such affidavits must "show sufficient facts to bring the identified and described document within the narrow confines of the privilege.") (emphasis in original).

10. *Hickman v. Taylor*, 329 U.S. 495 (1947).

11. See *In re Grand Jury Subpoenas Duces Tecum*, 112 F.3d 910, 924-25 (8th Cir. 1997), cert. denied *sub. nom.* *Office of the President v. Office of the Independent Counsel*, 521 U.S. 1105 (1997) (claims of first lady of work product immunity with respect to notes taken by white house counsel attorneys rejected as inapplicable because the possibility of a congressional investigation did not satisfy the element of anticipation of litigation and trial); *In re Grand Jury Proceeding*, 5 F. Supp. 2d 21, 39 (D.D.C. 1998), *aff'd on other grounds, sub. nom.* *In re Bruce R. Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998), cert. denied *sub. nom.* *Office of the President v. Office of the Independent Counsel*, 525 U.S. 996 (1998) (dismissing claim of work product immunity of a counsel to the president on the ground that preparation for a possible congressional investigation was not in anticipation of an adversarial proceeding).

12. U.S. Const., Art. I, sec. 5, cl. 2.

conclusion that committees possess the power to compel witness testimony. These indicia include: (1) the Supreme Court's strong recognition of the constitutional underpinnings of the legislative investigatory power to support the critical need for information;¹³ (2) long-standing congressional (and British parliamentary) practice;¹⁴ (3) the rejection by the House and Senate of opportunities to recognize the privilege by adoption of house rules;¹⁵ and (4) applicable appellate court rulings rejecting such claims by executive branch officials subject to grand jury investigations.¹⁶

3. The Rationale for Congressional Discretionary Authority to Deny Attorney-Client Claims

The attorney-client privilege is not a constitutionally based privilege. Rather, it is a judge-made exception to the general evidentiary principle of full disclosure in the context of court proceedings.¹⁷ The historic congressional discretionary practice is reflective of the widely divergent nature of the judicial and legislative forums. The attorney-client privilege is the product of a judicially developed public policy designed to foster an effective and fair adversary system. Courts view the privilege as a means to foster client confidence and encourage full disclosure to an attorney. Free communication, the argument goes, facilitates justice by promoting proper case preparation.¹⁸ Full factual disclosure can also help an attorney more accurately assess the strength of a client's case, and discourage frivolous litigation when the case is weak.¹⁹

It is critically important to remember that the attorney-client privilege is designed for, and properly confined to, the adversary process: the adjudicatory resolution of conflicting claims of individual obligations in a civil or criminal proceeding. The need to protect individual interests is less compelling in an investigatory setting where a legislative committee is not empowered to adjudicate a witness's liberty or property. Indeed, several courts have recognized that "only infrequently have witnesses...[in congressional hearings] been afforded rights normally associated with an adjudicative proceeding."²⁰

The suggestion that the legislature's investigatory authority is subject to non-constitutional, common law rules developed by the judicial branch to govern its proceedings is arguably contrary to the concept of separation of powers. It would, in effect, permit the judiciary to determine congressional procedures, which is difficult to reconcile with the constitutional

13. *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927); *Watkins v. United States*, 354 U.S. 178, 187 (1957); *Barenblatt v. United States*, 360 U.S. 109 (1959).

14. As with the legislature's inherent authority to investigate, the discretion to entertain claims of privilege traces back to the model of the English Parliament. See *ERSKINE MAY'S TREATISE ON THE LAW, PRIVILEGES, PROCEEDINGS AND USAGE OF PARLIAMENT*, 746-47 (20th edition 1983) which has been relied as an authoritative guide by the Supreme Court. See *McGrain v. Daugherty*, 273 U.S. at 161. Nineteenth century congressional rejections of attorney-client privilege claims are recounted in Thomas Millet, *The Applicability of Evidentiary Privileges for Confidential Communications Before Congress*, 21 JOHN MARSHALL L. REV. 309, 312-14 (1988).

15. In 1857 the House rejected an amendment to adopt recognition of claims of attorney-client privilege before committees during consideration of legislation to establish a criminal contempt process, which is recounted in Todd Garvey, *The Webster and Ingersoll Investigations*, at Part II *infra*. In 1954 the Senate rejected a similar proposal in S. REP. NO. 84-1 (1955).

16. In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910 (8th Cir. 1997), *cert. denied sub. nom.* Office of the President v. Office of the Independent Counsel, 521 U.S. 1105 (1997) (claims of first lady of attorney-client and work-product privilege with respect to notes taken by white house counsel office attorneys rejected); In re Lindsey (Grand Jury Testimony), 158 F.3d 1263 (D.C. Cir. 1998), *cert. denied* 525 U.S. 996 (1998) (White House attorney may not invoke attorney-client privilege in response to grand jury subpoena seeking information on possible commission of federal crimes); In re Sealed Case (Espy), 121 F.3d 729 (D.C. Cir. 1997) (deliberative process privilege is a common law agency privilege which is easily overcome by showing of need by an investigating body); In re A Witness Before the Special Grand Jury, 288 F.3d 289 (7th Cir. 2002) (attorney-client privilege not applicable to communications between state government counsel and state office holder). *But see* In re Grand Jury Investigation, 399 F.3d 527 (2d Cir. 2005) (upholding a claim of attorney-client privilege with respect to communications between a former chief legal counsel to the governor of Connecticut who was under grand jury investigation. It is worth noting that the Second Circuit recognized its apparent conflict with the afore-cited cases, and that the ruling is arguably distinguishable on its facts. See Kerri R. Blumenauer, *Privileged or Not? How the Current Application of the Government Attorney Client Privilege Leaves the Government Feeling Unprivileged*, 75 FORDHAM L. REV. 75 (2006).

17. *Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1423 (3d Cir. 1991) ("Because the attorney-client privilege obstructs the truth-finding process, it is construed narrowly."); *Moran v. Burbine*, 475 U.S. 412, 430 (1986) (Sixth Amendment not a source for attorney-client privilege); *Fisher v. United States*, 425 U.S. 391, 396-97 (1976) (compelling an attorney to disclose client communications does not violate the client's Fifth Amendment privilege against self-incrimination); *Hannah v. Larche*, 363 U.S. 420, 445 (1960) ("[O]nly infrequently have witnesses [in congressional hearings] been afforded the procedural rights normally associated with an adjudicative proceeding."); *United States v. Fort*, 443 F.2d 670 (1970) (rejecting contention that the constitutional right to cross-examine witnesses applied to congressional investigations). With respect to court treatment of other common law privileges, *see, e.g.*, In re Sealed Case (Espy), 121 F.3d 729 (D.C. Cir. 1997) (The deliberative process privilege is a common law privilege which, when claimed by executive officials, is easily overcome, and "disappears" altogether upon the reasonable belief by an investigating body that government misconduct has occurred.).

18. *See, e.g.*, *Upjohn v. United States*, 449 U.S. 382, 389 (1981).

19. *Id.*

20. *Hannah*, 363 U.S. at 425; *see also Fort*, 443 F.2d at 670.

6. Common Law Privileges Available in Court Do Not Shield Witnesses from Complying with Committee Information Demands

authority granted to each house of Congress to determine its own rules. This was dramatically underlined in *NLRB v. Noel Canning*,²¹ where the Supreme Court rejected the president's attempt to determine unilaterally when the Senate was in recess. The Court held that "for purposes of the Recess Appointments Clause, the Senate is in session when it says it is, provided that, under its own rules, it retains the capacity to transact Senate business."

Moreover, importing the judiciary's privileges and procedures is likely to have a paralyzing effect on the investigatory process. Indeed, it already has; the district court's ruling in the Fast and Furious litigation that agencies can validly invoke the common law deliberative process privilege in challenges to committee civil enforcement proceedings has significantly delayed committees access to information.²² Such judicialization is also antithetical to the consensus, interest-oriented goal of policy development in the legislative process.

Finally, concerns that denying the privilege in the congressional setting would undermine it elsewhere appear over-exaggerated. Parliament's rule has not impaired the practice of law in England, nor has its limited use here inflicted any apparent damage on the practice of the profession. Congressional investigations in the face of claims of executive privilege or the revelation of trade secrets have not diminished the general utility of these privileges nor undermined the reasons they continue to be recognized by the courts. Moreover, the assertion implies that current law is an impregnable barrier to the disclosure of confidential communications when, in fact, the privilege is riddled with qualifications and exceptions, and has been subject as well to the significant current development of the waiver doctrine. Thus, there can be no absolute certainty that communications with an attorney will not be revealed.

There are still unyielding private sector opponents of discretionary committee exercises of refusals to accept claims of attorney-client privilege.²³ But most recent critical commentary has focused on how to live with the reality of the assumed congressional authority, utilizing the understanding that committees need information sooner rather than later and that criminal and civil enforcement processes take too much time. Negotiating tactics are the theme of such articles.²⁴ Committees still retain significant leverage. There has been no definitive court ruling on the issue because no objector as yet has been willing to be the subject of a criminal prosecution as a matter of principle.

4. How Congress Has Traditionally Weighed the Attorney-Client Privilege

In practice, all committees that have denied claims of privilege have considered numerous factors before doing so. In favor of disclosure, committees consider (1) legislative need, (2) public policy, and (3) the ever-present statutory duty to oversee the application, administration, and execution of all laws within Congress' jurisdiction. They balance these considerations against any possible injury to the witness. Committees also consider whether a court would have recognized the claim in the judicial forum,²⁵ and invite the submission of privilege logs to support the validity and weight of the claims.

21. 134 S. Ct. 2550 (2014).

22. See Chris Armstrong, *A Costly Victory for Congress: Executive Privilege After Committee on Government Oversight and Reform*, 17 THE FEDERALIST SOCIETY REVIEW 28, 32 (2016) ("In recent months [as a result of the *Lynch* ruling] there appear to have been a marked increase in DPP claims across agencies and to a wide range of committees conducting active investigations."). See also HOUSE COMMS. ON ENERGY AND COMMERCE AND WAYS AND MEANS, JOINT CONGRESSIONAL INVESTIGATIVE REPORT INTO THE SOURCE OF FUNDING FOR THE ACA'S COST SHARING REDUCTION PROGRAM, 95-109, 114th Cong. 2d Sess. (2016) (detailing refusals by the Departments of Treasury, Health and Human Services, and the Office of Management and Budget to comply with requests and subpoenas for testimony and documents relevant to ACA cost sharing funding based on assertions of the common law deliberative process privilege).

23. See, e.g., Lance Cole, *Revolving Our Privileges: Federal Law Enforcement's Multi-Front Assault on the Attorney-Client Privilege (And Why It Is Misguided)*, 48 VILLANOVA L. REV. 469, 474-98 (2003).

24. See, e.g., Bradley J. Bondi, *No Secrets Allowed: Congress's Treatment and Mistreatment of the Attorney-Client Privilege and the Work Product Protection in Congressional Investigations and Contempt Proceedings*, 25 J. L. & POL. 145 (2009); James Hamilton, Robert F. Muse and Kevin R. Amer, *Congressional Investigations: Politics and Process*, 44 AMER. CRIM. L. REV. 1115 (2007); Michael D. Bopp & DeLisa Lay, *The Availability of Common Law Privileges for Witnesses in Congressional Investigations*, 35 HARV. J. L. PUB. POL'Y 897 (2012).

25. See, e.g., H. COMM. ON COMMERCE, CONTEMPT OF CONGRESS AGAINST FRANKLIN L. HANEY, H.R. DOC. NO. 105-792, at 11-16 (1998); H. COMM. ON GOV'T REFORM, PROCEEDINGS AGAINST JOHN. M. QUINN, DAVID WATKINS, AND MATTHEW MOORE, H.R. REP. NO. 104-598, at 50-54 (1996); REFUSAL OF WILLIAM H. KENNEDY, III TO PRODUCE NOTES SUBPOENAED BY THE SPECIAL COMM. TO INVESTIGATE WHITEWATER DEV. CORP. AND RELATED MATTERS, S. REP. NO. 104-191, at 9-19 (1995); H. COMM. ON FOREIGN AFF., PROCEEDINGS AGAINST RALPH BERNSTEIN AND JOSEPH BERNSTEIN, H.R. REP. NO. 99-462, at 13-14 (1986); *International Uranium Control: Hearing Before the Subcomm. on Oversight and Investigations, H. Comm. on Interstate and Foreign Commerce*, 95th Cong. 60, 123 (1977). See also H. COMM. ON ENERGY AND COMMERCE, 98th CONG., ATTORNEY-CLIENT PRIVILEGE (Comm. Print 98-1, 1983) (dealing with two separate instances of rejections of privilege claims by the House Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, one invoked by the general counsel of the Securities and Exchange Commission, the other by a corporation).

In the absence of a definitive court ruling,²⁶ the Legal Ethics Committee of the District of Columbia Bar issued an advisory opinion in February 1999.²⁷ It directly addressed the limits of an attorney's ethical duty of confidentiality to a client when the attorney is faced with a congressional subpoena for documents that would reveal client confidences.²⁸ The opinion urges attorneys to press every appropriate objection to the subpoena until no further avenues of appeal are available, and even suggests that clients might be advised to retain other counsel to file a separate lawsuit to prevent compliance with the subpoena.²⁹ But it does allow the attorney to relent and comply with the subpoena at the earliest point when he or she is in danger of being held in criminal contempt of Congress.

According to the D.C. Bar's ethics committee, an attorney acting under the D.C. Code of Professional Conduct³⁰ facing a congressional subpoena that would reveal client confidences or secrets must "seek to quash or limit the subpoena on all available legitimate grounds to protect confidential documents and client secrets."

If, thereafter, the Congressional subcommittee overrules these objections, orders production of the documents and threatens to hold the lawyer in contempt absent compliance with the subpoena, then, in the absence of a judicial order forbidding the production, the lawyer is permitted, but not required, by the D.C. Rules of Professional Conduct to produce the subpoenaed documents. A directive of a Congressional subcommittee accompanied by a threat of fines and imprisonment pursuant to federal criminal law satisfies the standard of 'required by law' as that phrase is used in D.C. Rule of Professional Conduct 1.6(d)(2)(A).

The opinion represents the first and thus far the only bar in the nation to directly and definitively address this question. Its publication aroused a good deal of debate.³¹ However, there is no evidence that congressional committees have been more aggressive in attempting to overrule privilege claims since the issuance of the opinion. Rather, Congress has been sparing in its attempts to challenge claims of attorney-client privilege.³² Interestingly, none of the writings in opposition to committee exercise of the discretionary authority reference or discuss the D.C. Bar opinion.

26. The Supreme Court has recognized that "only infrequently have witnesses ... [in congressional hearings] been afforded the procedural rights normally associated with an adjudicative proceeding." *Hannah*, 363 U.S. at 445; *See also Fort*, 443 F.2d at 670. In the *Matter of Provident Life and Accident Co.*, E.D. Tenn., S.D., CIV-1-90-219 (June 13, 1990) (per Edgar, J.) (noting that the court's earlier ruling on an attorney-client privilege claim was "not of constitutional dimensions, and is certainly not binding on the Congress of the United States").

27. DISTRICT OF COLUMBIA BAR LEGAL ETHICS COMM., OP. NO. 288, COMPLIANCE WITH SUBPOENA FROM CONGRESSIONAL COMMITTEE TO PRODUCE LAWYERS' FILES CONTAINING CLIENT CONFIDENCES OR SECRETS (Feb. 16, 1999).

28. The occasion for the ruling arose because of an investigation of a subcommittee of the House Commerce Committee into the circumstances surrounding the planned relocation of the Federal Communications Commission to the Portals office complex. *See* H.R. REP. NO. 105-792, at 1-8, 15-16. During the course of the inquiry, the subcommittee sought certain documents from the Portals' developer, Mr. Franklin L. Haney. Mr. Haney's refusal to comply resulted in subpoenas for those documents to him and the law firm representing him during the relocation efforts. Haney and the law firm asserted attorney-client privilege in their continued refusal to comply. The law firm sought an opinion from the D.C. Bar's Ethics Committee as to its obligations in the face of the subpoena and a possible contempt citation, but the Bar Committee notified the firm that the question was novel and that no advice could be given until the matter was considered in a plenary session of the committee. *See* H. COMM. ON COMMERCE, 105TH CONG., MEETING ON PORTALS INVESTIGATION: AUTHORIZATION OF SUBPOENAS; RECEIPT OF SUBPOENAED DOCUMENTS AND CONSIDERATION OF OBJECTIONS; and CONTEMPT OF CONGRESS PROCEEDINGS AGAINST FRANKLIN L. HANEY 48-50 (1998). The firm continued its refusal to comply until the subcommittee cited it for contempt, at which time the firm proposed to turn over the documents if the contempt citation was withdrawn. The subcommittee agreed to the proposal. *Id.* at 101-05.

29. A direct suit to block a committee from enforcing a subpoena was foreclosed by the Supreme Court's decision in *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 501 (1975), but that ruling does not appear to foreclose an action against a "third party," such as the client's attorney, to test the validity of the subpoena or the power of a committee to refuse to recognize the privilege. *See, e.g., United States v. AT&T*, 567 F.2d 121 (D.C. Cir. 1977) (entertaining an action by the Justice Department to enjoin AT&T from complying with a congressional subpoena to provide telephone records that might compromise national security matters).

30. Under D.C. Rule of Professional Conduct 1.6(e)(2)(A), a lawyer may reveal client confidences or secrets only when expressly permitted by the D.C. rules or when "required by law or court order."

31. *See, e.g.,* W. John Moore, *First Save All The Lawyers*, NATIONAL LAW JOURNAL, July 24, 1999 at 2170.

32. In the past, assertions of attorney-client and other common law privileges before committees often have gone unchallenged. One example occurred during the Iran-Contra hearings. Richard Secord, Albert Hakim, and Oliver North invoked the privilege as to a meeting with Secord's attorney, attended by all three, on the ground that he was acting as attorney for all at the time. In the same hearing, the committees recognized a rare assertion of the marital privilege by North on behalf of his wife who refused on that basis to testify about various funds created for the benefit of North's family from the proceeds of the Iranian arms sales. *See* REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, REP. NO. 216, H. R. REP. NO. 433, 100TH CONG., 1ST SESS. at 345 (1987). Privilege claims are also commonly negotiated prior to public hearings.

B. Claims of Deliberative Process Privilege and Presidential Communications Privilege**1. Definition and Purpose of the Deliberative Process Privilege**

The deliberative process privilege permits government agencies to withhold documents and testimony relating to policy formulation from the courts. The privilege was designed to enable executive branch officials to seek a full and frank discussion of policy options with staff without risk of being held to account for rejected proposals.

Executive branch officials often argue that congressional demands for information regarding an agency's policy development process would unduly interfere with, and perhaps "chill," the frank and open internal communications necessary for policymaking. In addition, they may also argue that the privilege protects against premature disclosure of proposed policies before the agency fully considers or adopts them. Agencies may further argue that the privilege prevents the public from confusing matters merely considered or discussed during the deliberative process with those that constitute the grounds for a policy decision. These arguments, however, do not necessarily pertain to Congress in its oversight and legislative roles.

2. Application of the Deliberative Process Privilege to Congressional Investigations

Congress's oversight process would be severely undermined were the courts or Congress to uniformly accept every agency assertion of the deliberative process privilege to block disclosure of internal deliberations. Such a broad application of the privilege would encourage agencies to disclose only materials that support their positions and withhold those with flaws, limitations, unwanted implications, or other embarrassments. Oversight would cease to become an investigative exercise of gathering the whole evidence and would become a "show and tell" performance.

Broad application of the deliberative process privilege to congressional investigations would also induce executive branch officials, including attorneys, to claim that oversight would dissuade them from giving frank opinions, or discourage others from seeking such advice. The Supreme Court dismissed that argument in *NLRB v. Sears, Roebuck & Co.*³³ It said:

The probability that the agency employee will be inhibited from freely advising a decisionmaker for fear that his advice, if *adopted*, will become public is slight. First, when adopted, the reasoning becomes that of the agency and becomes its responsibility to defend. Second, agency employees will generally be encouraged rather than discouraged by public knowledge that their policy suggestions have been adopted by the agency. Moreover, the public interest in knowing the reasons for a policy actually adopted by an agency supports [disclosure].³⁴

Agencies often claim the privilege to forestall inquiries while they develop substantive rules. However, an agency's rulemaking process is the prime object of legislative scrutiny; agencies may engage in substantive rulemaking only with an express grant of legislative authority. Moreover, Congress has enacted legislation determining the procedures each agency must follow³⁵ and retains ultimate control over each agency's rulemaking process.³⁶

33. 421 U.S. 132 (1975).

34. *Id.* at 161 (emphasis added). See also House Committee on the Judiciary v. Miers, 558 F. Supp. 2d 53, 101–02 (D.D.C. 2008) (rejecting the executive's argument that enforcing a congressional subpoena to a close adviser of the president would "chill" the candor necessary for frank and free advice to the chief executive).

35. See 5 U.S.C. § 553 (2000).

36. Congress may intervene in an agency rulemaking proceeding at any point. It is not limited to withdrawing an agency's authority or negating a particular rule by law after the fact. Where agency rulemaking is akin to the legislative process, the courts have held that "the very legitimacy of general policymaking performed by unelected administrators depends in no small part upon the openness, accessibility, and amenability of these officials to the needs and ideas of the public from whom their ultimate authority derives and upon whom their commands must fall." *Sierra Club v. Costle*, 657 F.2d 298, 400–401 (D.C. Cir. 1981). It is, therefore, "entirely proper for Congressional representatives vigorously to represent the interests of their constituents before administrative agencies engaged in informal, general policy rulemaking ... [A]dministrative agencies are expected to balance Congressional pressure with the pressures emanating from all other sources." *Id.* at 409–10. See also *Assoc. of National Advertisers, Inc. v. FTC*, 627 F.2d 1151 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921 (1980). For a full discussion of the legal propriety of committee interventions into agency rulemaking proceedings and other agency decision-making processes, see Chapter 12 *infra*.

Finally, the integrity, even the legitimacy, of an agency's rulemaking would be damaged more by efforts to avoid oversight inquiries than it would be by the agency officials' public embarrassment over disclosure of positions taken during the policy development process. The legitimacy and acceptability of the administrative process depends on the public's perception that the legislature has some sort of ultimate control over the agencies.

3. Congress Treats Deliberative Process Privilege Claims as Discretionary

As with claims of attorney-client privilege and work-product immunity, congressional practice has been to allow committees discretion over acceptance of deliberative process claims. Moreover, a 1997 appellate court decision, discussed below, shows that the deliberative process privilege is easily overcome by an investigatory body's showing of need for the information. Other court rulings and congressional practices have recognized the overriding necessity of an effective legislative oversight process.

4. The Deliberative Process Privilege is More Easily Overcome by Congress Than the Presidential Communications Privilege

As discussed in detail in Chapter 5, the presidential communications privilege is a constitutionally based doctrine that protects communications between the president and his or her immediate advisers in the Office of the President from disclosure.³⁷ It also extends to communications made by presidential advisers in the course of preparing advice for the president.³⁸ This doctrine does not cover the entire executive branch, but it applies more directly to relations between the president and his or her closest White House aides.

The 1997 D.C. Circuit's unanimous ruling in *In re Sealed Case (Espy)*³⁹ distinguishes between the "presidential communications privilege" and the "deliberative process privilege" and describes the severe limits of the latter as a shield against congressional investigative demands. The court of appeals held in *Espy* that the deliberative process privilege is a common law privilege that Congress can more easily overcome than the constitutionally rooted presidential communications privilege. Moreover, in congressional investigations, the deliberative process privilege "disappears altogether when there is any reason to believe government misconduct occurred."⁴⁰ The court's understanding thus severely limits the extent to which agencies can rely upon the deliberative process privilege to resist congressional investigative demands. A congressional committee merely needs to show that it has jurisdiction and authority, and that the information sought is necessary to its investigation to overcome this privilege. A plausible showing of fraud, waste, abuse, or maladministration would conclusively overcome an assertion of privilege.

On the other hand, the deliberative process privilege covers a broader array of information. Whereas the presidential communications privilege covers only communications between the president and high-ranking White House advisers, the deliberative process privilege applies to executive branch officials generally. But the deliberative process privilege only protects executive branch officials' communications that are "pre-decisional" and a "direct part of the deliberative process."

5. Congress Has Greater Ability to Obtain Deliberative Information Than Citizens Have Under FOIA

Even before *Espy*, courts and committees consistently countered agency attempts to establish a privilege that thwarted congressional oversight efforts. Agencies often claimed that internal communications must be "frank" and "open," and that communications are a part of a "deliberative process." This is the standard under the Freedom of Information Act (FOIA), which allows an agency to withhold documents from a citizen requester.⁴¹ It does not apply to Congress.

37. *United States v. Nixon*, 418 U.S. 683 (1974); *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977).

38. *Espy*, 121 F.3d. at 729.

39. *Id.* Among other things, the case involved White House claims of executive and deliberative process privileges for documents subpoenaed by an independent counsel.

40. *Id.* at 745-746 ("[W]hen 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.'"); *id.* at 737-38.

41. 5 U.S.C. § 552 (b)(5)(2010).

6. Common Law Privileges Available in Court Do Not Shield Witnesses from Complying with Committee Information Demands

Congress has vastly greater powers of investigation than those of citizen FOIA requesters. Moreover, Congress carefully provided that the FOIA exemption section “is not authority to withhold information from Congress.”⁴² The D.C. Circuit in *Murphy v. Department of the Army*⁴³ explained that FOIA exemptions were no basis for withholding from Congress because “Congress, whether as a body, through committees, or otherwise, must have the widest possible access to executive branch information if it is to perform its manifold responsibilities effectively.”⁴⁴

6. The Anomalous Ruling in *COGR v. Lynch*

The disquieting ruling in the Fast and Furious litigation and its immediate and long-range disruptive consequences for effective investigate oversight demands closer, albeit somewhat repetitive, examination.

The binding law with respect to executive privilege in the D.C. Circuit was established by the court's rulings in *Espy* (1997) and *Judicial Watch* (2004). Those decisions made an unequivocal distinction between the constitutionally-based presidential communications privilege and the common law deliberative process privilege, which the presiding judge in *COGR v. Lynch* ignored. While both have common general goals—to protect in some degree sensitive internal executive deliberations—and both are qualified privileges, the resemblance for purposes of legal significance and impact ends there. The *Espy* court's unanimous opinion emphasized the severe limits that the deliberative process privilege, as a common law privilege, would have as a shield against congressional demands since it would be more easily overcome by a showing of need. The court twice remarked that if there is a plausible showing that government misconduct may have occurred, the privilege “disappears.” At one point it stated: “[W]hen 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.’”⁴⁵ There is no hint of any constitutional concern that would allow an agency to invoke the deliberative process privilege in such circumstances.

And yet, the *Lynch* court determined that there “is an important constitutional dimension to the deliberative process aspect of the executive privilege.” This finding has serious constitutional and practical consequences for effective investigative oversight.⁴⁶

Historically, Congress has been recognized as the *initial determiner* of its own institutional rights and prerogatives, particularly for matters directly or indirectly related to oversight. Since the 1870s—with the express acquiescence of the Justice Department—all subpoena demands by the Justice Department to members or component entities must first be processed and reviewed by House and Senate leadership and counsel. In 2006, the Justice Department decided to circumvent this initial review process by means of a search warrant executed at a member's office. FBI agents barred the House general counsel and the member's private counsel from overseeing the search. The D.C. Circuit Court of Appeals declared the search a violation of the Constitution's Speech or Debate Clause. The court emphasized that a critical purpose of the clause is to prevent intrusions into the legislative process. The executive's search procedures did just that by “den[ying] the Congressman any opportunity to identify or assert the privilege with respect to legislative materials *before* their compelled disclosure to executive agents.”⁴⁷

Previously, in the same vein, the court ruled that courts may not block a congressional subpoena, holding that the Speech

42. 5 U.S.C. § 552 (d).

43. 613 F.2d 1151 (D.C. Cir. 1979).

44. *Id.* at 1158.

45. *Espy*, 121 F.3d at 745-46; *id.* at 737-38.

46. One could argue that the ruling is the equivalent of holding that denying a witness the right to cross-examine other witnesses or to call witnesses on his or her behalf at a congressional hearing violates the Sixth Amendment—an argument which the Supreme Court rejected in *Moran v. Burbine*, 475 U.S. 412, 430 (1986)—or violates due process rights, which the Supreme Court and lower courts have also rejected. See *Hannah v. Larche*, 365 U.S. 420 (1960) and *United States v. Fort*, 443 F.2d 670 (D.C. Cir. 1970), cert. denied, 403 U.S. 932 (1971). The ruling is further discussed in Chapter 3 *supra* section 4.b.ii.

47. *United States v. Rayburn House Office Bldg.*, 497 F.2d 654, 661-62 (D.C. Cir. 2008), cert. denied 552 U.S. 1295 (2008)(emphasis supplied).

or Debate Clause provides “an absolute bar to judicial interference with such compulsory process.”⁴⁸ As a consequence, a government witness’ sole remedy, until recently, was to refuse to comply, risk being cited for contempt, and then raise privilege claims as a defense in a contempt prosecution.

Most recently the Supreme Court deferred to the exercise of the Senate’s internal rulemaking authority to define when it is in session for recess appointments purposes, thereby nullifying a presidential attempt to unilaterally make that determination.⁴⁹ And, finally, there has been judicial approval and general recognition of each chamber’s absolute control over the initiation and conduct of investigations and hearings.⁵⁰

The *Lynch* court’s departure from both prior law and practice recognizing the legislature’s primacy in establishing first responses to intrusions on its core institutional prerogatives threatens to undermine one of Congress’s primary functions in our scheme of separated powers. The district court’s ruling has been appealed to the D.C. Circuit Court of Appeals. Under the appeals courts’ argument schedule no resolution can be expected until well into 2017.⁵¹

C. Release of Attorney-Client, Work-Product, or Deliberative Process Material to Congress Does Not Waive Applicable Privileges in Other Forums

Private parties and agencies often assert that yielding to committee demands for material arguably covered by the attorney-client, work-product, or deliberative process privileges will waive those privileges in other forums. Applicable case law, however, is to the contrary. When a congressional committee compels the production of a privileged communication through a properly issued subpoena, it does not prevent the assertion of the privilege elsewhere,⁵² as long as it is shown that the compulsion was in fact resisted.⁵³

For illustrations of some of the oversight powers, tools, principles, and obstacles discussed in this chapter, see the following case study in Part II:

Todd Garvey: *The Webster and Ingervoll Investigations*

48. See *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 503-07 (1975).

49. *NLRB v. Noel Canning*, 573 U.S. __ (2014).

50. See *Hanna*, 365 U.S. 420 and *Fort*, 443 F.2d at 670.

51. Committee on Government and Oversight Reform of the United States House of Representatives v. *Lynch*, Case No. 16-5078, (D.C. Circuit, appeal filed 10/6/2016). As a result of the change in presidential administration, the *Lynch* (now *Sessions*) appeal has been put on indefinite hold.

52. See, e.g., *FTC v. Owens-Corning Fiberglass Corp.*, 626 F.2d 966, 970 (D.C. Cir. 1980) (release of information to a congressional committee is not deemed to be disclosure to the general public); *Exxon Corp. v. FTC*, 589 F.2d 582 (D.C. Cir. 1978); *Rockwell International Corp. v. U.S. Department of Justice*, 235 F.3d 598, 604 (D.C. Cir. 2001) (compliance with a statutory obligation to provide Congress with information did not waive its FOIA exemption protection); *Murphy v. Department of the Army*, 613 F.2d 1151, 1155-59 (D.C. Cir. 1979); *Florida House of Representatives v. Department of Commerce*, 961 F.2d 941, 946 (11th Cir. 1992); *United States v. Zolin*, 809 F.2d 1411, 1415 (9th Cir. 1987), *aff’d in part, vacated in part*, 491 U.S. 554 (1989) (“When disclosure is involuntary, we will find the privilege preserved if the privilege holder has made efforts ‘reasonably designed’ to protect and preserve the privilege.”).

53. See *Iron Workers Union Local No. 17 Insurance Fund v. Phillip Morris, Inc.*, 35 F. Supp. 2d 582 (N.D. Ohio, 1999) and *Commonwealth of Massachusetts v. Phillip Morris, et al.*, 1998 Lexis 438 (Mass. Super. Ct. July 30, 1998) (holding that the companies had failed to sufficiently resist the committee’s subpoenas).



7. Executive Branch Investigations: Lessons from Department of Justice Probes

Congress's spower of inquiry extends equally to all executive departments, agencies, and establishments. Yet Congress's experience conducting oversight of the Department of Justice (Department or DOJ) has often been the most contentious, and has presented all of the issues that may arise in disputes between Congress and any executive agency. Therefore, Congress's experience with the Justice Department provides many useful lessons on how to conduct oversight of agencies.

The history of congressional investigations of DOJ covers a broad scope of congressional inquiries, including committee requests for:

- particular agency witnesses;
- proprietary, trade secret, or other sensitive information;
- documentary evidence of how an agency came to a particular decision; and
- the opinion of an agency's general counsel with respect to the legality of a course of action taken by the agency.

In response, congressional inquiries into Justice Department operations have been frequently met with claims that such inquiries:

- interfere with the presumptive sensitivity of its principal law enforcement mission;
- intrude upon matters of national security; and
- constitute improper political and constitutional interference with deliberative prosecutorial processes that are discretionary in nature.

As a result, the Justice Department has often refused to supply internal documents or testimony sought by jurisdictional committees.

Since many other agencies have followed DOJ's examples, the resolution of such past investigative confrontations with DOJ provides useful lessons. These lessons, outlined in detail below, should guide future committees in determining whether to undertake similar probes of DOJ or other executive agencies, as well as inform them about the scope and limits of their investigative prerogatives and the practical problems of such undertakings. The outcomes of these inquiries provide formidable practice precedents which will allow committees to effectively engage uncooperative agencies.

A. Overview of Congressional Investigations of DOJ

The Congressional Research Service review of oversight of the Justice Department over the last 95 years is a particularly instructive tool. This compilation and review provides summaries of 22 selected congressional investigations, from the Palmer Raids and Teapot Dome scandal in the 1920s to controversies over the past 25 years, including the revelations of the Church Committee of domestic intelligence abuse by the FBI, ABSCAM, Iran-Contra, the misuse of informants in the FBI's Boston Regional Office, the termination and replacement of U.S. attorneys, and the probe of Operation Fast and Furious.¹

These various investigations demonstrate that DOJ has consistently been obligated to submit to congressional oversight in investigating allegations of improper administration, misfeasance and/or malfeasance. This requirement to cooperate in investigations has applied even when there is ongoing or expected litigation. A number of these investigations spawned seminal Supreme Court rulings that today provide the foundation for the broad congressional power of inquiry. All were contentious and involved Department claims that committee demands for agency documents and testimony were precluded either on the basis of constitutional or common law privilege or policy.

1. Congress's Power to Obtain Documents and Testimony

To obtain documents and testimony, an inquiring committee need only show that the information sought is:

- within the broad subject matter of the committee's authorized jurisdiction;
- in aid of a legitimate legislative function; and
- pertinent to the area of concern.

Despite objections by an agency, either house of Congress, or its committees or subcommittees, may obtain and publish information it considers essential for the proper performance of its constitutional functions. There is no court precedent that requires committees to demonstrate a substantial reason to believe wrongdoing occurred before seeking disclosures with respect to the conduct of specific criminal and civil cases, whether open or closed. Indeed, the case law is quite to the contrary.

During the inquiries covered by the CRS compilation, committees sought and obtained a wide variety of evidence, including:

- deliberative prosecutorial memoranda;
- FBI investigative reports and summaries of FBI interviews;
- memoranda and correspondence prepared while cases were pending;

1. See ALISEA M. DOLAN & TODD GARVEY, CONG. RESEARCH SERV., R43811, CONGRESSIONAL INVESTIGATIONS OF THE DEPARTMENT OF JUSTICE, 1920-2012 (Nov. 5, 2012) (periodically updated). Also useful is the two volume study CONGRESS INVESTIGATES: A CRITICAL AND DOCUMENTARY HISTORY (revised edition edited by Roger A. Bruns, David L. Hostetter, and Raymond W. Smock, 2011), which presents case studies with accompanying commentary and documentary material on 29 important congressional investigations from General St. Clair's debacle in 1792 to the Hurricane Katrina inquiry in 2005. The CRS study of the history of congressional investigations of Justice Department actions originated as a result of a request to the author for a legal analysis in September 1993 from the chief counsel of the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, chaired by Rep. John Dingell, for an assessment of the legal propriety of its requests and subpoenas for documents and testimony from line attorneys regarding certain prosecutorial decisions in which they were involved. The subcommittee was engaged in a contentious investigation of the department's Environmental Crimes Unit. At issue were department refusals to comply. The demands were characterized as an abrupt departure from "a time honored" department policy that shields its prosecutorial decision-making process from the political process that is based exclusively in the president as a result of the vestment in him of the constitutional duty to "take care" that the laws are faithfully executed. A statement by a former attorney general attested to that history and legal view. The memorandum I prepared was included in the subcommittee's final report following the successful conclusion of the inquiry. A detailed account of the investigation and an assessment of the oversight lessons learned is presented in a study by Deborah Jacobson, *The 1992-1994 Investigation of the Justice Department's Environmental Crimes Program*, may be found in Part II. Subsequently, a revised version of the memorandum was published as a CRS report, which I periodically updated until my retirement in 2008. Since then the report has been ably maintained by my successors.

- confidential instructions outlining the procedures or guidelines to be followed for undercover operations and the surveillance and arrest of subjects;
- documents presented to grand juries not protected from disclosure by Rule 6(e) of the Federal Rules of Criminal Procedure, which establishes the rules for grand jury secrecy;
- the testimony of line attorneys and other subordinate agency employees regarding the conduct of open and closed cases; and
- detailed testimony about specific instances of the Department's failure to prosecute cases that allegedly merited prosecution.

Also, those investigations encompassed virtually every component of DOJ, including its sensitive Public Integrity Section and its Office of Professional Responsibility. They also covered all levels of officials and employees in Main Justice and field offices, from attorneys general down to subordinate line personnel. Further, they delved into virtually every area of the Department's operations, including its conduct of domestic intelligence investigations.

There have been only four formal presidential assertions that executive privilege required withholding internal DOJ documents sought by a congressional subpoena. Two of those claims were ultimately abandoned by the president; one was not acted on further by a House committee before the end of the 110th Congress; and one is pending resolution before an appeals court.² The most recent Supreme Court and appellate court rulings covering the presidential communications privilege and the Take Care Clause of the Constitution³ suggest that a claim of executive privilege to protect internal deliberations would be unlikely to succeed.

2. Weighing Pragmatic Considerations When Seeking Disclosures

The consequences of these historic inquiries at times have been profound and far-reaching. They have led directly to important legislation and the promulgation of internal administrative rules to remedy problems discovered and to the resignations (Harry M. Daugherty, J. Howard McGrath, Alberto R. Gonzales) and convictions (Richard Kleindienst, John Mitchell) of five attorneys general. Despite the broad extent of their constitutional power to access deliberative processes, committees have generally limited themselves due to prudential considerations. Congressional committees typically weigh legislative need, public policy, and the statutory duty of committees to conduct oversight, against the potential burdens imposed on an agency if deliberative process matter is publicly disclosed. In particular, Congress has considered the sensitive law enforcement concerns and duties of the Justice Department and has, therefore, declined to seek disclosure of the agency's deliberative processes in the absence of a reasonable belief that government misconduct has occurred. Over time, Congress has been generally faithful to these prudential considerations.

2. One of the abandoned claims involved subpoenaed documents sought in the 1981 investigation of the Environmental Protection Agency enforcement of the Superfund law which were all released following a negotiated settlement. H.R. REP. NO. 97-968, at 18, 28-29 (1982). The second concerned documents sought in the Boston FBI matter, which were all internal DOJ materials. A third claim of presidential privilege was invoked on July 16, 2008, in response to a subpoena by the House Oversight and Government Reform Committee seeking documents concerning DOJ's investigation by a special counsel of the disclosure of the identity of a CIA agent. 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 to the special counsel during the investigation. The documents were not pursued after the close of the legislative session. The fourth claim was invoked in response to the threatened contempt of former Attorney General Holder for withholding subpoenaed documents during the investigation of Operation Fast and Furious. A district court ruled that since the deliberative process privilege contains a constitutional element it may be raised against a congressional subpoena demand. That ruling is being challenged and is pending review before the D.C. Circuit Court of Appeals. Comm. on Oversight & Gov't Reform of the U.S. House of Representatives v. Lynch, 156 F. Supp. 3d 101 (D.C. Cir. 2016). See TODD GARVEY & ALISSA M. DOLAN, CONG. RESEARCH SERV., R42670, PRESIDENTIAL CLAIMS OF EXECUTIVE PRIVILEGE: HISTORY, LAW, PRACTICE, AND RECENT DEVELOPMENTS, at 30-32, 36-39 (periodically updated).

3. The Take Care Clause of the Constitution states that the president "shall take Care that the Laws be faithfully executed." U.S. CONST., art. II, § 3.

B. The Justice Department's Responses to Congressional Inquiries

The reasons advanced by the executive branch for declining to provide information to Congress about open and closed civil and criminal proceedings have included:

- avoiding prejudicial pre-trial publicity;
- protecting the rights of innocent third parties;
- protecting the identity of confidential informants;
- preventing disclosure of the government's strategy in anticipated or pending judicial proceedings;
- avoiding the potentially chilling effect on the exercise of prosecutorial discretion by DOJ attorneys; and
- preventing interference with the president's constitutional duty to faithfully execute the laws.⁴

Historically, DOJ has continued to assert such objections. For example, in the 2001–2002 House Oversight and Government Reform Committee investigation of the FBI's misuse of informants, the Department resisted producing internal deliberative prosecutorial documents. In a February 1, 2002 letter to Chairman Dan Burton, the DOJ assistant attorney general for legislative affairs explained that: “the public interest in avoiding the polarization of the criminal justice process required greater protection of those documents ... This is not an ‘inflexible position,’ but rather a statement of a principled interest in ensuring the integrity of prosecutorial decision-making.”⁵

More recently, during the George W. Bush administration, agencies asserted broader and more strenuous opposition to providing evidence and testimony to Congress through presidential signing statements,⁶ executive orders,⁷ and opinions of the Department of Justice's Office of Legal Counsel (OLC). In OLC's view, under the precepts of executive privilege and the unitary executive, Congress may not bypass the procedures the president establishes to authorize disclosure to Congress of classified, privileged, or even non-privileged information. Thus, the executive branch has resisted congressional efforts to seek testimony by lower-level officers or employees without presidential authorization. OLC has declared that “right of disclosure” statutes “unconstitutionally limit the ability of the President and his or her appointees to supervise and control the work of subordinate officers and employees of the Executive Branch.”⁸ However, the OLC assertions of these broad notions of presidential prerogatives have not been supported by any authoritative judicial citations.

4. These reasons were most famously articulated by then Attorney General Robert Jackson in 1941, who stated that all would “seriously prejudice law enforcement.” See 40 Op. Att’y Gen. 45, 46–47 (1941). See also Letter from William French Smith, Att’y Gen., to Hon. John D. Dingell, Chair, House Subcomm. on Oversight & Investigation, Comm. on Energy and Commerce (Nov. 30, 1982), reprinted in H.R. REP. NO. 97-968 at 37–38.

5. See HOUSE COMM. ON GOV’T REFORM, EVERYTHING SECRET DEGENERATES: THE FBI’S USE OF MURDERERS AS INFORMANTS, H. REPT. NO. 108-414, vol. 1 at 132 (2004). See also, DOLAN & GARVEY, *supra* note 1, at app. A.

6. See T.J. HALSTEAD, CONG. RESEARCH SERV., RL33667, PRESIDENTIAL SIGNING STATEMENTS: CONSTITUTIONAL & INSTITUTIONAL IMPLICATIONS (updated Sept. 17, 2007), <http://www.fas.org/sgp/crs/natsec/RL33667.pdf>.

7. See, e.g., Executive Order 13233 issued by President Bush on November 1, 2001, which gave current and former presidents and vice presidents broad authority to withhold presidential records and delay their release indefinitely. It vested former vice presidents, and the heirs or designees of disabled or deceased presidents, the authority to assert executive privilege, and expanded the scope of claims of privilege. Hearings held by the House Committee on Government Reform in 2002 raised substantial questions as to the constitutionality of the order and resulted in the reporting of legislation (H.R. 4187) in the 107th Congress that would have nullified the order and established new processes for presidential claims of privilege and for congressional and public access to presidential records. H.R. REP. NO. 107-790 (2002). Substantially the same legislation (H.R. 1225) passed the House on March 14, 2007. See H.R. REP. NO. 110-44 (2007), and was reported out of the Senate Committee on Homeland Security and Governmental Affairs on June 20, 2007, without amendment and with no written report. President Obama revoked Executive Order 13233 by an executive order issued on January 21, 2009. See generally, Jonathan Turley, *Presidential Papers and Popular Government: The Convergence of Constitutional and Property Theory in Claims of Ownership and Control of Presidential Records*, 88 CORNELL L. REV. 651, 666–96 (2003).

8. See Letter from Jack L. Goldsmith III, Assistant Att. Gen., Office of Legal Counsel, Department of Justice, to Hon. Alex M. Azar, II, General Counsel, Department of Health and Human Services (May 21, 2004), <http://www.usdoj.gov/ole/crsmemorresponse.htm>. This broad view of presidential privilege was repeated in Attorney General Mukasey's request to the president that he claim executive privilege with respect to a House committee subpoena for DOJ documents in an investigation by a DOJ special counsel into the revelation of a CIA agent's identity. See Letter from Michael Mukasey, Att’y Gen., to the President (July 15, 2008) (on file with author).

C. Lessons from Prior Investigations of DOJ

1. Oversight May Proceed Despite Pre-Trial Publicity, Due Process, and Concurrent Investigations Concerns

The Supreme Court has repeatedly reaffirmed the breadth of Congress' right to investigate the government's conduct of criminal and civil litigation.⁹ Congress must be given access to agency documents, even in situations where the inquiry may result in pre-trial publicity and the exposure of criminal corruption or maladministration of agency officials. The Supreme Court has noted that a committee's investigation "need not grind to a halt whenever responses to its inquiries might potentially be harmful to a witness in some distinct proceeding ... or when crime or wrongdoing is disclosed."¹⁰ Despite the existence of pending litigation, Congress may investigate facts that have a bearing on that litigation where the information sought is needed to determine what, if any, legislation should be enacted to prevent further ills.¹¹

Although several lower court decisions have recognized that congressional hearings may have the result of generating prejudicial pre-trial publicity, they have not suggested that there are any constitutional or legal limitations on Congress' right to conduct an investigation while a court case is still proceeding. Instead, the courts have granted additional time or a change of location for a trial to deal with the publicity problem.¹² For example, the court in one of the leading cases, *Delaney v. United States*, entertained "no doubt that the committee acted lawfully, within the constitutional powers of Congress duly delegated to it," but went on to note that the Justice Department

must accept the consequence that the judicial department, charged with the duty of assuring the defendant a fair trial before an impartial jury, may find it necessary to postpone the trial until by lapse of time the danger of the prejudice may reasonably be thought to have been substantially removed.¹³

Thus, the courts have recognized that the cases pose a choice for the Congress: congressionally generated publicity may result in harming the prosecutorial effort of the executive; but access to information under secure conditions can fulfill the congressional power of investigation. Courts have recognized that this remains a choice that is solely within Congress' discretion to make irrespective of the consequences. As the Iran-Contra independent counsel observed: "The legislative branch has the power to decide whether it is more important perhaps to destroy a prosecution than to hold back testimony they need. They make that decision. It is not a judicial decision, or a legal decision, but a political decision of the highest importance."¹⁴

2. Probes of Government Strategies, Methods, or Operational Weaknesses Should Not Be Limited

Attorney general and OLC opinions have raised concerns that congressional oversight that calls for information that reflects the executive branch's strategy or its methods or weaknesses is somehow inappropriate. However, if this concern were permitted to block congressional inquiries, this would prevent Congress from performing a major portion of its constitutionally mandated oversight. Congressional inquiries into foreign affairs and military matters call for information on strategy and assessment of weaknesses in national security matters; congressional probes into waste, fraud, and

9. See Chapter 2.

10. *Hutcheson v. United States*, 369 U.S. 599, 617 (1962).

11. *Sinclair v. United States*, 279 U.S. 263, 294 (1929).

12. See e.g., *Delaney v. United States*, 199 F.2d 107 (1st Cir. 1952); *United States v. Mitchell*, 372 F. Supp. 1259, 1261 (S.D.N.Y. 1973). For discussion of issues in addition to prejudicial publicity that have been raised in regard to concurrent congressional and judicial proceedings, including allegations of violation of due process, see CONTEMPT OF CONGRESS, H.R. REP. NO. 97-968, at 58 (1982).

13. *Delaney v. United States*, 199 F.2d 107, 114 (1st Cir. 1952). The court did not fault the committee for holding public hearings, stating that if closed hearings were rejected "because the legislative committee deemed that an open hearing at that time was required by overriding considerations of public interest, then the committee was of course free to go ahead with its hearing, merely accepting the consequence that the trial of Delaney on the pending indictment might have to be delayed." *Id.* at 114-15. It reversed Delaney's conviction because the trial court had denied his motion for a continuance until after the publicity generated by the hearing, at which Delaney and other trial witnesses were asked to testify, subsided. See also *Hutcheson*, 369 U.S. at 613 (upholding contempt conviction of person who refused to answer committee questions relating to activities for which he had been indicted by a state grand jury, citing *Delaney*).

14. Lawrence E. Walsh, *The Independent Counsel and the Separation of Powers*, 25 Hous. L. Rev. 1, 9 (1988).

7. Executive Branch Investigations: Lessons from Department of Justice Probes

inefficiency in domestic operations call for information on strategy and weaknesses. For Congress to forego such inquiries would be an abandonment of its oversight duties. The best way to correct either bad law or bad administration is to closely examine the methods and strategies that led to the mistakes. The many examples of congressional probes recounted in the CRS compilation demonstrate how important and effective proper congressional oversight can be.

a. The Revelations of the Cover-Up of Investigative Findings of Misconduct at Ruby Ridge

The DOJ Office of Professional Responsibility (OPR), which monitors the conduct of Department personnel, is notable for its revelations of a number of sensitive, previously undisclosed internal investigations in the face of extraordinary agency resistance. One such instance occurred during the 1995 investigation by the Senate Judiciary Committee's Subcommittee on Terrorism, Technology, and Government Information of allegations that several branches of DOJ and the Department of the Treasury had engaged in serious criminal and professional misconduct in the investigation, apprehension, and prosecution of Randall Weaver and Kevin Harris at Ruby Ridge, Idaho. The subcommittee, chaired by Senator Arlen Specter, held 14 days of hearings in which it heard testimony from 62 witnesses, including DOJ, FBI, and Treasury officials, line attorneys and agents, obtained various internal reports from these agencies,¹⁵ and issued a final report.¹⁶

The subcommittee's hearings revealed that the federal agencies involved conducted at least eight internal investigations into charges of misconduct, none of which had ever been publicly released.¹⁷ DOJ expressed reluctance to allow the subcommittee to see any documents out of a concern they would interfere with the ongoing investigation but ultimately supplied some of them under agreed-upon conditions regarding their public release. The most important of these documents was the report of the Ruby Ridge Task Force.¹⁸

The task force submitted a 542 page report to OPR on June 10, 1994, which described numerous problems with the conduct of the FBI, the U.S. Marshals, and the U.S. Attorney's Office in Idaho, and made recommendations for institutional changes to address the problems it found. It also concluded that portions of the rules of engagement issued by the FBI during the incident were unconstitutional under the circumstances, and that the second of two shots fired by a member of the FBI's Hostage Rescue Team (HRT), which resulted in the death of Vicki Weaver, was not reasonable. The task force recommended that the matter be referred to a prosecutorial component of the department for a determination as to whether a criminal investigation was appropriate.

OPR reviewed the task force report and transmitted the report to the deputy attorney general with a memorandum that dissented from the recommendation that the shooting of Vicki Weaver by the HRT member be reviewed for prosecutorial merit. The dissent was based on the view that the agent's actions were not unreasonable considering the totality of the circumstances. The deputy attorney general referred the task force recommendations for prosecutorial review to the criminal section of the civil rights division, which concluded that there was no basis for criminal prosecution.

The task force report was the critical basis for the subcommittee's inquiries during the hearings and the discussion and for the conclusion in its final report that "With the exception of the [Ruby Ridge] Task Force report, which was partially disavowed by the Department, and the April 5, 1995 memorandum of Deputy Attorney General Jamie Gorelick, it appeared to the Subcommittee that the authors of every report we read were looking more to justify agency conduct than to follow the facts wherever they lead."¹⁹

15. *The Federal Raid on Ruby Ridge, Idaho: Hearings before the Senate Subcommittee on Terrorism, Technology and Government Information, Committee on the Judiciary*, 104th Cong. (1995) [hereinafter *Ruby Ridge Hearings*].

16. *Ruby Ridge: Report of the Subcommittee on Terrorism, Technology and Government Information of the Senate Committee on the Judiciary* [hereinafter *Ruby Ridge Report*]. The 154-page report appears not to have been officially reported by the full committee. A bound copy may be found in the United States Senate Library, catalogue number HV 8141.U56 1995.

17. *Id.* at 1; *Ruby Ridge Hearings*, *supra* note 15, at 722, 954, 961.

18. See generally, *Ruby Ridge Report*, *supra* note 16.

19. See *Ruby Ridge Hearings*, *supra* note 15, at 719-37, 941-85; *Ruby Ridge Report*, *supra* note 16, at 10-11, 61-69, 115, 122-23, 34-35, 139, 145-49; see also David Johnston, *Idaho Siege Report Says FBI Violated Procedure*, N.Y. TIMES, Dec. 14, 1994.

3. Prosecutorial Discretion is Not a Core Presidential Power Justifying a Claim of Executive Privilege

In the past, the executive frequently has made the broad claim that prosecution is an inherently executive function and that congressional access to information related to the exercise of that function is thereby limited. Under this view, matters of prosecutorial discretion are off-limits to congressional inquiry, and access demands are viewed as interfering with the discretion traditionally enjoyed by the prosecutor. However, court decisions have not upheld this view and have permitted congressional inquiries into prosecutorial decisions.

a. Morrison v. Olson: Prosecutorial Discretion is Not Central or Unique to the Executive Branch

The Supreme Court has rejected the notion that prosecutorial discretion in criminal matters is an inherent or core executive function. In *Morrison v. Olson*,²⁰ the court recognized that while the executive regularly exercises prosecutorial powers, the exercise of prosecutorial discretion is in no way “central” to the functioning of the executive branch.²¹ The court therefore rejected a challenge to a statutory provision exempting the independent counsel from at-will presidential removal. The court held that insulating the independent counsel in this way did not interfere with the president’s duty to “take care” that the laws be faithfully executed.²²

The *Morrison* court reiterated that Congress’s oversight functions of “receiving reports or other information and to oversight of the independent counsel’s activities ... [are] functions that have been recognized generally as being incidental to the legislative function of Congress.”²³ Arguments that only the executive branch has the power to prosecute violations of the law also have been soundly rejected outside the realm of congressional investigations. In *United States ex rel Kelly v. The Boeing Co.*,²⁴ the Ninth Circuit upheld the constitutionality of *qui tam* provisions of the False Claims Act allowing private parties to bring enforcement actions against federal agencies, holding that: “[W]e reject Boeing’s assertion that all prosecutorial power of any kind belongs to the Executive Branch.”²⁵

Prosecution is not a core or exclusive function of the executive, but oversight is a constitutionally mandated function of Congress; therefore, a claim of executive privilege to protect the ability to prosecute a case would likely fail. Additionally, congressional oversight and access to documents and testimony, unlike the action of a court, cannot stop a prosecution or set limits on the management of a particular case. Access to information by itself would not seem to disturb the authority and discretion of the executive branch to decide whether to prosecute a case.

20. *Morrison v. Olson*, 487 U.S. 654 (1988).

21. *Id.* at 691–92.

22. Any doubt that this is the intended, clear ruling of the majority opinion may be dispelled by a reading of Justice Scalia’s famous lone dissent. *Morrison*, 487 U.S. at 703–715. “It effects a revolution in our constitutional jurisprudence for the Court, once it has determined that (1) purely executive functions are at issue here and (2) those functions have been given to a person whose actions are not fully within the supervision and control of the President, nonetheless to proceed further to sit in judgment of whether ‘the President’s need to control the exercise of [the independent counsel’s] discretion is ‘so central’ as to the functioning of the Executive Branch’, as to require complete control, ante at 487 U.S. at 691, (emphasis added), whether the conferral of his powers upon someone else ‘sufficiently deprives the President of control over the independent counsel to interfere with [his] constitutional obligation to ensure the faithful obligation of the laws’, ante at 487 U.S. at 696.” *Id.* at 708–09. “It is not for us to determine, and we have never presumed to determine, how much of the purely executive powers must be within the full control of the President. The Constitution prescribes that they *all* are.” *Id.* at 709 (emphasis in original text).

23. *Id.* at 658, 694 (citing *McGrain v. Daugherty*, 273 U.S. 135 (1927)).

24. *United States ex rel. Kelly v. Boeing Co.*, 9F.3d 743 (9th Cir. 1993).

25. *Id.* at 751 (emphasis in original). See also, *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000) (holding that *qui tam* relators meet Article III standing requirements).

7. Executive Branch Investigations: Lessons from Department of Justice Probes

Given the legitimacy of congressional oversight of the law enforcement agencies of government, and the need for access to information pursuant to such activities,²⁶ a claim of prosecutorial discretion by itself is unlikely to defeat a congressional need for information. The congressional action itself does not and cannot dictate prosecutorial policy or decisions in particular cases.

b. Recent Court Rulings Further Undermine Presidential Claims of Prosecutorial Prerogatives

Judicial rulings over the past two decades in other contexts have rejected various assertions of presidential privilege that might be raised in attempts to deny congressional access to agency information. The Supreme Court's ruling in *Morrison v. Olson* casts significant doubt on whether prosecutorial discretion is a core presidential power, a doubt that has been magnified by the appellate court rulings in *Espy*²⁷ and *Judicial Watch*.²⁸ In those later decisions, assertion of the presidential communications privilege was held to be limited to "quintessential and non-delegable presidential power" and confined to communications with advisers in "operational proximity" to the resident.

Those decisions indicate that core powers include only decisions that the president alone can make under the Constitution: appointment and removal, pardoning, receiving ambassadors and other public ministers, negotiating treaties, and exercising powers as commander in chief. As discussed in Chapter 5, *Espy* strongly hinted, and *Judicial Watch* made clear, that the protection of the presidential communications privilege extends only to the boundaries of the White House and the executive office complex and not to the departments and agencies. Even if the actions at an agency related to a core power, unless the subject documents are "solicited and received" by a close White House adviser or the president, they are not covered by the privilege. *Judicial Watch*, which dealt with pardon documents in DOJ that had not been "solicited and received" by a close White House adviser, determined that "the need for the presidential communications privilege becomes more attenuated the further away the advisers are from the President ... [which] affects the extent to which the contents of the President's communications can be inferred from predecisional communications."²⁹ Of course, these rulings did not involve congressional requests, and they are rulings by the U.S. Court of Appeals for the D.C. Circuit, not decisions by the Supreme Court. However, they provide helpful guidance, especially since the D.C. Circuit is the court most likely to hear and rule on future claims of presidential privilege.³⁰

26. The district court ruling in *House Committee on the Judiciary v. Miers*, in rejecting a claim of lack of standing of the House Judiciary Committee to challenge an executive assertion of absolute immunity from compulsory congressional process, reiterated that prior Supreme Court rulings in *McGrain v. Daugherty*, *Eastland v. U.S. Servicemen's Fund*, and *Barenblatt v. United States*, among others, had firmly established that Congress's power and authority to seek and compel information from executive agencies in criminal and civil enforcement contexts is constitutionally based. In denying the claim by the executive that a jurisdictional committee charged with oversight of the Justice Department could not permissibly employ its investigative resources to determine the reasons for the forced resignations and replacement of nine U.S. attorneys, the court stated that "Given its 'unique ability to address improper partisan influence in the prosecutorial process ... [n]o other institution will fill the vacuum if Congress is unable to investigate and respond to this evil.' ... With the legitimacy of its investigation established, there is no need to belabor the argument concerning informational standing—non-compliance with a duly issued subpoena is a quintessential informational injury. ... Thus, the Committee filed this suit to vindicate both its right to the information that is the subject of the subpoena and its institutional prerogative to compel compliance with its subpoenas. A harm to either interest satisfies the injury-in-fact standing requirement." *House Committee on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 78 (2008). The court also remarked: "The exercise of Congress's investigative 'power,' which the Executive concedes that Congress has, creates rights. For instance, by utilizing its power to issue subpoenas and proceed with an investigation via compulsory process, Congress creates a legal right to the responsive information that those subpoenas will yield. To hold that Congress's ability to enforce its subpoenas in federal court turns on whether its investigative function and accompanying authority to utilize subpoenas are properly labeled as 'powers' or 'rights' would elevate form over substance. The Court declines to do so." *Id.* at 91. (emphasis in original). Subsequent district court rulings have reiterated and relied on the *Miers* rationale to uphold legal actions to protect core constitutionally-based institutional prerogatives. *See, e.g.* *United States House of Representative v. Burwell*, 130 F. Supp. 3d 53, 81 (D.D.C. 2015) (power of the purse); *Committee on Oversight and Government Reform v. Holder*, 979 F. Supp. 2d 1, 4 (D.D.C. 2013) (document subpoena enforcement).

27. *In re Sealed Case (Espy)*, 121 F.3d 279 (D.C. Cir. 1997).

28. *Judicial Watch v. Dep't of Just.*, 365 F.3d 1108 (D.C. Cir. 2004).

29. *Id.* at 1123.

30. It may be noted that the district court ruling in *House Committee on the Judiciary v. Miers*, however, did involve a direct confrontation between a congressional committee and the executive over demands for testimony and documents from present and past senior advisers to the president, and that the court's opinion approvingly cited the *Espy* ruling five times with respect to doctrinal trends and interpretations concerning the presidential communications privilege. *See Miers*, 558 F. Supp. 2d at 73, 74 n.15, 103 n.35, and 105 n.37. Arguably, these references reinforce the notion that *Espy* is the controlling law in the District of Columbia Circuit with respect to the applicability of the privilege and its nature and scope.

c. Although Committees Enjoy Significant Investigative Powers, They Carefully Weigh Agency Interests When Seeking Information

The fact that presidential claims of privilege are often unsuccessful does not mean that DOJ policy arguments in particular situations should be immediately dismissed. A review of the historical record of congressional inquiries and experiences with committee investigations of DOJ reveals that committees normally have been restrained by prudential considerations. Members of Congress typically weigh the considerations of legislative need, public policy, and the statutory oversight duties of congressional committees against the potential burdens and harms that may be imposed on the agency if deliberative process matter is publicly disclosed. If a jurisdictional committee lacks a reasonable belief that the government has engaged in misconduct, a committee generally will give substantial weight to sensitive law enforcement concerns regarding an agency's internal deliberations. However, the oft-repeated claim that the department never has allowed congressional access to open or closed litigation files or other "sensitive" internal deliberative process matters is simply not accurate. Under the appropriate circumstances, committees fully and properly have exercised their well-established congressional oversight authority.

4. Neither Agencies Nor Private Parties Can Deny Committee Access to Proprietary, Trade Secret, Privacy, and Other Sensitive Information

a. The Broad Right of Congressional Access and Disclosure

Generally speaking, Congress' authority and power to obtain information, including but not limited to proprietary or confidential information, is extremely broad.³¹ Upon occasion, Congress has found it necessary and appropriate to limit its access to information it would normally be able to obtain by exercise of its constitutional oversight prerogatives.³² But where a statutory confidentiality or nondisclosure provision is not made explicitly applicable to the Congress, the courts have consistently held that agencies and private parties may not deny Congress access to such information on the basis of such provisions.³³ Ambiguities in such statutes as the Trade Secrets Act and the Privacy Act have been resolved in a committee's favor.³⁴ The courts have also held that the release of information to a congressional requester is not considered to be disclosure to the general public.³⁵ Once documents are in congressional control, the courts will presume that committees of Congress will exercise their powers responsibly and with proper regard to the rights of the parties.³⁶ Moreover, it would appear that courts may not prevent congressional disclosure at least when such disclosure would serve a valid legislative purpose.³⁷

Two early instances in which committees used the contempt power to successfully overcome agency claims that general confidentiality provisions in their enabling legislation prohibited disclosures to Congress are important precedents. The first involved a 1975 investigation by the Subcommittee on Oversight and Investigations of the then-House Interstate and Foreign Commerce Committee, chaired by Rep. John Moss, seeking to learn the degree to which Arab countries had asked U.S. companies to refuse to do business with Israel. It requested the Commerce Department to disclose to it all boycott

31. Proprietary information is commonly understood to encompass both trade secrets and confidential business information.

32. See, e.g., 1 U.S.C. § 112b (limiting congressional access to international agreements, other than treaties, where, in the opinion of the president, public disclosure would be prejudicial to the national security, to the foreign relations committees of each House under conditions of secrecy removable only by the president); 26 U.S.C. §§ 6103(d), 6104(a)(2) (limiting inspection of tax information to the Senate Finance Committee, House Ways and Means Committee, and the Joint Committee on Taxation, or any committees "specifically authorized by a resolution of the House or Senate"); 10 U.S.C. § 1582 (which provides that in reporting to Congress on certain sensitive positions created in the Defense Department, "the Secretary may omit any item if he considers a full report on it would be detrimental to national security"); and under 50 U.S.C. § 403j (b), the Congress' ability to obtain information about the CIA, particularly with regard to expenditures, is very limited.

33. See, e.g., *F.T.C. v. Owens-Corning Fiberglass Corp.*, 626 F.2d 966, 970 (D.C. Cir. 1980); *Exxon Corp. v. F.T.C.*, 589 F.2d 582, 585–86 (D.C. Cir. 1978), cert. denied, 441 U.S. 943 (1979); *Ashland Oil v. F.T.C.*, 548 F.2d 977, 979 (D.C. Cir. 1976).

34. See, e.g., *Devine v. United States*, 202 F.3d 547, 551 (2d Cir. 2000); *Owens-Corning Fiberglass Corp.*, 626 F.2d at 970; *Exxon Corp.*, 589 F.2d at 585–86; *Ashland Oil*, 548 F.2d at 979.

35. See, e.g., *Owens-Corning Fiberglass Corp.*, 626 F.2d at 970; see also *Exxon Corp.*, 589 F.2d at 589; *Ashland Oil*, 548 F.2d at 979; *Moon v. CIA*, 514 F. Supp. 836, 840–41 (S.D.N.Y. 1981).

36. See, e.g., *Owens-Corning Fiberglass Corp.*, 626 F.2d at 974; see also *Exxon Corp.*, 589 F.2d at 589; *Ashland Oil*, 548 F.2d at 979; *Moon*, 514 F. Supp. at 849–51.

37. See *Doe v. McMillan*, 412 U.S. 306 (1973); *Eastland*, 421 U.S. at 491; see also *Owens-Corning Fiberglass Corp.*, 626 F.2d at 970.

7. Executive Branch Investigations: Lessons from Department of Justice Probes

requests filed by U.S. companies under the Export Administration Act of 1969. Secretary Rogers C.B. Morton refused on the ground that a broad confidentiality provision of the act, which did not expressly mention Congress, precluded such disclosure. The subcommittee subpoenaed the documents but the secretary again refused to comply and was supported by an attorney general opinion that declared that the confidentiality provision did apply to Congress. The subcommittee voted the secretary in contempt after rejecting his proffer of information reflecting the number of such reports filed and other statistical information, but without revealing the names of the companies. The subcommittee had noted that there were at least 120 confidentiality provisions in various laws and that acceptance of their applicability to Congress would substantially undermine legislative oversight. The day prior to a scheduled vote by the full committee on contempt an agreement was reached under which the chairman of the subcommittee agreed to receive the documents in executive session and not make them public.³⁸

The second instance occurred during a 1978 investigation by the same House subcommittee which was dealing with allegations that a number of drug companies put their trade names on drugs actually manufactured by generic drug companies. The subcommittee requested pertinent company documents held by the Food and Drug Administration (FDA) that the companies were required to file. Refusals after negotiations failed resulted in a subpoena to Health, Education and Welfare Secretary Joseph A. Califano. The secretary, supported by another attorney general opinion, refused to comply, again on the ground that a general confidentiality provision in its enabling legislation precluded disclosure to Congress. The subcommittee rejected the contention and voted to cite the secretary for contempt. The matter was resolved by the release of the documents prior to full committee consideration.³⁹

b. Release of Proprietary, Trade Secret, or Privacy Information to Congress Does Not Waive Available Privileges in another Forum

Agencies, and private party submitters of sensitive information to agencies, often claim that acquiescing in a committee demand will waive agency rights under exemption 5 of the Freedom of Information Act (FOIA) as well as other privileges that they might assert in any subsequent court litigation. Exemption 5 of FOIA covers all the privileges against disclosure that would be provided under court rules governing civil litigation. While agencies have a legitimate interest in preserving these privileges, there should be no fear of waiver. "Waiver is the voluntary relinquishment of a known right or privilege."⁴⁰ It is well established that acquiescence in a valid, official request from a jurisdictional committee to a subject agency does not constitute a waiver of applicable nondisclosure privileges elsewhere.⁴¹

In *Rockwell International Corp. v. U.S. Department of Justice*,⁴² the court acknowledged that the existence of statutory obligations to comply with congressional information requests is sufficient to demonstrate that compliance was not voluntary. *Rockwell* dealt with an assertion by the company that the Justice Department had waived the company's claim of FOIA exemption 5 protection with respect to internal deliberative documents by giving the documents to a congressional investigating subcommittee at the subcommittee's request. The appeals court rejected the waiver claim, remarking that since the Justice Department had given "the documents to the Subcommittee only after the Subcommittee expressly agreed not to make them public," this indicated that "far from intending to waive the attachments' confidentiality, the Justice Department attempted to preserve it. Under those circumstances, we find no Exemption 5 waiver."⁴³

It is also well established that when the production of privileged communications is compelled, either by a court or a congressional committee, compliance with the order does not waive the applicable privilege in other litigation, as long

38. See *Contempt Proceedings against Secretary of Commerce Rogers C.B. Morton: Hearing Before the Subcomm. on Oversight and Investigations, H. Comm. on Interstate and Foreign Commerce*, 94th Cong., 1st Sess. (1975); Paul C. Rosenthal and Robert S. Gressman, *Congressional Access to Confidential Information Collected by Agencies*, 15 HARV. J. ON LEGIS. 74, 82-83 (1977).

39. See *Contempt Proceedings Against Secretary of HES Joseph A. Califano, Jr.: Business Meeting of the Subcomm. on Oversight and Investigations, H. Comm. on Interstate and Foreign Commerce*, 95th Cong., 2d Sess. (1978) (Comm. Print No. 95-76, 1978).

40. *Florida House of Representatives v. U.S. Department of Commerce*, 961 F.2d 941, 946 (11th Cir. 1992).

41. *Murphy v. Dep't of the Army*, 613 F.2d 1151, 1155-59 (D.C. Cir. 1979); *Florida House of Representatives*, 961 F.2d at 946. See also *Owens-Corning Fiberglas Co.*, 626 F.2d at 970; *Ashland Oil*, 548 F.2d at 979, 980-81 (Release of confidential information to a congressional requester is not deemed to be disclosure to the public generally, and the legal obligation to surrender requested documents arises from the official request).

42. *Rockwell Int'l Corp. v. Dep't of Justice*, 235 F.3d 598 (D.C. Cir. 2001).

43. *Id.* at 604.

as it is demonstrated that the compulsion was resisted.⁴⁴ Some courts have even refused to find waiver when the client's production, although not compelled, is pressured by the court.⁴⁵

Two court rulings involving the House Energy and Commerce Committee confirm that turning over documents to a committee does not necessarily waive claims of privilege. However, the rulings also highlight the importance of sufficiently challenging a subpoena to demonstrate that the turnover was, indeed, involuntary. Both cases involved claims in judicial forums that the Energy and Commerce Committee's receipt and dissemination of documents from tobacco companies waived claims of privilege asserted in those courts. Both courts agreed that there would be no waiver if the document turnover had been involuntary. Both courts found, however, that the companies had failed to sufficiently challenge the chairperson's subpoenas: "In short, a party must do more than merely object to Congress' ruling. Instead a party must risk standing in contempt of Congress."⁴⁶

c. The Speech or Debate Clause Protects Committee Release of Proprietary, Trade Secret, and Other Sensitive Information

The public release of proprietary, trade secret or other sensitive information, either through inclusion in a hearing record or via the Congressional Record, is protected by the Speech or Debate Clause. Moreover, because such information does not normally include classified material, it is unlikely that release or publication would be deemed to violate the ethics rules of the House. The Speech or Debate Clause of the Constitution⁴⁷ protects "purely legislative activities," including those considered inherent in the legislative process.⁴⁸ The protection afforded by the clause covers not only the words spoken during debate but also "[c]ommittee reports, resolutions, and the act of voting are equally covered, as [these] are 'things generally done in a session of the House by one of its members in relation to the business before it.'"⁴⁹ Finally, the clause has been held to encompass such activities integral to the lawmaking process as the circulation of information to other members, as well as participation in committee investigative proceedings and reports.⁵⁰

The Speech or Debate Clause's protections, however, do not extend to activities only casually or incidentally related to legislative affairs.⁵¹ For example, newsletters, press releases, or the direct distribution of reports containing information or quotes will likely

44. See, e.g., *United States v. de la Jara*, 973 F.2d 746, 749–50 (9th Cir. 1992) ("In determining whether the privilege should be deemed to be waived, the circumstances surrounding the disclosure are to be considered," citing *Transamerica Computer Corp. v. IBM*, 573 F.2d 646, 652 (9th Cir. 1978)); *United States v. Zolin*, 809 F.2d 1411, 1415 (9th Cir. 1987), *aff'd in part, vacated in part*, 491 U.S. 554 (1989) ("When the disclosure is involuntary, we will find the privilege preserved if the privilege holder has made efforts 'reasonably designed' to protect and preserve the privilege. See *Transamerica Computer*, 573 F.2d at 650."); *Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1427 n. 14 (3d Cir. 1991) ("We consider Westinghouse's disclosure to the DOJ to be voluntary even though it was prompted by a grand jury subpoena. Although Westinghouse originally moved to quash the subpoena, it later withdrew the motion and produced the documents pursuant to the confidentiality agreement. Had Westinghouse continued to object to the subpoena and produced the documents only after being ordered to do so, we could not consider its disclosure of those documents to be voluntary.") (emphasis added); *Jobin v. Bank of Boulder (In re M&L Business Machines Co.)*, 167 B.R. 631 (D. Colo. 1994) ("Production of documents under a grand jury subpoena does not automatically vitiate the attorney-client privilege, much less in an unrelated civil proceeding brought by a non-government entity. This is especially true in a case such as this, where the record demonstrates that the Bank has consistently sought to protect its privilege.").

45. *Transamerica Computer*, 573 F.2d at 651. Similarly, another court found that a client's voluntary production of privileged documents during discovery did not effect a waiver because it was done at the encouragement of the presiding judge. *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1163 (S.D.S.C. 1974) (finding no waiver "where the voluntary waiver of some communications was made upon the suggestion of the court during the course of the in camera proceedings."). Moreover, a number of federal appeals and district courts similarly have held that disclosures to congressional committees do not waive claims of privilege elsewhere. See *Florida House of Representatives*, 961 F.2d at 946; *Murphy*, 613 F.2d at 1155 (D.C. Cir. 1979); *In re Sunrise Securities Litigation*, 109 B.R. 658 (D.C. E.D. Pa. 1990); *In re Consolidated Litigation Concerning International Harvester's Disposition of Wisconsin Steel*, 1987 U.S. Dist. Lexis 10912 (N.D. Ill. E.D. 1987).

46. See *Iron Workers Local Union No. 17 Insurance Fund v. Phillip Morris, Inc.*, 35 F. Supp. 2d 582 (N.D. Ohio, E.D. 1999); *Massachusetts v. Phillip Morris, Inc. et al.*, 1998 Lexis 438 (Mass. Super. Ct. July 30, 1998).

47. U.S. Const. art. 1, § 6, cl. 1 (providing that "for any Speech or Debate in either House, [Members] shall not be questioned in any other place").

48. See *id.*; see also *United States v. Swindall*, 971 F.2d 1531, 1534 (11th Cir. 1992); *Chastain v. Sundquist*, 833 F.2d 311, 314 (D.C. Cir. 1987), *cert denied* 487 U.S. 1240 (1988) (quoting *United States v. Brewster*, 408 U.S. 501, 512 (1972)).

49. *Powell v. McCormack*, 395 U.S. 486, 502 (1969).

50. See, e.g., *McMillan*, 412 U.S. at 311–12; *Gravel v. United States*, 408 U.S. 606, 625 (1972); *Dombrowski v. Eastland*, 387 U.S. 82 (1967); *Tenney v. Brandhove*, 341 U.S. 367, 376–77 (1951).

51. See *Walker v. Jones*, 733 F.2d 923, 929 (1984) (holding that activities integral to the legislative process may not be examined, but peripheral activities not closely connected to the business of legislating do not get protection under the Clause). For an in-depth discussion of the Speech or Debate Clause see Chapter 10.

7. Executive Branch Investigations: Lessons from Department of Justice Probes

not be shielded, because they are considered "primarily means of informing those outside the legislative forum."⁵² On the other hand, the distribution of such documents to members of a committee and/or their staff, or the inclusion of such information or reports in the public record of hearings or the Congressional Record, are likely to be considered "integral" and, therefore, protected by the clause. The key consideration in such cases appears to be the act, not the actor.

d. The Privacy Act is Inapplicable to Disclosures to Congress

Agencies often contend that the Privacy Act⁵³ prevents them from disclosing certain information to Congress in response to an official congressional inquiry. However, a review of the relevant statutory provisions, judicial interpretations, and congressional practice indicates that there is no such barrier.

The Privacy Act safeguards individuals against invasions of personal privacy by requiring government agencies to maintain accurate records and by providing individuals with more control over the gathering, dissemination, and accuracy of government information about themselves. To secure this goal, the act prohibits an agency from disclosing information in its files to any person or to another agency without the prior written consent of the individual to whom the information pertains.⁵⁴ This broad prohibition is subject to 12 exceptions, one of which specifically allows disclosures to Congress and its committees. Section 552a(b)(9) permits disclosure of covered information without the consent of the individual "to either House of Congress, or to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any joint committee." A 2000 court of appeals ruling held that this provision "unambiguously permits federal agencies to disclose personal information about an individual without the individual's consent to a Congressional subcommittee that has jurisdiction over the matter to which the information pertains."⁵⁵

Similarly, DOJ's Office of Legal Counsel has agreed that the section (b)(9) exception applies "where the Senate or House exercises its investigative and oversight authority directly, as is the case with a resolution of inquiry adopted by the Senate or House, each House of Congress exercises its investigative authority through delegations of authority to its committees, which act either through requests by committee chairs, speaking on behalf of the committee, or through some other action by the committee itself."⁵⁶ More recently, a Department of Justice official agreed that based upon this Privacy Act exception, the Department was permitted to disclose to Congress details from nine U.S. attorneys' personnel files in connection with the investigation of the removal of these U.S. attorneys. The official was testifying before the investigating congressional committee, and he explained in detail the Department's position that the U.S. attorneys were removed for purely personnel-related reasons.⁵⁷

5. Access to Grand Jury Materials

Rule 6(e) of the Federal Rules of Criminal Procedure provides that members of the grand jury and those who attend grand jury proceedings may not "disclose matters occurring before the grand jury, except as otherwise provided in these rules."⁵⁸ The prohibition does not ordinarily extend to witnesses.⁵⁹ Violations are punishable as contempt of court.⁶⁰

52. *Hutchinson v. Proxmire*, 443 U.S. 111 (1979).

53. 5 U.S.C. § 552a (2000).

54. *See* 5 U.S.C. § 552a(b).

55. *Devine v. United States*, 202 F.3d 547, 551 (2d Cir. 2000).

56. Letter from Jay S. Bybee, Assistant Atty Gen., Off. of Legal Counsel, Dept of Justice, to David D. Aufenhauser, Esq., General Counsel, Department of the Treasury (December 5, 2001).

57. *See H.R. 580, Restoring Checks and Balances to the Confirmation Process of U.S. Attorneys: Hearing before the Subcomm. on Commercial and Admin. Law*, 110th Cong. 1st Sess. (Mar. 6, 2007) (Testimony of Principal Associate Deputy Attorney General William F. Moschella).

58. *See id.*

59. *United States v. Sells Engineering*, 463 U.S. 418, 425 (1983); *In re Sealed Motion*, 880 F.2d 1367, 1373 (D.C. Cir. 1989).

60. Fed. R. Crim. Pro. 6(e)(2).

There is some authority for the proposition that Rule 6(e), promulgated as an exercise of congressionally delegated authority and reflecting pre-existing practices, is not intended to address disclosures to Congress.⁶¹ As a general rule, however, neither Congress nor the courts have accepted that proposition.

But not all matters presented to a grand jury are covered by the secrecy rule. Rather, according to the courts, the aim of the rule is to "prevent disclosure of the way in which information is presented to the grand jury, the specific questions and inquiries of the grand jury, the deliberations and vote of the grand jury, the targets upon which the grand jury's suspicions focuses, and specific details of what took place before the grand jury."⁶² But, "when testimony or data is sought for its own sake—for its intrinsic value in the furtherance of a lawful investigation—rather than to learn what took place before the grand jury, it is not a valid defense to disclosure that the same information was revealed to a grand jury or that the same documents had been, or were presently being, examined by a grand jury."⁶³ Congressional committees have gained access to documents under this theory, the courts ruling that the committee's interest was in the documents themselves and not in the events that transpired before the grand jury.⁶⁴ However, Rule 6(e) bars congressional access to matters that "reflect exactly what transpired in the grand jury," such as transcripts of witness testimony.⁶⁵

The case law indicates that Rule 6(e) would not prevent disclosure to Congress of the following types of documents:

- Documents within the possession of the Department of Justice concerning a particular case or investigation, other than transcripts of grand jury proceedings and material indicating "the identities of witnesses or jurors, the substance of testimony, the strategy or direction of the investigation, the deliberations or questions of jurors, and the like." Material that would not otherwise be identifiable as grand jury material does not become secret simply through Department of Justice identification.⁶⁶
- Immunity letters, draft pleadings, target letters, and draft indictments.⁶⁷
- Plea agreements as long as particular grand jury matters are not expressly mentioned.⁶⁸
- Third party records which pre-exist the grand jury investigation even if they are in the possession of the Department of Justice as custodian for the grand jury.⁶⁹
- Memoranda, notes, investigative files, and other records of FBI agents or other government investigators except to the extent those documents internally identify or clearly define activities of the grand jury.⁷⁰

61. See *In re Grand Jury Proceedings of Grand Jury No. 81-1* (Miami), 669 F. Supp. 1072, 1074–75 (S.D. Fla. 1987), *aff'd on other grounds*, 833 F.2d 1438 (11th Cir. 1987); *In re Report and Recommendation of June 5, 1972 Grand Jury Concerning Transmission of Evidence to the House of Representatives*, 370 F. Supp. 1219, 1230 (D.D.C. 1974), *petitions for writs of prohibition and mandamus denied sub nom.*, *Haldeman v. Sirica*, 501 F.2d 714 (D.C. Cir. 1974); *In re Grand Jury Investigation of Ven-Fuel*, 441 F. Supp. 1299, 1304–08 (M.D. Fla. 1977).

62. *In re Grand Jury Investigation of Ven-Fuel*, 441 F. Supp. at 1302–03 (citing *United States v. Interstate Dress Carriers*, 280 F.2d 52, 54 (2d Cir. 1960)).

63. *Interstate Dress Carriers v. Dress Carriers*, 280 F.2d 52, 54 (2d Cir. 1960). See also *SEC v. Dresser Industries*, 628 F.2d 1368 (D.C. Cir. 1980); *In re Grand Jury Investigation (New Jersey State Commission of Investigation)*, 630 F.2d 996 (3rd Cir. 1980); *Davis v. Romney*, 55 F.R.D. 337 (E.D. Pa. 1972); *In re Senate Banking Committee Hearings*, 19 F.R.D. 410, 412 ((N.D. Ill. 1956).

64. *In re Grand Jury Impaneled October 2, 1978*, 510 F. Supp. 112, 115 (D.D.C. 1981); *In re Grand Jury Proceedings, Newport News Drydock & Shipbuilding Co.*, Mem. Opinion (E.D. Va. Nov. 12, 1984); *In re Senate Banking Committee Hearings*, 19 F.R.D. 410 (N.D. Ill. 1956).

65. *In re Grand Jury Investigation Uranium Industry*, 1979 WL 1661 at 4 (D.D.C. (1979)); *In re Grand Jury Impaneled October 2, 1978*, 510 F. Supp. 112 (D.D.C. 1981).

66. *Senate of Puerto Rico v. U.S. Department of Justice*, 823 F.2d 574, 583 n.30 (D.C. Cir. 1987); *In re Grand Jury Impaneled October 2, 1978* (79–2), 510 F. Supp. 112, 114–15 (D.D.C. 1981).

67. *In re Harrisburg Grand Jury 83-2*, 638 F. Supp. 43, 47 n.4 (M.D. Pa. 1986); *In re Grand Jury Matter (Catania)*, 682 F.2d 61, 64 n.4 (3d Cir. 1982).

68. *Washington Post v. Robinson*, 935 F.2d 282, 290–91 (D.C. Cir. 1991).

69. *SEC v. Dresser Industries, Inc.*, 628 F.2d at 1382–83; *United States ex rel Woodard v. Tynan*, 757 F.2d 1085, 1087–88 (10th Cir. 1985).

70. *Anaya v. United States*, 815 F.2d 1373, 1380–81 (10th Cir. 1987).

6. Committees Cannot be Denied Access to Subordinate Agency Personnel*a. Asserted Basis of Agency Refusals*

Investigatory committees often reach a point where it becomes vital to interview or call as witnesses subordinate personnel who have unique, hands-on knowledge of events or operational details that are the subject of legislative scrutiny. Agency refusals of requests to provide particular employees typically rest on the grounds that:

- Permitting such an appearance would undermine the agency's ability to ensure that such agents would be able to exercise the independent judgment essential to the integrity of law enforcement, prosecutorial, or regulatory functions and to public confidence in their decisions.
- It is more appropriate that committees question supervisors or political appointees, which will satisfy a committee's oversight needs without undermining the independence of line agents and without raising the appearance of political interference in investigational, prosecutorial, or policymaking decisions.

Such claims are made even in the face of subpoenas to the requested agency witnesses, or to a head of the agency to supply the named witnesses. At that point, the identified witness is placed between a rock and a hard place: in a test of wills between the committee and the agency. Allowing the designated agency employees to appear but only if accompanied by an agency attorney is a common alternative offered by agencies.

b. A Committee Sets the Terms and Conditions for Agency Witnesses

If the requesting committee has jurisdiction over the agency, and has the authority to initiate and conduct investigations and issue subpoenas, the witness must be allowed to appear. An agency has no authority to determine who from the agency shall or shall not appear before a requesting committee or to set the terms and conditions of such appearances.⁷¹ Indeed, an agency official who blocks the appearance of a witness may be subject to criminal sanctions for obstruction of a congressional proceeding,⁷² loss of pay,⁷³ or a citation for contempt of Congress.⁷⁴

i. The Example of the Rocky Flats Investigation

Whether a witness access dispute ratchets up to a full-blown interbranch controversy depends on political factors. Illustrative is a 1992 inquiry of the Subcommittee on Investigations and Oversight of the House Committee on Science, Space, and Technology. The subcommittee investigated the plea bargain settlement of the prosecution of Rockwell International Corporation for environmental crimes committed in its capacity as manager and operating contractor at the Department of Energy's (DOE) Rocky Flats nuclear weapons facility.⁷⁵ The settlement was a culmination of a five-year investigation of environmental crimes at the facility, conducted by a joint government task force involving the FBI, the Department of Justice, the Environmental Protection Agency (EPA), EPA's National Enforcement Investigation Centers, and the DOE inspector general.

71. See Chapter 4 (section E.3.) for a discussion of a committee's prerogative to determine which agency witnesses shall appear before it and the conditions of such appearances, including limitations on attorney representation and the attendance of agency representatives during the testimony.

72. 18 U.S.C. § 1505.

73. P.L. 109-115, § 818, Transportation Treasury and Independent Agency Appropriations, 2005 (November 30, 2006) (carried over to date by continuing resolutions).

74. 2 U.S.C. §§ 192, 194, or if no subpoena has been issued, under each House's inherent contempt power.

75. See *Environmental Crimes at the Rocky Flats Nuclear Weapons Facility: Hearings Before the Subcomm. on Investigations and Oversight of the House Comm. on Science, Space & Technology*, 102d Cong., 2d Sess., vols. I and II (1992) [hereinafter *Rocky Flats Hearings*]; *Meetings: To Subpoena Appearance by Employees of the Department of Justice and the FBI and To Subpoena Production of Documents From Rockwell International Corporation, Before the Subcomm. on Investigations and Oversight of the House Comm. on Science, Space, and Technology*, 102d Congress, 2d Sess., (1992) [Hereinafter *Subpoena Hearings*].

The subcommittee was concerned with several issues:

- the small size of the agreed-upon fine relative to the profits made by the contractor and the damage caused by inappropriate activities;
- the lack of personal indictments of either Rockwell or DOE personnel despite a DOJ finding that the crimes were “institutional crimes” that “were the result of a culture, substantially encouraged and nurtured by DOE, where environmental compliance was a much lower priority than the production and recovery of plutonium and the manufacture of nuclear ‘triggers;’”
- and that expense reimbursements provided by the government to Rockwell and the contractual arrangements between Rockwell and DOE may have created disincentives for environmental compliance and aggressive prosecution of the case.

The subcommittee held ten days of hearings, seven in executive session, in which it took testimony from the U.S. attorney for the District of Colorado; an assistant U.S. attorney for the District of Colorado; a DOJ line attorney from Main Justice; and an FBI field agent. It also received voluminous FBI field investigative reports and interview summaries, and documents submitted to the grand jury not subject to Rule 6(e).⁷⁶

At one point in the proceedings, all the witnesses who were under subpoena, upon written instructions from the acting assistant attorney general for the Criminal Division of the Justice Department, refused to answer questions concerning internal deliberations about the investigation and prosecution of Rockwell, the DOE, and their employees. Two of the witnesses advised that they had information and, but for the DOJ directive, they would have answered the subcommittee’s inquiries. The subcommittee members unanimously authorized the chairperson to send a letter to President Bush requesting that he either personally assert executive privilege as the basis for directing the witnesses to withhold the information or direct DOJ to retract its instructions to the witnesses. The president took neither course and DOJ subsequently reiterated its position that the matter sought would chill department personnel. The subcommittee then moved to hold one of the witnesses in contempt of Congress.

A last-minute agreement forestalled the contempt citation. Under the agreement:

- DOJ issued a new instruction to all personnel under subpoena to answer all subcommittee questions, including those relating to internal deliberations about the plea bargain. Those instructions applied to all department witnesses, including FBI personnel, who might be called in the future. Those witnesses were advised to answer all questions fully and truthfully, and were specifically instructed that they were allowed to disclose internal advice, opinions, or recommendations connected to the matter.
- Transcripts were made of all interviews and provided to the witnesses. They were not to be made public except to the extent they needed to be used to refresh the recollection or impeach the testimony of other witnesses called before the subcommittee in a public hearing.
- Witnesses were required to be interviewed by staff under oath.
- The subcommittee reserved the right to hold further hearings in the future, at which time it could call other department witnesses who would be instructed by the department not to invoke the deliberative process privilege as a reason for refusing to answer subcommittee questions.⁷⁷

Key to the success of the investigating committee was the support of the chairperson by the ranking minority member throughout the proceeding and the perception that there were sufficient votes on the full committee for a contempt citation. Media attention to the dispute also helped, particularly coverage of grand jury members who complained about

⁷⁶ *Rocky Flats Hearings*, *supra* note 75, at vol. I, 389–1009, 1111–1251, vol. II.

⁷⁷ *Rocky Flats Hearings*, *supra* note 75, at vol. I, 9–10, 25–31, 1673–1737; *Subpoena Hearings* at 1–3, 82–86, 143–51.

not being allowed to hand up indictments of Energy Department and Rockwell officials.

c. A Committee May Reject an Agency-Designated Attorney Appearing with an Agency Witness

Often as an alternative, an agency may offer to allow a subordinate official or employee to be interviewed or to testify if the witness is accompanied by agency counsel. Under certain circumstances, however, this may raise conflict-of-interest problems, particularly where the investigatory hearing involves issues of agency corruption, maladministration, abuse, or waste. In such instances, the agency attorney or other official may have a conflict of interest in representing both the interests of the employee-witness and those of the agency. Moreover, the presence of such an agency official may inhibit the witness from testifying fully. Thus, both pragmatic and legal concerns caution strongly in favor of limiting a witness' choice of counsel to someone who does not present the potential conflict of interest or pressure on the witness.

To be effective, a committee must be confident that the responses it obtains from officers and employees with respect to the administration of agency programs are candid, objective, and truthful. Committees have no way to ascertain whether a witness' statement that he or she personally requested to be accompanied by agency personnel is, in fact, based solely on the employee's personal wishes. Where a potential conflict-of-interest situation appears to arise, a committee should seek to insulate the witness from the presence of agency personnel during a staff interview, deposition, or hearing testimony.

Under House Rule XI.2(k)(4), each committee chair has the express authority to maintain order and decorum in the conduct of hearings and the inherent authority to preserve the integrity of the investigative process. Thus, a determination by a chair that agency-selected counsel for a witness raises a potential conflict of interest, or might chill the candor of the witness' testimony, may be treated as an obstruction of the investigatory process or a breach of decorum or order of a hearing. This may be remedied by exclusion of the agency counsel or punishment by the contempt process of the House. The witness would not be excused from testifying, but the choice of the witness' counsel could be circumscribed.

d. An Agency May Direct its Designated Counsel to Solely Represent the Witness

An effective compromise to such situations is for the agency to direct its attorney to represent only the employee-witness' interests. This solution was employed by the Department of Health and Human Services (HHS) and House Energy and Commerce Committee in the 1990s. The secretary of HHS authorized a department attorney to represent an employee subpoenaed to testify before the committee, without reporting back to the department. The agreement reflected DOJ regulations authorizing personal representation by a DOJ attorney or private counsel of a government employee subpoenaed to testify about actions occurring during the course of the person's official duties.⁷⁸ The agreement solved the conflict of interest problem and removed the financial burden for subpoenaed government witnesses who no longer needed to pay substantial fees for private legal representation.⁷⁹

i. The Investigation of the DOJ Attempt to Block Enforcement of the Contempt Citation of Anne Burford

The end of the 97th Congress saw a dramatic illustration of the techniques and authorities just described. DOJ investigations grew out of the highly charged confrontation concerning the refusal, at the direction of President Ronald Reagan, of Environmental Protection Agency (EPA) Administrator Anne Gorsuch Burford to comply with House subcommittee subpoenas requiring the production of documentation about EPA's enforcement of the legislation requiring the cleanup of hazardous wastes (Superfund). The dispute culminated in the House of Representative's citation of Burford for contempt of Congress, the first head of an executive branch agency ever to have been so cited. It also resulted in an unprecedented legal action by DOJ against the House to obtain a judicial declaration that Burford had acted lawfully in refusing to comply with the subpoena at the behest of the president.

Ultimately the lawsuit was dismissed, all the documents sought were provided to the subcommittees, and the contempt citation was dropped. However, a number of questions about the role of the Justice Department during the controversy

78. See General Powers of Special Counsel, 28 C.F.R. § 600 (delineating the process for DOJ appointment of special counsel).

79. See STAFF OF SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS, H. COMM. ON ENERGY AND COMMERCE, 103rd CONG., DAMAGING DISARRAY: ORGANIZATIONAL BREAKDOWN AND REFORM IN THE JUSTICE DEPARTMENT'S ENVIRONMENTAL CRIMES PROGRAM 54-6 (Comm. Print No. 103-T, 1994).

remained: whether DOJ, not EPA, had made the decision to persuade the president to assert executive privilege; whether the department had directed the United States attorney for the District of Columbia not to present the contempt citation to the grand jury and made the decision to sue the House; and, generally, whether there was a conflict of interest in the department's simultaneously advising the president, representing Burford, investigating alleged executive branch wrongdoing, and not enforcing the congressional contempt statute. These and other related questions raised by DOJ's actions became the subject of an investigation by the House Judiciary Committee beginning in early 1983. The committee issued a final report in December 1985.⁸⁰

Although the Judiciary Committee was able to gain access to virtually all the documentation and other information it sought from DOJ, in many respects the investigation proved as contentious as the earlier controversy. Among other clashes between DOJ and the Judiciary Committee, there was disagreement about the access that would be provided for DOJ staff interviews. DOJ demanded that any such interviewees be accompanied by DOJ lawyers. Ultimately DOJ agreed to permit interviews to go forward without its attorneys present, and if an employee requested representation, DOJ paid for a private attorney. In all, committee staff interviewed 26 current and former department employees, including four assistant attorneys general.

Partly as a result of these interviews, as well as from the handwritten notes initially withheld, the committee determined it needed access to Criminal Division documents respecting the origins of former EPA Assistant Administrator Rita Lavelle in order to determine whether department officials had deliberately withheld the documents in an attempt to obstruct the committee's investigation. The department first refused to provide the documents relating to the Lavelle investigation "[c]onsistent with the longstanding practice of the Department not to provide access to active criminal files."⁸¹ The department also refused to provide the committee with access to documents related to the department's handling of its inquiry, objecting on the ground of the committee's "ever-broadening scope of...inquiry."⁸² After a delay of almost three months the department produced both categories of documents.⁸³

The committee's final report asked for the attorney general to appoint an independent counsel pursuant to the Ethics in Government Act to investigate its allegations of obstruction of congressional proceedings. That appointment of an independent counsel and her subsequent inquiry led to the Supreme Court's landmark ruling in *Morrison v. Olson* which sustained the validity of the law creating the office and its function, held that prosecutorial discretion is not a core presidential power, and directly reaffirmed Congress's broad constitutionally-based oversight and investigatory authority.⁸⁴

e. Congress Has Enacted Witness Protection Laws

Congress has enacted legislation to protect its vital interest in receiving information about the performance of executive agencies, both through permanent statutory provisions and provisions in yearly appropriations laws. These statutes ensure that federal employees have the right to communicate with and provide information to the U.S. Congress, or to a member or committee of Congress, and that this right may not be interfered with or impeded. A current provision, originally enacted as part of the Lloyd-LaFollette Act, states as follows at 5 U.S.C. § 7211:

The right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied.

This so-called "anti-gag rule" statute was adopted by Congress in the face of the Taft and Theodore Roosevelt administrations' attempts to "gag" or restrain employees from speaking or providing information to Congress without the

80. See, REPORT OF THE H. COMM. ON THE JUDICIARY ON INVESTIGATION OF THE ROLE OF THE DEP'T OF JUSTICE IN THE WITHHOLDING OF EPA DOCUMENTS FROM THE CONG. IN 1982-83, H.R. REP. NO. 99-435 (1985) [hereinafter EPA WITHHOLDING REPORT].

81. *Id.* at 1265.

82. *Id.* at 1266.

83. *Id.* at 1270.

84. *Morrison*, 487 U.S. at 691-92, 694.

7. Executive Branch Investigations: Lessons from Department of Justice Probes

consent of the employees' heads of departments.⁸⁵ With such "gag rules" in place requiring departmental clearance for employees to speak to Congress or respond to members, Congress was specifically concerned that it would hear only the point of view of cabinet officials and not the views of the rank-and-file experts in the departments.⁸⁶ The anti-gag rule law has no enforcement mechanism.

But the provisions and the underlying policy of the "anti-gag rule" statute have been reaffirmed, strengthened, and clearly reasserted in recent appropriations laws. Repeatedly, Congress has expressly provided that no funds appropriated in any act of Congress may be spent to pay the salary of one who prohibits or prevents an employee of an executive agency from providing information to the Congress, or to any member or committee of Congress, when such information concerns relevant official matters. Similarly, current appropriations provisions also provide that no funds may be spent to enforce any agency nondisclosure policy, or any nondisclosure agreement with an officer or employee, without expressly providing an exemption for information provided to the Congress. In support, these provisions specifically cite the anti-gag rule law and other whistleblower protection provisions.⁸⁷ In discussing the latter provision when it was first added to appropriations laws in 1987, the House conference report stated clearly that the effect of the law was to reduce the potential that an overbroad nondisclosure agreement or agency nondisclosure policy might produce a "chilling effect on the first amendment rights of government employees, including their ability to communicate directly with members of Congress."⁸⁸

Congress has also passed other provisions of law, such as the Whistleblower Protection Act of 1988, and in 2012 the Whistleblower Protection Enhancement Act,⁸⁹ to assure the free and unfettered passage of information from executive agency employees to, among others, the Congress, to assure the fair and honest administration of the laws of the nation.⁹⁰ The Senate report on the legislation noted that in large bureaucracies it is not difficult to conceal evidence of waste or mismanagement "provided that no one summons the courage to disclose the truth."⁹¹ The Whistleblower Act expressly protects employees from reprisals for the disclosure of certain information regarding waste, fraud, or abuse in federal programs. Although the act limits the right to disclose *publicly* certain confidential or secret information relating to national security or defense, it expressly allows the disclosure to the Congress of any and all such information: "This subsection shall not be construed to authorize the withholding of information from the Congress or the taking of any personnel action against an employee who discloses information to the Congress."⁹²

While the Whistleblower Act is generally used as a defense to personnel actions taken against covered employees for making protected disclosures, it clearly demonstrates Congress' continued policy of preserving open communications to the Congress from federal employees. Similarly, the Military Whistleblower Protection Act of 1989⁹³ provides that "No person may restrict a member of the armed forces in communicating with a Member of Congress or an Inspector General" and prohibits any retaliatory personnel action against a member of the armed forces for making or preparing a communication to a member of Congress.⁹⁴

85. Postal Service Appropriations Act of 1912, § 6, Pub. L. No. 62-336, 37 Stat. 539, 555 (1912). For history of the gag rules and anti-gag rule law, see generally Louis Fisher, *Invoking Executive Privilege: Navigating Ticklish Political Waters*, 8 WM. & MARY BILL RTS. J. 583, 623-625 (2000), and *Congressional-Executive Struggles Over Information: Secrecy Pledges*, 42 ADM. L. REV. 89, 98-100 (1990). For the text of the Taft and Roosevelt gag orders, see 48 CONG. REC. 4513 (Apr. 9, 1912).

86. 48 CONG. REC. 4656-57 (Apr. 12, 1912).

87. See Transportation, Treasury, and Independent Agency Appropriations, 2005, Pub. L. No. 109-115 §§ 818, 820 (Nov. 30, 2006). These provisions have been carried over to the current fiscal year by subsequent continuing resolutions.

88. H.R. REP. NO. 100-498, at 1179 (1987) (emphasis added).

89. Pub. L. No. 101-12 and Pub. L. No. 112-199, codified as amended at 5 U.S.C. §§ 2301-2306, 1201-1222.

90. 5 U.S.C. § 2302(b)(8).

91. S. REP. NO. 95-969, at 8 (1978).

92. 5 U.S.C. § 2302(b). For an overview of the federal laws providing safeguards for whistleblowers see JON O. SHIMABUKURO & L. PAIGE WHITAKER, CONG. RESEARCH SERV., *WHISTLEBLOWER PROTECTIONS UNDER FEDERAL LAWS* (periodically updated). See also the Supreme Court's recent ruling in *Dep't of Homeland Sec. v. MacLean*, 135 S. Ct. 913 (2015), holding that an agency regulation allowing retaliation for a legitimate whistleblower does not displace the protections of the act.

93. 10 U.S.C. § 1034 (2000).

94. 10 U.S.C. § 1034 (a)(1), (b).

Finally, the provisions of 18 U.S.C. § 1505 provide a criminal penalty for one who "corruptly," or through the use of "any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct or impede," the "due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress. . . ." This statute makes it a criminal violation for anyone to use such threatening means to obstruct or impede a committee inquiry, or other such inquiry of the House or Senate.⁹⁵

For illustrations of some of the oversight powers, tools, principles, and obstacles discussed in this chapter, see the following case studies in Part II:

Alissa M. Dolan: *The House Committee on Government Reform Investigation of the FBI's Use of Confidential Informants*

Debra Jacobson: *1992-1994 Investigation of the Justice Department's Environmental Crimes Program*

95. *United States v. Mitchell*, 877 F.2d 294 (4th Cir. 1989); *United States v. Poindexter*, 725 F. Supp. 13 (D.D.C. 1989) (a committee inquiry, however, need not be formally authorized, and may be a preliminary inquiry).

Chairman NADLER. The gentleman from California, Mr. McClintock, is recognized.

Mr. MCCLINTOCK. Thank you, Mr. Chairman.

Professor Turley, I keep hearing that we are on a constitutional crisis. To my mind, a constitutional crisis is a matter that our constitutional institutions cannot resolve. Is this a crisis or is just the normal tension between the executive and legislative branches?

Mr. TURLEY. No, it is not a crisis. I mean, there have been serious fights with prior administrations. During the Obama administration, during the Clinton administration there were massive fights.

Mr. MCCLINTOCK. So what is the constitutional path to resolve this dispute?

Mr. TURLEY. Well, I think that all of the witnesses agree on some salient points, but one of them is that this is a process that usually is resolved through a give-and-take.

The one thing I would caution again is this discussion about how the subpoena was drafted. Understand what you are suggesting.

Mr. MCCLINTOCK. But, I mean, would we not take this to court at some point and say, look, the executive thinks one thing, the legislative thinks another. Judiciary, please weigh in on this?

Mr. TURLEY. Right, but when you go to court with this broad subpoena you are guaranteeing to lose—

Mr. MCCLINTOCK. I get that, but is that the—we are obviously not taking that path. We haven't gone to court.

Mr. TURLEY. Right.

Mr. MCCLINTOCK. Why haven't we?

Mr. TURLEY. I am not sure. I think that, quite frankly, the Committee pulled the trigger too fast on contempt.

Mr. MCCLINTOCK. Was it possible that the legislative branch's case is very, very weak? You have kind of suggested that.

Mr. TURLEY. Well, I have to say we obviously disagree on this point. I would have thrown myself bodily across the subpoena to keep it from being signed.

Mr. MCCLINTOCK. Yeah, but it has been signed as all—

Mr. TURLEY. Yeah.

Mr. MCCLINTOCK [continuing]. Water under the bridge, as they say. But is this not an impasse that ultimately would either be resolved by negotiations between the two sides or by recourse through the judiciary?

Mr. TURLEY. Well, usually this would be resolved on both sides. The question is, by pulling the trigger on contempt did you actually interrupt the process, because now you have sort of forced us into a formal court proceeding, and—

Mr. MCCLINTOCK. I understand that, but my point is there are institutional ways of dealing with this impasse.

Mr. TURLEY. Right.

Mr. MCCLINTOCK. All right. On the protective assertion of executive privilege, my understanding is this is simply the executive branch saying, "Wait a second. You guys have just asked for 1.4 million pages of material. Some of that is illegal for us to release. Some of it would interfere with ongoing investigations. We don't know which until we go through each one of those 1.4 million

pages, so we are going to put a protective order on all of it as we go through that, and we will release what we can."

Mr. TURLEY. That is right. This is why I hate to come back to the way the subpoena was drafted. If you take that to court, that is why you are guaranteeing that you will lose to some degree. Now people have said, well, this is just a conversation we go over broadly.

Mr. MCCLINTOCK. I think that is why we are making all of this fuss and fury rather than going to the court because I think deep down inside our folks know, this is an extremely weak case.

Mr. TURLEY. Well, but what a court would have to say is that, look, a subpoena is a demand for information. You are saying you must turn over this information. A subpoena is not some casual form of conversation—

Mr. MCCLINTOCK. If we thought—

Mr. TURLEY [continuing]. To concentrate the mind.

Mr. MCCLINTOCK [continuing]. If we thought we had a strong case we would be in court in a New York minute.

Mr. TURLEY. Right, and I think ultimately this Committee will prevail on getting some of this information under the subpoena. I think this Committee has an unassailable—

Mr. MCCLINTOCK. Right.

Mr. TURLEY [continuing]. And compelling right to some of this information.

Mr. MCCLINTOCK. Well, again, if the Administration had released material protected under 6(e), or released material involving ongoing investigations, you know for a fact that in a heartbeat there would be a criminal referral against the Administration, either for releasing grand jury testimony and violating 6(e) or obstructing justice by releasing material in an ongoing criminal investigation.

Mr. TURLEY. Well, one of the things I said earlier is that the reason I think this Committee should shift from the—or pivot from the redactions is I think you are guaranteed to lose some of that fight and create precedent against yourself. But more importantly, if the court just agrees on Rule 6(e) and ongoing investigation, that is virtually all the redactions in the report. The report itself is only 8 percent redacted.

So you are going to a court and a court is going to look at you like, really? You are going to fight on this ground? Where you have a really strong argument is on those witnesses and the supporting material. But on that I think a court is going to view this Committee as premature when it pulled that trigger.

Mr. MCCLINTOCK. Why is it illegal to release grand jury testimony? Why—

Mr. TURLEY. I am sorry?

Mr. MCCLINTOCK. Why is it illegal to release grand jury testimony?

Mr. TURLEY. Well, as the D.C. Circuit said recently, the 6(e) rule that this body helped draft understands that in grand juries a great deal of information is brought in that is highly damaging to individuals' reputations. It is not subject to a cross-examination. So when I have had clients go into the grand jury room I stand outside, and my client has to say, "I want to go talk to my counsel," and they have to leave the grand jury room. Otherwise, everything

can go into that grand jury and there are very few rules limiting the prosecutors.

Mr. MCCLINTOCK. Thank you.

Chairman NADLER. The gentleman's time has expired. The gentleman from Maryland, Mr. Raskin.

Mr. RASKIN. Mr. Chairman, thank you very much.

Mr. Rosenzweig, I don't know whether you saw this exchange yesterday that took place between U.S. District Court Judge Amit Mehta and the President's lawyer, William Consovoy, but I just want to read you a little passage and then get your reaction to it.

Judge Mehta said, "President Trump's finances are not subject to investigation?" "Correct," Consovoy said. "Congress can't verify the accuracy of the President's financial statements?" "Correct." The judge says, "If a President was involved in some corrupt enterprise, you mean to tell me because he is the President of the United States Congress would not have the power to investigate?" "No," Consovoy said, "because that is not pursuant to its legislative agenda."

So starting with presidential finances, is there any reason to believe the President's lawyer that Congress cannot investigate the finances of the President?

Mr. ROSENZWEIG. I believe that Mr. Consovoy's statement is wrong, and not just wrong but frivolously wrong.

Mr. RASKIN. And what about his suggestion that Congress could not investigate criminal activity or corruption in the executive branch or on the part of the President?

Mr. ROSENZWEIG. That would be contrary to more than 220 years of congressional precedent, dating back to the first investigation of military disaster under President George Washington.

Mr. RASKIN. Thank you. Professor Shaw, there is an increasing pattern now of the executive branch asserting that this body has no proper legislative basis for its inquiries for information. In your experience in the executive branch, was it normal practice for the government to respond to oversight requests by saying, "What is it to you? What does it matter? What is your proper basis for asking this question?"

Ms. SHAW. Not at all, Congressman, no.

Mr. RASKIN. In other words, it has been the standard practice of Congress and the executive branch, for centuries, really, for Congress to be able to exercise its broad and comprehensive oversight power by asking for information from the executive branch, and the executive branch just complying, however happily or unhappily.

Ms. SHAW. I think—I mean, I certainly think there is resistance at times, but I think that the general narrative has been one of, maybe I could call it grudging compliance, but recognition of the legitimacy of the requests.

Mr. RASKIN. Yeah.

Professor Kinkopf, do you believe that the executive branch should be refusing to produce information based on the assertion that Congress really shouldn't be asking for it?

Mr. KINKOPF. No.

Mr. RASKIN. What about the claim that moved some people that there are political motives? I know when, you know, the tables were turned and the Republicans ran these committees, we would

often say there were political motives for the Hillary Clinton email investigation, for the Fast and Furious investigation, for the Benghazi investigation. But did that stop the executive branch from overwhelmingly complying with the requests?

Mr. KINKOPF. It did not, no. Of course there are political motives involved, and involved on both sides, and the Supreme Court itself has said that that is completely irrelevant.

Mr. RASKIN. The existence of political motives, which is just in human nature and the nature of a representative democratic system are completely irrelevant to what our constitutional powers are.

Mr. KINKOPF. Correct.

Mr. RASKIN. Okay. How do you feel about the assertion made yesterday by President Trump's private attorney that Congress has no business investigating whether the President has broken the law?

Mr. KINKOPF. His view is preposterous. It—there aren't words for what a frivolous assertion that was. It ignores the necessary and proper clause, fundamentally, which gives this body the authority to enact all laws that are necessary and proper for carrying into execution all of the powers of the government, including those that are vested exclusively in the President.

Mr. RASKIN. I did a little West Law search last night, and I could not find a single appellate case in the last century where a court has found that Congress has exceeded its legislative authority, under the necessary and proper clause and other parts of the Constitution, by issuing a subpoena. Are any of you aware of an appellate case in the last century, or even beyond that, where a court has struck down a subpoena as being—

Mr. TURLEY. Well, yeah. The Senate Select Committee v. Nixon, D.C. Circuit, 1974, rejected the subpoena demand under oversight authority. I made a distinction between this Committee proceeding under impeachment as opposed to oversight, but I would cite that opinion.

Mr. RASKIN. Okay.

Ms. SHAW. Could I respond to that?

Mr. RASKIN. Yes, Professor Shaw.

Ms. SHAW. I would just say that I think that at least part of the basis of that decision isn't the—doesn't lie just in the distinction between impeachment and oversight but lay in the duplicative nature of the request, right? The court says the House Judiciary Committee, right, is—happened to be, and maybe not just happened to be—was, you know, in a constitutionally relevant sense, pursuing impeachment, but that the Senate committee had no legitimate basis to have two committees, essentially, examining the same material.

So I don't view that decision as resting so thoroughly on the, you know, impeachment oversight.

Mr. RASKIN. It was based on the redundancy of the request.

Ms. SHAW. That is, I think, a fair way to read the opinion.

Mr. TURLEY. Can I just ask a question?

Mr. RASKIN. Well, unfortunately, I am down to 30 seconds, or 13 seconds now, so forgive me, Professor Turley.

Do we—does anyone here believe the assertion that the executive branch is somehow above Congress' power of inquiry and investigation? Does anybody believe that?

Mr. TURLEY. Well, it can be if executive privilege assertions are valid. I mean, executive privilege assertions, when valid, prevent the Congress—

Mr. RASKIN. Okay, but, in general, what we are getting today is a statement by the executive branch that it doesn't have to participate at all. I mean, is anybody aware of any precedent?

Let me come to you, Mr. Rosenzweig. Are you aware of any precedent for the President of the United States telling the executive branch not to cooperate with legislative inquiries, saying, "No more subpoenas. Enough is enough"?

Mr. ROSENZWEIG. Not in the wholesale manner here. Professor Turley is correct that some of the means by which the investigation proceeds may be subject to certain privilege claims that are narrow in focus, but I have never been aware of the executive branch being able to tell the legislative that that is not a fit subject for you to be inquiring into vel non.

Mr. RASKIN. Thank you very much. I yield back.

Chairman NADLER. I thank the gentleman for yielding. The gentlelady from Arizona, Mrs. Lesko, is recognized.

Mrs. LESKO. Thank you, Mr. Chairman. My question is going to be for Professor Turley, and I am just going to give a little bit of background first.

Last week, this Committee held a business meeting to discuss holding the Attorney General of the United States in contempt of Congress. At this meeting, Chairman Nadler acknowledged the difference between the intent of the subpoena and the language in the actual subpoena itself, which we discussed quite thoroughly at that time.

During a discussion about grand jury 6(e) material, which would require the attorney general to break the law in order to produce to the Committee, the chairman stated, and I quote, "The reason that was in the subpoena was to increase our clout in court, in getting the 6(e) material, hopefully with the attorney general's support, but it is in no way meant to force him to give that support."

So my question for you, Professor Turley, from that statement do you believe it is safe to assume that the chairman's goal all along was to go to court and not engage in the accommodation negotiation process, and he went so fast with his subpoena, which included 6(e) material?

Mr. TURLEY. Well, I don't want to venture to guess about the chairman's motivations, but what I will say is that I believe it is a mistake, if this is a serious effort to go to court, to put a subpoena, a demand for information, that, if complied with, would have violated federal law, and you are going to a federal court, which tends to be highly protective over grand jury material. They are the last group of people that will take this casual approach to Rule 6(e).

So what you have is if that subpoena goes to court you will start out, very likely, with creating precedent against yourself and being very clear, for all future committees, that you don't have this abil-

ity. That is the reason I think that that subpoena should have been more narrowly tailored.

Can I make one statement with regard to my colleague's statement—

Mrs. LESKO. Of course.

Mr. TURLEY [continuing]. About the earlier case? With regard to the Senate Select Committee v. Nixon, as I say in my testimony, they do refer to the duplicative aspect of the two committees. That is not the holding of the case, in my view. First of all, it would be bizarre, in my view, if the federal court said you have authority to this information, but because those guys got it I am not going to give it to you. I mean, I don't know of any case where that would be true.

What the court was saying was that you are proceeding under oversight, those people are proceeding under impeachment, they have the material, and, by the way, your case for this information is even weaker because Congress has it on the impeachment side, and, by the way, it is going to be coming to you if they end up impeaching. That is what I believe the court would say.

Mrs. LESKO. Thank you, and Mr. Turley, I have two minutes left, and so is there anything else you wanted to add to this discussion today, that you haven't said already?

Mr. TURLEY. Bless you for that question. The answer is yes, and it is this. We have to distinguish between what is being discussed here in terms of waiver. I believe that at least Professor Shaw and I agree that there is not a waiver that took place because of the sharing of information between the special counsel and the White House. That position has been stated by members of this Committee and advance the position that I beseech you not to make in federal court, because you will create precedent against this body.

The question of waiver, then, gets a little more difficult when you talk about disclosures to counsel, private counsel. I think the President has made a mistake by mixing people with different representational statuses and not creating walls. But once again, I encourage you not to push that envelope, because my guess is that it would create new precedent and you wouldn't like it, in terms of future investigations.

So what does that leave this Committee? It leaves the Committee with a lot. You can fight and get these witnesses. I think the White House cannot maintain that position. You can fight and get these documents. I don't believe they can sustain that position. But you will have to hone your targets a little more closely to protect precedent. And I will simply repeat once again—beware of close calls. This is not a blackjack game in Vegas. If you do a close call, that is where you lose precedent, and you have an obligation to future judiciary committees, just as they had an obligation to you, and I suggest don't get into fights that are close calls. You have take-down cases here to bring into court. Focus on those.

Mrs. LESKO. Thank you. I yield back my time.

Chairman NADLER. The gentlelady from Washington, Ms. Jayapal, is recognized.

Ms. JAYAPAL. Thank you, Mr. Chairman, and thank you all I think this has been a really instructive hearing.

We were sworn to a constitutional duty to conduct oversight of the executive branch, along with many other things, and there are many ways to do this—holding hearings, requesting documents, issuing subpoenas, and holding people in contempt when our requests are ignored.

There are over 20 investigations into Donald Trump's actions where the Trump administration has stonewalled our pursuit of the truth on behalf of the American people, and we have talked about a few of them. We went through all these steps to obtain the unredacted Mueller report, which contains information that is vital to protect our elections and ensure that the President isn't using his power to cover up certain things that he is doing. The President responded with a blanket proactive assertion of privilege over the entirety of the report and its underlying materials.

We asked for Trump's tax returns, essential for the public to understand whether the President has complied with the law and paid his taxes in full, and to understand any financial conflicts that the President might have. The Trump administration said no.

We asked for documents to understand alleged abuses into the White House security clearance system, abuses that may undermine our national security. The Trump administration said no. I could go on. There is a list of 20 of them.

But let me turn to you, Mr. Rosenzweig, because as a career prosecutor you were independent counsel for the Office of Independent Counsel under Ken Starr, not typically the witness that the Democratic majority would call. You are an expert on executive privilege. And in your written testimony you explain that executive privilege can't be looked at, and you used the words "in a vacuum."

Given President Trump's pattern of defying as many as 20 different efforts to examine his own conduct, would you agree that the President's invocation of executive privilege has been undertaken in bad faith?

Mr. ROSENZWEIG. It certainly is a conclusion. I would be reluctant to impute a motive to the President, who I don't know, but it certainly is a conclusion that you could reasonably draw, either of bad faith or a motive of delay.

Ms. JAYAPAL. And, in fact, I think in your written testimony you do say that the President's—it suggests that the President's resistance—you didn't say for sure but you said it suggests that it was taken in bad faith.

Given the competing interests here, including Congress' need to protect our elections, do you think that the blanket assertion of executive privilege by the White House, in response to our subpoena, is legally justified?

Mr. ROSENZWEIG. It does not seem to be, and I think one of the reasons that I reached that conclusion is because of the context that you laid out in the premise to your question, which is that this particular invocation, whatever its merits or demerits on its own face, comes in the context of what appears to be a wholesale determination not to cooperate with any congressional investigation. That certainly colors, for me, an assessment of the validity of the invocation and also ought to color your assessment of it as well, and I think, frankly, would color a court's assessment too.

Ms. JAYAPAL. Yeah. Thank you.

Professor Kinkopf, you, in your response to Representative Bass, said, “Never before has there been a blanket assertion that an administration will stonewall all subpoenas and all requests for documents. When I think of a word to describe that, the only one that comes to mind is contemptuous.”

And just because there are a lot of people watching this who are not legal scholars, don’t necessarily understand executive privilege, what is the impact for the average American of one branch of government being completely contemptuous, to use your word, of another branch of government’s power? What does it mean for their health care? What does it mean for their life if that is the case?

Mr. KINKOPF. So Congress the linchpin of our constitutional system, and to stonewall Congress prevents it from performing its proper constitutional role, and that puts everything in jeopardy. And you are quite right to bring it down to that sort of kitchen-table level of our health insurance, of everything else that we rely on and are engaged with every day, because it does filter down to that level.

Ms. JAYAPAL. It is not some distant thing. It is actually the idea that we have no oversight or authority over another branch’s actions, even when they are unlawful. So do you think that the actions of President Trump and Attorney General Barr in refusing to respond to any congressional subpoenas are permitted under the Constitution?

Mr. KINKOPF. No.

Ms. JAYAPAL. Thank you. You have actually—you have a footnote in your testimony where you say, “In this connection the President’s recent declaration of a blanket intention to oppose all the subpoenas is unprecedented, contrary to the process that the courts have regarded.”

So this issue goes beyond partisan politics. It is about our democracy, our Constitution, it is about precedent that we set, of course, and it is about us being able to do our constitutional duties and to have checks and balances.

And I see that my time has expired and I thank you, Mr. Chairman, and I yield back.

Chairman NADLER. Thank you, the gentlelady for yielding. I now recognize the gentleman from California, Mr. Correa?

Mr. CORREA. Thank you, Mr. Chairman. I want to thank the witnesses for being here today. You are appreciated. I want to say, as a Member of Congress, a member of this Committee, I take my job of oversight over a co-equal branch of government very seriously, so I thank you for being here for your testimony.

Talking about balance, reasonableness, time to respond, Professor Kinkopf, I want to ask you if you think the attorney general can legitimately claim he needs more time to conduct a review, given that the Committee itself made it clear for several months that we had a compelling need to review the unredacted documents and reports of the underlying evidence?

Mr. KINKOPF. With respect to the unredacted documents, or the unredacted Mueller report, I think the claim of a need for more time is just not credible. As to the underlying documents, though, I think it is fair, but only for a very brief window of time, and I point this out in my statement. The precedent for this is the 1996

assertion, protective assertion by Attorney General Janet Reno, and a full response with privilege laws specifically identifying what documents are privileged and why each document is privileged was forthcoming two weeks later.

Mr. CORREA. You know, we offered, in a May 3rd letter, as well as in the April 18th subpoena itself, to prioritize specific defined set of underlying evidence. We essentially said prioritize which information you could present to us, and what other information you need time to present to us.

What do you think about that information? Does that change your response?

Mr. KINKOPF. Well, I think still it is fair for the executive branch to say we need time to look through and see what is privileged and what isn't. I do think, though, it bears on this question of whether or not you have simply issued a subpoena and then, moments later, issue a contempt citation.

Mr. CORREA. Professor Kinkopf, Attorney General Barr's letter to the—to President Trump said protective assertion was consistent with something that had been done during the Clinton administration, but in that case, about two weeks after making the protective assertion of privilege, the Clinton White House completed its review and released 1,000 pages of documents, and produced a privileged log as to the documents it withheld. Should we expect the Trump administration to do the same thing here?

Mr. KINKOPF. Yes. I think the Trump administration should be held to the same standard. I am not sure that I would say that you should expect the Trump administration to do that, though.

Mr. CORREA. Well, the point here is we have gone through this exercise before. The Administration, under Clinton, released 1,000 pages on a timely basis and then gave us a log of the information that they were not releasing.

Mr. KINKOPF. Right. I think the point here is that the idea of a protective assertion of privilege is basically an expression of exigency, as we don't have time. And it is justified only as long as that exigency actually exists.

So, yes, the Administration might say 1.4 documents is going to take us a bit of time to go through, but the Justice Department has lots of lawyers and it can go through even that large a document request very, very quickly, and it is its duty to do exactly that. It is not a proper mechanism for merely delaying and deferring the Committee's request.

Mr. CORREA. For the people of this country watching this hearing today, what is a protective assertion?

Mr. KINKOPF. A protective assertion is an assertion that we don't—we believe there are privileged documents within the set of—within the many boxes that you have requested, but we need some time to go through and pick out the privileged documents, right, to pick them out, in order to release those that aren't privileged.

Mr. CORREA. And do you believe this Committee's offer to work with the Administration, to give them time to prioritize the documents to be released, in their terms, is that something that is reasonable, that a court would look at and say Congress is being reasonable. They are being fair with the Administration.

Mr. KINKOPF. Yes.

Mr. CORREA. Thank you very much.

Chairman NADLER. Will the gentleman yield?

Mr. CORREA. Yes.

Chairman NADLER. Thank you. I have one question for Professor Kinkopf. Professor, Professor Turley suggested that we don't have a narrowly tailored purpose for our subpoena, and Professor Turley's written testimony acknowledges that where Congress has a strong legislative purpose that is a factor in assessing executive privilege, but somehow suggested our investigation into alleged corruption, obstruction, and abuse of power is not sufficiently tied to any legislative purpose.

Do you agree with Professor Turley's apparent position that this Committee does not have a valid legislative or oversight purpose in the subpoenaed information?

Mr. KINKOPF. No, I do not. I couldn't disagree more strongly. As I point out in my written statement, and as I mentioned in my opening statement, I think Congress has a compelling interest in knowing all the details of Russian interference in the 2016 election in order to be able to legislate intelligently on how to fix the system. I believe that this Committee and Congress also have a compelling interest in investigating serious and substantiated allegations of presidential misconduct.

And so those interests more than justify your request for those documents, and I think then impose on the executive branch a duty to say, with specificity, why each document it wishes to withhold is privileged, and is privileged in a way that cannot allow an accommodation of your compelling interest.

Mr. TURLEY. In fairness, can I respond, Mr. Chairman?

Chairman NADLER. Sure.

Mr. TURLEY. That is not my testimony. I say in my testimony that, in fact, I believe—I go through each of the elements of Wilkinson, the three elements, including purpose, and I say that you have satisfied the Wilkinson condition for purpose, and I do not believe you would lose on that ground. I say that quite clearly in my testimony.

Chairman NADLER. Well, thank you for clarifying that very much. I thank the gentleman for yielding to me. Does the gentleman have anything further to say?

Mr. CORREA. No further comments, Mr. Chairman.

Chairman NADLER. Thank you. The gentleman yields back.

This concludes today's hearing. I want to thank our distinguished witnesses for attending. Without objection, all members will have five legislative days to submit additional written questions for the witnesses or additional materials for the record.

Without objection, the hearing is adjourned.

[Whereupon, at 12:53 p.m., the committee was adjourned.]

APPENDIX

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Congress of the United States
House of Representatives
 Washington, DC 20515

COMMITTEE ON THE JUDICIARY
 THE COMMITTEE ON THE JUDICIARY
 CONSTITUTION, PROSECUTION AND THE JUDICIAL
 INFORMATION AND PUBLIC SECURITY
HOMELAND SECURITY
 SUBCOMMITTEES
 HAWKINS MANDATE
 BORDER AND MARITIME SECURITY
 TRANSPORTATION SECURITY
 EMPLOYMENT
 DEMOCRATIC CAUCUS

CONGRESSWOMAN SHEILA JACKSON LEE OF TEXAS
COMMITTEE STATEMENT
COMMITTEE ON THE JUDICIARY
SUBJECT: EXECUTIVE PRIVILEGE AND
CONGRESSIONAL OVERSIGHT
MAY 15, 2019
2141 RAYBURN HOUSE OFFICE BUILDING
10:00PM

- Thank you Mr. Chairman.
- I thank you for yielding the floor on this important topic and I thank you for convening this hearing, which will undoubtedly shed light on a topic that will be fore of mind for many Americans.
- So before I proceed further, let me welcome the panel to our committee:
 - Kate Shaw, Professor of Law, Cardozo Law School, Yeshiva University
 - Paul Rosenzweig, Senior Fellow, National Security & Cybersecurity, R Street Institute
 - Jonathan Turley, Professor of Law, George Washington University School of Law

- Neil Kinkopf, Professor of Law, Georgia State University College of Law
- The topics I hope you will discuss will illuminate the topics this committee, this Congress and this Country have been deliberating, and have been considering from any number of mile-markers since the start of this presidential administration.
- This is because since this Congress began conducting oversight over this president, the White House has indicated that it will not be responding to any overtures at oversight and would instead be asserting an all encompassing executive privilege, which it believes will forestall any oversight into this administration.
- Notably, the claim is before us today because of reports that the President seeks to invoke executive privilege to block the testimony of Don McGahn, former White House Counsel and who is currently noticed to appear before this committee in 6 days.
- For some Americans, the topics discussed this morning are eerily reminiscent of that which we discussed almost 50 years ago, during the second presidential administration of Richard Nixon.
- During that time, the country was steeped in a political controversy emanating from the circumstances surrounding political espionage and whether one side used subversive methods to gain an upper hand ahead of a national presidential contest.
- Then, like now, the Congress became involved, and began probing serious questions about presidential power and in the face of unsatisfactory responses from the president, the country then – as seems to be the case now – became steeped into a discussion of executive privilege.
- The conflict in 1974, of course, was settled by the landmark case of *United States v. Nixon*.
- That case held:

“Neither the doctrine of separation of powers nor the generalized need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances. *See, e.g., Marbury v. Madison*, 1 Cranch 137, 177; *Baker v. Carr*, 369 U.S. 186, 211. Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, the confidentiality of Presidential communications is not significantly diminished by producing material for a criminal trial under the protected conditions of *in camera* inspection, and any absolute executive privilege under Art. II of the Constitution would plainly conflict with the function of the courts under the Constitution. *United States v. Nixon*, 418 U.S. 683, 703-707 (1974).

And, the Supreme Court further indicated:

Although the courts will afford the utmost deference to Presidential acts in the performance of an Art. II function, *United States v. Burr*, 25 F.Cas. 187, 190, 191-192 (No. 14,694), when a claim of Presidential privilege as to materials subpoenaed for use in a criminal trial is based, as it is here, not on the ground that military or diplomatic secrets are implicated, but merely on the ground of a generalized interest in confidentiality, the President's generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial and the fundamental demands of due process of law in the fair administration of criminal justice. 418 U.S. 707-713.

- And here we are now, with today's assembled panel, about to hear the very real strictures of executive privilege.

- When the Special Counsel submitted his report into Russian interference into the 2016 election and whether that crime was aided and abetted by associates of the Trump campaign, it was revealed that the White House Counsel sat for over 30 hours with the Special Counsel and his team answering questions about how the Office of the President, and its occupant, conducted itself and himself while the investigation into whether he obstructed justice.
- Moreover, the decision to permit the White House Counsel to speak freely with the Special Counsel was one—at the time—rooted in a desire to be perceived—by the public—as transparent.
- McGahn told Mueller that Trump on multiple occasions directed him to fire the special counsel, including by ginning up a fanciful claim that Mueller had a conflict of interest.
- Trump thereafter directed McGahn to lie about Trump's campaign and to write a letter falsely asserting that Trump had not directed him to fire the special counsel, Mueller's report said.
- McGahn's testimony also helped establish another obstruction offense: Trump's instructing his former campaign manager, Corey Lewandowski, by then a private citizen, to tell then-Attorney General Jeff Sessions to limit Mueller's probe to future elections.
- As if that were not enough, the American people learned last Friday that after the Mueller Report was published, the President asked his Don McGahn to publicly state that he did not commit obstruction of justice.
- Soon after the release of the Special Counsel's report, Chairman Jerrold Nadler, and this Committee issued a subpoena requiring that McGahn produce all documents in his possession and testify before the committee about the 33 subjects listed in the subpoena's schedule, including, among other things:
 - the investigation into National Security Adviser Michael Flynn;

- the firing of FBI Director James Comey;
- Attorney General Jeff Sessions's recusal from the Russia investigation;
- the resignation or termination, "whether contemplated or actual," of Sessions, Deputy Attorney General Rod Rosenstein, and Special Counsel Robert Mueller;
- the infamous Trump Tower meeting;
- other figures such as Paul Manafort, Roger Stone and Rick Gates;
- as well as information about the handling of the investigations into President Trump and his various companies and organizations by prosecutors in the U.S. Attorney's Office for the Southern District of New York.
- The President now seeks to block the American people from hearing from Don McGahn for himself and telling the American people all to which he swore under oath to Robert Mueller.
- So it is against that backdrop that we welcome you to this Committee to help the American people understand the President's position and determine whether his position rooted in the constitution or just garden-variety intransigence.

Questions for Professor Shaw

In *U.S. v. Nixon*, the Supreme Court recognized the President has a general interest in maintaining confidentiality of communications with close advisors but made it clear presidential privilege was not absolute.

1. ***In terms of the balancing test they used, can you articulate the factors the court considered in reaching its holding?***
2. In your written statement to the committee, you said that the court *OGR v. Holder* "firmly rejected the Department of Justice's argument that 'because the executive is seeking to shield records from the legislature, another co-

equal political body, the law forbids the Court from getting involved.” Do you does that suggest a role for Article III Courts?

3. If the president continues to refuse to allow the Mueller report to be released to Congress, acting as a shield, and the law forbids the Supreme Court from weighing in, what legal recourse does the committee have for those documents to be released to us?

Questions for Professor Kinkopf

Given your experience at DOJ’s Office of Legal Counsel, if a government agency has a subpoena for documents, would it be a normal response for a President to withhold it from that agency’s purview by claiming *every single document* of it falls under the executive without specific justification,

- 1. *What kind of review (in camera or otherwise), if any, would each document need to undergo to determine whether it is subject to that privilege?***
- 2. *As the nature of the information is important to determining if executive privilege is asserted by the President, how particularized must his justification be?***

Questions for Mr. Rosenzweig

President Trump did not make any assertion of executive privilege when he permitted numerous White House aides and other administration officials to be interviewed by the Special Counsel’s office. Moreover, as the Attorney General confirmed in his April press conference, the President waived executive privilege with respect to the Mueller report itself. Attorney General Barr said “no material [was] redacted based on executive privilege.” As they have both previously stated nothing in the documents fall within executive privilege,

- 1. Can the President now make a “protective assertion” of privilege over all the redacted materials in the Mueller Report and all the underlying evidence, having previously waived that privilege?***

The D.C. Circuit has held publication of otherwise-confidential information, like Mr. McGahn’s testimony and communications in the Muller Report” waives privileges for the documents *or information* specifically released.”

- 1. Would this also imply the White House cannot assert executive privilege over testimony by Mr. McGahn related to information already revealed by the Muller Report?***

The Washington Post

Opinions

Trump's legal case for executive privilege is strained at best

By Harry Litman

As part of the most comprehensive stonewalling of Congress since at least Watergate, the White House is blocking the House Judiciary Committee from obtaining documents it had subpoenaed from former White House counsel Donald McGahn.

At this point, the White House hasn't expressly asserted executive privilege over the McGahn documents. But once McGahn made it clear he would not comply with this subpoena to "maintain the status quo" in a dispute between equal branches of government, the bottom-line result was the same: If Congress wants the documents, it will have to negotiate terms with the White House or go to court.

These maneuvers are preparatory to a bigger fight over whether the White House will be able to prevent McGahn from testifying to Congress, and the stakes in this fight about as high as they come. McGahn met with special counsel Robert S. Mueller III's team for some 30 hours, during which he provided some of the most damaging testimony of any witness in the probe.

Critically, McGahn told Mueller that Trump on multiple occasions directed him to fire the special counsel, including by ginning up a fanciful claim that Mueller had a conflict of interest. Trump thereafter directed McGahn to lie about Trump's campaign and to write a letter falsely asserting that Trump had not directed him to fire the special counsel, Mueller's report said.

McGahn's testimony also helped establish another obstruction offense: Trump's instructing his former campaign manager, Corey Lewandowski, by then a private citizen, to tell then-Attorney General Jeff Sessions to limit Mueller's probe to future elections.

What this all means is that McGahn is already locked into an account of Trump's conduct that appears to amount to multiple felonies for obstruction of justice. Detailing that conduct in a congressional hearing would provide a moment of drama akin to John Dean's Watergate testimony. And it is that sort of drama that seems to be the Democrats' only hope for putting impeachment into serious play.

No wonder, then, that the White House seems frantic to try to stifle McGahn. Both Attorney General William P. Barr and Trump lawyer Emmet Flood have telegraphed that the White House may attempt to invoke executive privilege to prevent McGahn's testimony.

But the legal case for executive privilege is strained at best.

The animating idea for executive privilege is that the president needs confidential, candid advice to discharge his responsibilities. As a consequence, the president enjoys a constitutionally anchored privilege to bar the disclosure of communications related to the need for that kind of advice.

To date, the Trump administration has tried to play it cute in its dealings with Congress. Witnesses such as Director of National Intelligence Daniel Coats and former chief strategist Stephen K. Bannon have declined to answer Congress's questions by stating that they were protecting the president's prerogative to assert executive privilege — but without Trump's having actually done so.

That won't work for McGahn. In his case, Congress will insist that Trump actually invoke executive privilege, serving up the issue for judicial resolution.

And under prior Office of Legal Counsel memorandums from 1982 and 1989 — the latter, in fact, written by Barr, then-assistant attorney general — and related practices, invoking the privilege requires multiple steps by the executive branch, beginning with good-faith negotiations with Congress.

Assuming negotiations fail, the department is required — by its own playbook — to make several determinations that will be challenging in the case of McGahn. Two are of special import here.

First, the department needs to conclude that executive privilege has not already been waived. Both Barr and Flood have been laying the groundwork for that assertion, but that's going to be quite a stretch. Arguably, McGahn's interviews with Mueller did not constitute waiver, because they took place within the executive branch. But the subsequent transmission of the report to Congress, with an express declination to assert executive privilege, seems plainly to amount to a waiver of at least the substance of the material in the report. The president's after-the-fact protective assertion of privilege over the report Wednesday — on the ground that there is some unspecified privileged material somewhere in the report — does nothing to change the waiver argument.

Second, the department needs to determine that the privilege is not being used to conceal evidence of wrongdoing or criminal conduct.

So imagine, now, the position of the Justice Department official tasked with checking this box. On the one hand, the attorney general has declared that the conduct that McGahn detailed was not criminal. The problem is that the attorney general's judgment is wrong; in fact, it is not even credible, and Mueller does not share it. Will a reviewing official be willing to put his or her law license on the line in reliance on the attorney general's scarcely defensible position? That's going to be quite a dilemma for someone.

Unfortunately, as in the score of investigative issues on Congress's plate, the strength of Congress's legal position is counterbalanced by the weakness in its practical position: in a word, time. If recent precedent is any guide, the president may well be able to tie up the issue of McGahn's testimony in the courts until the 2020 election and beyond.

In the administration's dishonorable campaign to keep the American people in the dark about the president's conduct, time is its strongest ally.

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Jennifer Rubin: McGahn's testimony should rock Trumpland

Harry Litman

Harry Litman, a Washington Post contributing columnist, is a former U.S. attorney and deputy assistant attorney general. He teaches constitutional law and national security law at the University of California at Los Angeles School of Law and the University of California at San Diego Department of Political Science. Follow 

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CONGRESS

Executive Privilege and Compelled Testimony of Presidential Advisers: Don McGahn's Dilemma

By **Jonathon Shaub** Friday, May 3, 2019, 10:04 AM

The release of the redacted Mueller report focused the spotlight squarely on former White House Counsel Don McGahn, whose testimony to the special counsel featured prominently in the report's discussion of obstruction of justice. Indeed, the first questions to Attorney General William Barr from Sen. Dianne Feinstein during Barr's May 1 testimony exclusively addressed the events described in McGahn's testimony.

Soon after the release of the special counsel's report, House judiciary committee Chairman Jerrold Nadler, issued a subpoena requiring that McGahn produce all documents in his possession and testify before the committee about the 33 subjects listed in the subpoena's schedule, including, among other things, the investigation into National Security Adviser Michael Flynn; the firing of FBI Director James Comey; Attorney General Jeff Sessions's recusal from the Russia investigation; the resignation or termination, "whether contemplated or actual," of Sessions, Deputy Attorney General Rod Rosenstein, and Special Counsel Robert Mueller; the infamous Trump Tower meeting; other figures such as Paul Manafort, Roger Stone and Rick Gates; as well as information about the handling of the investigations into President Trump and his various companies and organizations by prosecutors in the U.S. Attorney's Office for the Southern District of New York.

Early reports indicated, and Trump confirmed last night, that the administration plans to "fight" the subpoena issued to McGahn and to oppose other requests for testimony from current and former White House aides. McGahn thus faces a dilemma. As "one person close to McGahn" told the Washington Post, "He's not eager to testify. He's not reluctant. He got a subpoena. It compels him to testify. But there are some countervailing legal reasons that might prevent that."

The only "countervailing legal reason" identified is executive privilege, which the administration reportedly plans to invoke over McGahn's testimony. McGahn's dilemma raises several interesting legal questions about executive privilege and the compelled congressional testimony of senior presidential advisers that the courts have only seldom, if ever, addressed.

I worked on a few similar disputes as a career attorney in the Office of Legal Counsel (OLC) during the Obama administration, and it is impossible to understand the full extent of the dilemma and McGahn's possible options without a complete understanding of the executive branch doctrine on which McGahn and the White House will undoubtedly rely. The executive branch's expansive view of its constitutional prerogatives in the context of oversight, the seeds for which were planted long ago—including during Barr's previous service in the Department of Justice—is as much to blame for the present oversight disputes and comparative congressional weakness as is any decision by this particular administration.

McGahn's Choice

First, no matter how McGahn, Congress or the press frames the issue, the choice of what to do will ultimately be McGahn's. Reports suggest he "has expressed frustration" about the situation, and his attorney is "trying to help him navigate the difficult situation of being pulled by two branches of government."

There is no doubt that he will be asked to testify about his personal interactions and conversations with the president—communications that the Supreme Court has expressly recognized as protected by executive privilege. If the White House decides to object to his testimony on the basis of executive privilege (or to his attendance on the basis of immunity, as described below), it could take one of two actions. It could direct McGahn not to answer questions or, if

immunity is the claim, not to attend the hearing. Or it could indicate that there are executive privilege issues the president is still considering and request that McGahn refrain from answering any question that may implicate confidential information until the president has had an opportunity to decide whether to assert privilege. After President George W. Bush asserted executive privilege in the U.S. attorney matter, for example, the White House directed former Counsel Harriet Miers and aide Sara Taylor not to comply with congressional subpoenas. When former Deputy Attorney General Sally Yates was set to testify about her communications to the White House regarding Michael Flynn, the Justice Department responded to her letter seeking "authorization" to testify by noting that the "President owns" the privilege and indicating that she would "need[] to consult with the White House" before disclosing any privileged information.

As former White House and congressional lawyer Andy Wright ably explained with respect to the dispute between Sally Yates and the administration, "the White House does not have effective control" of former officials who are set to testify. The administration faced the same problem when former FBI Director Comey agreed to testify voluntarily. And a similar principle applies when former officials decide to write books or go on talk shows. Former officials are not formally subject to the direction of the president or other superior executive branch officials, nor are they subject to termination for defiance of a superior's order. As a result, it is not at all clear that the executive branch has authority to control their speech, particularly considering the potential First Amendment implications. Moreover, when testimony is not voluntary but compelled by a subpoena, the former official may feel obligated to respond because the official lacks a countervailing direction by a superior officer not to comply. Because of this, subpoenas to third parties who are not subject to executive branch control are a particularly effective oversight tool for gaining access to otherwise confidential information. Most contractual confidentiality agreements and provider terms of service allow for disclosure of confidential information if compelled by subpoena.

The executive branch can thus cite the privileges and even purport to direct a former official to adhere to them. And, in its view, it has the authority to issue such directions. But compliance is not assured. Nor is the direction certain to hold up in any subsequent judicial proceedings.

The executive branch's legal authority is even weaker if the president has not invoked his constitutional authority expressly by asserting executive privilege or claiming immunity. The only real way to ensure compliance by a former official would be to ask a court to enjoin the testimony. The Department of Justice has taken this approach only once, when Congress attempted to get national security information from AT&T: The department sued AT&T asking the court to enter an injunction against AT&T prohibiting compliance with the subpoena, and the House intervened to argue AT&T had to comply with the subpoena. But the Justice Department has not filed such an action since, certainly not against an individual. And the cause of action in the AT&T suit ultimately rested on the enforcement of a nondisclosure provision in the contract with AT&T. It is not clear if a similar nondisclosure agreement exists here between McGahn and the White House or, if there is, whether such an agreement between the government and an official would be enforceable.

In the end, then, McGahn will decide what to do, not the White House. As a former White House counsel, he may feel obligated, as Harriet Miers and Sara Taylor did, to follow the direction of the White House on privilege or immunity, out of a desire to protect the institution of the presidency and the institutional confidentiality interests of the executive branch, out of what he feels his ethical obligations are to the White House as an attorney and former official, or simply out of a desire to avoid further testimony on these issues—particularly the kind of highly publicized testimony that would occur here. Certainly, if he chooses not to appear or chooses to invoke executive privilege, he will incur the wrath of the committee. How he and the White House would justify such a decision as a constitutional matter depends on the course they adopt. And, undoubtedly, they will attempt to rely on executive branch doctrine.

Has Executive Privilege Been Waived?

The administration's reported reliance on executive privilege to block McGahn's testimony resulted in a spate of commentary suggesting that any executive privilege claim had been waived, perhaps even twice. Aaron Blake, for the Washington Post, reported that "[e]xperts say the White House may have already shot itself in the foot on this one" and

waived executive privilege *twice* because it had first allowed McGahn to give testimony to the special counsel and then had not objected to the release of the Mueller report. One of the experts, law professor Heidi Kitrosser, is quoted as saying, "Given all of this, it seems to me that Trump cannot claim 'backsies—i.e., un-waive the privilege—simply because he doesn't like the way that things are unfolding." Professor Ross Garber, by contrast, tweeted that the McGahn interview was "not a waiver" and that the release of the report did not waive executive privilege.

Who is right? The answer is not settled given the scarcity of judicial decisions and no firm guidance from the Supreme Court. But, as Garber noted, the administration has a strong case based on historical practice and judicial precedent that it has not waived its ability to assert executive privilege entirely.

First 'Waiver': Allowing McGahn to Testify

In a memorandum Trump's personal attorneys sent to Mueller on Jan. 29, 2018, they indicated the president would "waive[] the obviously applicable privileges where appropriate" and allow the special counsel's office to interview close presidential advisers in the course of its obstruction investigation. They did so, it appears, in order to bolster their legal argument that Trump himself need not testify because any information he could convey would now be "practically available from another source." Accordingly, Trump allowed McGahn to testify for over 30 hours about confidential conversations, "waiving" any potential executive privilege.

"Waiver" in this context, however, means only that the president allowed McGahn to talk to the special counsel. As the head of the executive branch, the president already has the authority to direct McGahn and other executive branch officials who serve at the pleasure of the president to take particular actions. An invocation of executive privilege is neither necessary nor relevant to intrabranch disclosures. As Douglas Letter, counsel to the House of Representatives, has recognized in the context of the Mueller report, "it simply makes no sense to speak of invocations by the President of executive privilege or any other litigation privilege against his own Attorney General." The same is true for an "invocation" that would have prevented McGahn from speaking to the special counsel. The president did not need to "invoke" executive privilege; he simply could have directed McGahn not to testify or not to provide particular information. The special counsel could have then sought a grand jury subpoena for the information, setting up a court battle. And because presidents do not have the authority to issue directives to the judiciary, the president would have had to assert executive privilege to justify his refusal to allow McGahn to testify.

Does Trump's decision not to prevent McGahn from testifying "waive" his ability to assert executive privilege later? In other circumstances, the answer would be yes; the voluntarily disclosure of privileged information to an outside party serves to "waive" the privilege entirely, meaning the privilege holders may no longer claim the privilege to prevent its disclosure. For example, disclosure to an outside party of information protected by attorney-client privilege waives the privilege for not only the information disclosed but also "to all other communications relating to the same subject." And an individual who begins to answer questions on a particular subject without invoking her Fifth Amendment right against self-incrimination may waive her ability to claim the privilege in response to questions on that subject matter.

But such a broad waiver doctrine has never been applied to information protected by executive privilege; instead, it has been repeatedly rejected in this context, both by past administrations and by the judiciary. As an initial matter, there likely has been no waiver because McGahn did not disclose information to an "outside party"; his was an intrabranch disclosure. Under the executive branch's understanding of executive privilege, the president maintains control of the dissemination of this information, both within and outside of, the executive branch. Thus, even if the president allowed McGahn to disclose to the special counsel information that falls within the scope of executive privilege, the president retains the constitutional authority, discussed below, to prevent that material from being disclosed further or released to Congress.

OLC previously addressed a similar situation, concluding that the president could assert executive privilege over information gathered by Special Counsel Patrick Fitzgerald in the course of his investigation into the disclosure of Valerie Plame Wilson's identity. Vice President Dick Cheney and other White House officials had voluntarily cooperated with the special counsel, just as McGahn has here. The OLC opinion argues that "[w]ere future presidents, vice

presidents or White House staff to perceive that such voluntary cooperation would create records that would likely be made available to Congress (and then possibly disclosed publicly outside of judicial proceedings such as a trial), there would be an unacceptable risk that such knowledge could adversely impact their willingness to cooperate fully and candidly in a voluntary interview.” In a later suit filed under the Freedom of Information Act seeking the special counsel’s records of his interview of Cheney, a court agreed with the Justice Department that “the discussion between Fitzgerald and Vice President Cheney is more appropriately considered a protected inter-agency disclosure” as opposed to a disclosure to an outside party that would have waived privilege. Moreover, the court noted that the vice president’s “failure to invoke any executive privileges” before the special counsel “did not preclude the White House’s future reliance on those privilege.”

One note of caution, however. An intraagency disclosure *could* in effect “waive” executive privilege by undermining the executive branch’s interest in confidentiality. Executive privilege is a qualified privilege, and each attorney general opinion justifying the assertion of the privilege balances the executive branch’s need for confidentiality against Congress’s need for the information. If a disclosure is so extensive that it destroys the confidentiality of information, then the executive branch’s constitutional interests protected by executive privilege are no longer applicable and the balance favors disclosure to Congress. In other words, executive privilege only protects confidential information; once the information has been disclosed widely, it is no longer a candidate for an assertion of executive privilege. As preeminent constitutional law scholar Alexander Bickel put it during the Watergate controversy, “the issue is not whether the President has waived his privilege ... if a document or a tape is no longer confidential because it has been made public, it would be nonsense to claim that it is privileged.”

Here, however, there is no indication that McGahn’s testimony was distributed beyond the special counsel’s office and other select officials at the Department of Justice. Nor would have the administration expected wide disclosure of his testimony at the time. Prior to the release of the report, there were reports of what McGahn had said, but the testimony remained confidential.

Second ‘Waiver’: Disclosure of the Mueller Report

At Barr’s press conference just prior to the release of the Mueller report on April 18, Barr said that “the President confirmed that, in the interests of transparency and full disclosure to the American people, he would not assert privilege over the Special Counsel’s report.... Accordingly, the public report I am releasing today contains redactions only for the four categories that I previously outlined, and no material has been redacted based on executive privilege.” One scholar called the president’s decision “unprecedented for a modern presidency,” but others have argued that any attempt to prevent the public release of the report by asserting executive privilege would be unsuccessful.

Two things are particularly important about Barr’s statement. One, Barr states that the president was not asserting privilege over the “report”; he did not make any statements about the underlying information collected by the special counsel but not included in the report. Two, he noted that no material had been redacted “based on executive privilege.” The Justice Department has long taken the position, spelled out in a 1989 memo issued by Barr when he was the head of OLC, that the president need not assert executive privilege “except in response to a lawful subpoena.” Because the Justice Department voluntarily released the redacted report and has offered to allow certain members of Congress to read the report with redaction of only the grand jury material, an assertion of executive privilege has not yet become necessary. The fact that no redactions were “based on executive privilege” at the time Barr made the report public does not mean the president has “waived” his ability to assert executive privilege over the material that has not yet become public. In the executive branch’s view, when Barr released the redacted report, executive privilege had not yet become relevant for the redacted material because Congress had not yet subpoenaed that material—and the executive branch generally will not decide whether or not to assert executive privilege until a contempt vote for noncompliance with the subpoena has been scheduled. At least two categories of the material that is redacted—sensitive intelligence and information related to ongoing investigations—are certainly considered by the executive branch to be components of executive privilege. Now that Barr has refused to comply with the House judiciary committee’s subpoena for the full unredacted report and underlying materials, the committee may consider contempt. If they do, an assertion of executive privilege remains viable under executive branch doctrine.

With respect to the redacted report that was provided to Congress and has been released publicly, the disclosure constitutes a disclosure to an outside party. Moreover, the public release of any material, no matter how sensitive, eliminates—or “waives”—any potential executive privilege claim because the executive branch can no longer claim any legitimate interest in maintaining its confidentiality; nor, of course, would a subpoena that would force an executive privilege claim be necessary if the material is publicly available.

But unlike the disclosure to an outside party of attorney-client information, the disclosure of *some* information protected by executive privilege does *not* waive the privilege for related materials. The most forceful statement of this position occurs in an opinion by the U.S. Court of Appeals for the D.C. Circuit addressing whether the now defunct office of the independent counsel could enforce a subpoena seeking documents from the White House counsel’s office. Similar to what has occurred here, the White House counsel had released a final report about its investigation into former Agriculture Secretary Mike Espy, but claimed that the documents generated in the course of producing that report remained privileged. The court agreed, distinguishing the waiver doctrine applicable to attorney-client privilege and opining that such an “all-or-nothing approach has not been adopted with regard to executive privileges generally.” Instead, “release of a document only waives these privileges for the document or information specifically released, and not for related materials.”

During the Watergate disputes, the D.C. Circuit reached a similar conclusion, holding that President Nixon had not waived his ability to assert executive privilege over the tape recordings of his conversations with advisers even though he had stated explicitly, as did the White House here, that executive privilege would not be invoked to prevent their testimony to the special counsel. And OLC has also reiterated that position, relying on those cases and others, in the context of an executive privilege claim. During the dispute over information related to the firing of several U.S. attorneys, the Department of Justice had disclosed its emails reflecting communications between the White House and the Justice Department. But Acting Attorney General Paul Clement reasoned that the disclosures did not result in a waiver that would preclude the White House from asserting privilege over its records of those communications or related testimony.

In short, substantial precedent—both judicial and from past administrations—establishes that a disclosure of material to Congress or to the public “waives” executive privilege only as to that specific information disclosed. The public release of the report thus likely waived executive privilege only as to the specific aspects of McGahn’s testimony explicitly contained in the report. Additional context for or further details about the testimony he provided or the events he described to the special counsel’s office would remain protected by executive privilege, assuming the information fits within the scope of the privilege. According to the D.C. Circuit, waivers of executive privilege “should not be lightly inferred,” in part, because doing so would discourage the government from disclosing *any* information for fear of waiving potential privilege claims over related information. Or, as Clement put it, “If the Department’s provision of documents and information to Congress, as part of the accommodation process, eliminated the President’s ability to assert privilege over White House documents and information concerning those same communications, then the Executive Branch would be hampered, if not prevented, from engaging in future accommodations.”

Presumably, the administration would adopt this same position with respect to the parts of the report it offered to let select members of Congress view but not copy. Although that disclosure would constitute a “disclosure” to an outside party, the executive branch view is that limiting the disclosure and maintaining custody of the information itself sufficiently maintains its confidentiality to preserve the president’s authority to assert executive privilege and prevent further dissemination. In its view, holding that an accommodation allowing members of Congress to see material waives executive privilege would discourage, or eliminate, the practice and undermine the ability of the two branches to reach accommodations that further both Congress’s informational needs and the executive branch’s confidentiality interests.

In fact, according to executive branch doctrine, and contrary to the suggestion of some of the reporting on McGahn, the disclosure of *some* information does not weaken a later assertion of executive privilege over related information but *strengthens* it. Giving Congress some information, such as the redacted Mueller report, arguably satisfies its informational needs, at least for the most part. Because executive privilege is a qualified privilege, that disclosure in

turn makes it more difficult for Congress to demonstrate that it still has a legitimate need for the specific information not released and that any such need is sufficiently important to outweigh the executive branch's need to preserve confidentiality.

In the New York Times, Charlie Savage suggests that any claim of executive privilege over McGahn's claim may have been waived, pointing to two cases. The first is the same 1997 D.C. Circuit decision discussed above, which in fact construes waiver very narrowly. Savage notes that the court found the privilege waived because information had been shared with a third party, an official's personal lawyer, but he under-emphasizes the importance of the court's ruling that privilege had been waived only for the single document that had been shared with the personal lawyer and only for precise words that had been shared. The court found privilege had not been waived for the other documents, and, with respect to the document that had been shared, even held that handwritten notes on the document that had not been included in the version sent to the personal lawyer remained subject to privilege. Applying that principle here, the only information disclosed to a third party is the precise information in the Mueller report. Everything else remains subject to privilege.

The second case Savage cites is the 2016 district court decision in the *Fast & Furious* matter. But that decision does not address waiver at all. In conducting the balancing test for executive privilege, that court held that Congress's need for the documents outweighed the executive branch's confidentiality interests because the publicly released inspector general's report had undermined those confidentiality interests. The Department of Justice disagreed with that method of analysis, which it felt would undermine the presumption against waiver established by the 1997 decision—and, in any event, is not bound to follow it, because it is a nonprecedential district court decision and one from which an appeal is still pending.

If Executive Privilege Has Not Been Waived, Can McGahn Refuse to Appear?

Based on the above precedent, McGahn and his attorney could reasonably agree with the White House that at least some aspects of his testimony continue to be protected by executive privilege under existing executive branch doctrine. Specifically, any otherwise privileged information that is not expressly disclosed in the report remains subject to an assertion of executive privilege.

But could they then conclude—based on that fact alone—that he does not have to show up for the hearing at all? Probably not. If the only issue is executive privilege, then the traditional practice would be to attend the hearing but decline to respond to any questions that implicate executive privilege. Sara Taylor, a former aide to President George W. Bush, took that approach in 2007, indicating her willingness as a private citizen to answer questions but also testifying that she would follow the president's direction not to testify about information covered by his executive privilege claim. And declining to show up at all in defiance of the subpoena would not advance any constitutional interest in confidentiality that could not also be protected by appearing and invoking privilege. As I discussed with respect to the administration's refusal to allow executive branch officials to comply with deposition subpoenas without agency counsel present, any defense to noncompliance with a valid congressional subpoena would need to be grounded in the Constitution's separation of powers. And it's difficult to see a constitutional argument that former officials can ignore subpoenas requiring their attendance entirely any time the requested testimony will likely implicate information protected by executive privilege, rather than attend and decline to answer specific questions on privilege grounds.

Perhaps McGahn or the administration will seek to argue that noncompliance here would be acceptable because *all* of the subject areas potentially implicate executive privilege. But that would be a novel position, and one that would be difficult to defend. The breadth of the subject matters listed in the subpoena, and the amount of information about those subjects that has already been released—effectively mooted executive privilege for that specific information—makes it quite possible to imagine a number of questions to which he could respond, consistent with executive privilege. Indeed, in the last Congress, the House oversight committee referred Bryan Pagliano, who had helped Hillary Clinton set up her email server, to the Justice Department for contempt of Congress for taking a similar action. Pagliano had already asserted his constitutional Fifth Amendment right against self-incrimination, and he

refused to comply with the subpoena because he insisted its only purpose was to require him to “appear in a public session where [Pagliano’s] further and repeated assertion of his constitutional right not to testify can be videotaped and broadcast.” The Republican-controlled committee did not accept that refusal.

Executive privilege is not the only doctrine relevant, here, however. A related doctrine—the immunity of senior presidential advisers—could provide McGahn with a legal rationale and historical precedent for refusing to comply with the subpoena. Barr appeared to reference this doctrine in his testimony before the Senate Judiciary Committee, asserting he would object to McGahn testifying because McGahn is a “close adviser to the president,” but that the decision was ultimately the president’s to make.

On at least three occasions, the Justice Department has opined publicly that the counsel to the president is immune from compelled congressional testimony—two opinions during the Clinton administration and another during the George W. Bush administration. The third opinion, addressing a subpoena to Harriet Miers, concluded that Miers’s status as a *former* counsel did not alter the analysis. And, although the 1996 opinion describes this immunity as a facet of executive privilege—“We believe that *executive privilege* would be assertable on the basis that you serve as an immediate adviser to the President and are therefore immune from compelled congressional testimony.”—immunity is clearly addressed as a separate doctrine in later opinions and even analyzed according to different procedures. Claims of executive privilege are accompanied by an opinion of the attorney general, while immunity claims have been justified in opinions by the head of OLC—unless the claim is a part of a larger executive privilege assertion.

The foundation of the doctrine of immunity is a statement by then-Assistant Attorney General William Rehnquist: “The President and his immediate advisers—that is, those who customarily meet with the President on a regular or frequent basis—should be deemed absolutely immune from testimonial compulsion by a congressional committee. They not only may not be examined with respect to their official duties, but they may not even be compelled to appear before a congressional committee.” Initially, the doctrine was justified as a matter of comity. As Assistant Attorney General Theodore Olson explained in 1982, “The President is a separate branch of government. He may not compel congressmen to appear before him. As a matter of separation of powers, Congress may not compel him to appear before it. The President’s close advisors are an extension of the President.” The executive branch found support for that statement in the Supreme Court’s conclusion that the immunity provided to members of Congress by the Speech and Debate Clause of the Constitution also provides immunity to congressional aides because those aides are the “alter egos” of the members. Because Congress may not compel the president to provide testimony, in the executive branch’s view, the same analysis applies to compelled testimony of presidential advisers.

Over time, the executive branch has expanded that position and explained more fully the basis for its immunity position. The most extensive public explication of the doctrine is in the 2014 OLC opinion concluding that David Simas, a senior adviser to President Obama, was immune from compliance with the House oversight committee’s subpoena. Although some have questioned whether the Obama administration took this position, the OLC opinion and the letter from White House Counsel Neil Eggleston to the committee make it clear that the administration believed “Mr. Simas is immune from congressional compulsion to testify on matters relating to his official duties” and, accordingly, would not appear as the subpoena required.

The fact that this position has been asserted by administrations of both parties does not, of course, make it valid. Indeed, the only court to have addressed a claim of presidential adviser immunity has resoundingly rejected both the claimed absolute immunity *and* a qualified immunity. But the 2014 OLC opinion makes it clear the executive branch does not accept the analysis in that nonprecedential decision. Thus, the administration and McGahn may decide to claim immunity, particularly given the unlikelihood that the resulting court dispute, and its appeals, would be resolved quickly.

What is the basis for this immunity? The 2014 OLC opinion explains that “[t]he Executive Branch’s longstanding position, reaffirmed by Administrations of both political parties, is that the President’s immediate advisers are absolutely immune from congressional testimonial process.” The opinion, collecting past executive branch precedent, makes three principal arguments. One, senior presidential advisers are “alter egos” of the president and share his

immunity; otherwise, the separation-of-powers principles underlying the president's immunity would be damaged. Two, if Congress can compel senior presidential advisers to testify, that authority would "interfere with the President's discharge of his constitutional functions" by threatening his independence and autonomy. Utilizing that authority, Congress could "wield their compulsory power to attempt to supervise the President's actions, or to harass those advisers in an effort to influence their conduct, retaliate for actions the committee disliked, or embarrass and weaken the President for partisan gain." Third, such authority would "threaten executive branch confidentiality," a euphemism for executive privilege. The opinion recognizes that the "President's advisers could invoke executive privilege to decline to answer specific questions" but concludes that immunity is necessary because advisers could reveal confidential information on accident or be pressured by the committee to reveal protected information. The opinion also explains at length why its position is "consistent with relevant Supreme Court case law" and rejects the district court's conclusion, in the subsequent litigation over Harriet Miers's immunity, that the 2008 OLC opinion was incorrect. The 2014 OLC opinion does not address the applicability of its analysis to a *former* official, but it cites the 2008 opinion favorably.

The White House thus does have a path—and one based on precedents from administrations of both parties—to instruct McGahn not to appear at all before the House committee. Immunity was the difference between Harriet Miers and Sara Taylor when they were subpoenaed to testify about the firing of U.S. attorneys: Miers did not appear at all in accordance with the 2008 OLC opinion and the White House's instruction on immunity. But Taylor *did* appear, as required by the subpoena, and simply declined to answer numerous questions, citing the White House's direction on executive privilege.

Asserting immunity here may also establish a precedent for the coming oversight battles between the House and the administration, including the White House's decision to deny the House oversight committee's request that Stephen Miller testify. A subsequent subpoena for his testimony would likely bring the executive branch's immunity doctrine into the spotlight.

Whether such an immunity claim would withstand judicial scrutiny is not clear. As noted, one court has already rejected it. And it seems somewhat unlikely that the courts would accept an *absolute* privilege of immunity given that even executive privilege itself is only a qualified privilege. The 2014 OLC opinion acknowledges this possibility, concluding that Simas enjoyed immunity that is "absolute and may not be overcome by [the Committee's] competing interest," but also including a second section concluding that Simas would be immune "[e]ven if Mr. Simas were only entitled to qualified immunity, which could be overcome by a sufficient showing of compelling need." But the bipartisan executive branch precedent is there on which to base such a claim and no precedential judicial opinion has rejected it.

As I and a number of others have explained in recent days, the chances of this or other congressional oversight subpoena disputes being resolved by an appellate court before the next election are slim. So the executive branch view may again prevail by default. Whether McGahn's dilemma is resolved in this way or another, it further illustrates the current imbalance of power between the branches. And, despite some suggestions to the contrary, that is not wholly the result of decisions by this particular administration. It has been evolving over a much longer period of time.

Editor's note: This piece has been edited to incorporate Charlie Savage's analysis of executive privilege issues in the New York Times.

Topics: Congress, Executive Power

Tags: Executive Privilege, White House Counsel, Mueller Investigation, Robert Mueller, L'Affaire Russe, Donald Trump, President Trump

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5/15/2019

White House Asked McGahn to Declare Trump Never Obstructed Justice - The New York Times

The New York Times

White House Asked McGahn to Declare Trump Never Obstructed Justice

By Michael S. Schmidt

May 10, 2019

WASHINGTON — White House officials asked at least twice in the past month for the key witness against President Trump in the Mueller report, Donald F. McGahn II, to say publicly that he never believed the president obstructed justice, according to two people briefed on the requests.

Mr. Trump asked White House officials to make the request to Mr. McGahn, who was the president's first White House counsel, one of the people said. Mr. McGahn declined. His reluctance angered the president, who believed that Mr. McGahn showed disloyalty by telling investigators for the special counsel, Robert S. Mueller III, about Mr. Trump's attempts to maintain control over the Russia investigation.

The White House made one of the requests to Mr. McGahn's lawyer, William A. Burck, before the Mueller report was released publicly but after the Justice Department gave a copy to Mr. Trump's lawyers in the preceding days. Reading the report, the president's lawyers saw that Mr. Mueller left out that Mr. McGahn had told investigators that he believed the president never obstructed justice. Mr. Burck had told them months earlier about his client's belief on the matter and that he had shared it with investigators.

Mr. McGahn initially entertained the White House request. "We did not perceive it as any kind of threat or something sinister," Mr. Burck said in a statement. "It was a request, professionally and cordially made." A White House spokeswoman did not respond to a message seeking comment.

But after the report was released, detailing the range of actions Mr. Trump took to try to impede the inquiry, Mr. McGahn decided to pass on putting out a statement supportive of the president. The report also revealed that Mr. Trump told aides he believed Mr. McGahn had leaked to the news media to make himself look good.

The episodes show the lengths the White House has gone around the release of the Mueller report to push back on the notion that Mr. Trump obstructed justice. House Democrats have used the report to open investigations into whether Mr. Trump abused his position to insulate himself from the Russia inquiry.

5/15/2019

White House Asked McGahn to Declare Trump Never Obstructed Justice - The New York Times

The revelations came as the Democrats on Friday increased their pressure on the White House on other fronts. The chairman of the House Ways and Means Committee, Richard E. Neal, subpoenaed the Treasury Department and Internal Revenue Service for six years of Mr. Trump's personal and business tax returns. Democrats are also pursuing testimony from Mr. Mueller but have not agreed on a date, Representative Jerrold Nadler of New York, the chairman of the House Judiciary Committee, told reporters.

In the days after the report was released, White House officials asked Mr. McGahn again to put out a statement as Mr. Trump fumed about his disclosures but Mr. McGahn rebuffed the second request as well.

White House officials believed that Mr. McGahn publicly asserting his belief would calm the president and help the administration push back on the episodes that Mr. Mueller detailed in the obstruction section of the report, said one of the people. Both spoke on the condition of anonymity to describe private conversations involving the White House.

Around the time Mr. McGahn declined the second request, the president's lawyer Rudolph W. Giuliani began publicly attacking his credibility, saying that Mr. McGahn had a bad memory. "It can't be taken at face value," Mr. Giuliani said of Mr. McGahn's account one day after the Mueller report was released. "It could be the product of an inaccurate recollection or could be the product of something else."

The White House learned in August that Mr. McGahn had told Mr. Mueller's investigators that he believed the president had not obstructed justice, according to one of the people. After a New York Times article revealed that Mr. McGahn had spoken to investigators for at least 30 hours, Mr. Burck tried to reassure the White House by explaining that his client told Mr. Mueller that he never believed Mr. Trump had committed an obstruction offense.

Mr. McGahn's cooperation with Mr. Mueller played a crucial role in allowing the special counsel's investigators to paint a picture in their report of a president determined to use his power atop the executive branch to protect himself from the Russia investigation.

The president's lawyers are particularly concerned about two episodes that Mr. McGahn detailed to prosecutors. In one, Mr. Trump asked him to fire the special counsel but backed off after Mr. McGahn refused. After that episode was revealed, the president asked Mr. McGahn to create a White House document falsely rebutting his account. Mr. McGahn declined to go along but told Mr. Mueller about the encounters.

It makes no difference legally whether Mr. McGahn believes Mr. Trump obstructed justice. That is a determination made by prosecutors, not witnesses. But politically, such a statement could have been a powerful argument for Mr. Trump, who faces scrutiny from House Democrats about whether he obstructed justice and abused his power.

5/15/2019

White House Asked McGahn to Declare Trump Never Obstructed Justice - The New York Times

Mr. Mueller declined to make a determination about whether Mr. Trump obstructed justice, saying that because a sitting president cannot be indicted, it was unfair to accuse him of committing a crime. Attorney General William P. Barr stepped in and decided with his deputy, Rod J. Rosenstein, to clear Mr. Trump of wrongdoing.

But because Mr. Mueller made no determination — and wrote a damning report that showed repeated efforts by Mr. Trump to interfere with his inquiry — questions about whether the president obstructed justice have lingered as Democrats have sought to gain momentum in their investigation of Mr. Trump.

The Democrat-led House Judiciary Committee has subpoenaed Mr. McGahn to testify. But White House advisers have indicated they will try to block him from appearing before lawmakers, and Mr. Trump has said that there is no reason for Mr. McGahn to speak with congressional investigators because he had cooperated so extensively with Mr. Mueller's team.

"I've had him testifying already for 30 hours and it's really — so I don't think I can let him and then tell everybody else you can't," Mr. Trump said last week in an interview with Fox News. "Especially him, because he was a counsel, so they've testified for many hours, all of them, many, many, many people. I can't say, 'Well, one can and the others can't.' I would say it's done."

Mr. McGahn left the White House last year but is still entangled with the president on matters related to the Mueller investigation. The White House instructed Mr. McGahn on Tuesday to not turn over documents he had to the House in response to a subpoena. Mr. McGahn followed the White House's advice and is now waiting to see whether Democrats will hold him in contempt.

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^a A version of this article appears in print on May 11, 2019, on Page A1 of the New York edition with the headline: White House Pressured Witness To Say President Didn't Obstruct

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Congresswoman Sylvia Garcia (TX-29)
Statement for the Record

Thank you all for being here. I think most of you here will all agree that Executive Privilege serves a vital function in our government's ability to make laws and protect our national interests.

Without it, Presidents and the privacy required to make decisions of great national interest would be severely limited.

This privilege is limited, like all powers of the respective branches within our government, to the interests they seek to protect.

But I would like to remind everyone that it is not the interests of the President that are being protected by Executive Privilege. It is not one man's profits, political capital, or well-being that is being protected.

No, at the end of the day, it is the interests of the United States, the methods that serve our

citizens and our collective well-being that Executive Privilege is meant to protect.

What are the interests of the people of the United States?

Well let's look at the facts:

Even in its unredacted form, the Special Counsel's Report makes clear that our democracy was attacked by the Russian government in a coordinated and unprecedented manner.

Furthermore, the Report has made it crystal clear that the President repeated and systematically attempted to exert influence over the Special Counsel and other law enforcement investigations to impede their fact-finding missions.

Finally, the report concluded that contrary to the President's theories, the Constitution prohibits the President from engaging in this obstructive conduct.

Now, the Attorney General seeks to invoke executive privilege over the full Mueller report, giving no justification or reasoning.

This is not protecting the American people.
This is hiding from the American people.

They deserve to know what happened. They deserve to know what the President is hiding.



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Testimony Submitted for the Record

House Committee on the Judiciary

Hearing on “Executive Privilege and Congressional Oversight”

May 15, 2019

By Caroline Fredrickson, President, American Constitution Society, and Noah Bookbinder, Executive Director, Citizens for Responsibility and Ethics in Washington, on behalf of the joint ACS/CREW Presidential Investigation Education Project

Chairman Nadler, Ranking Member Collins, and members of the Committee, thank you for the opportunity to submit written comments for the record of the Committee’s May 15 hearing on “Executive Privilege and Congressional Oversight.” We write on behalf of the Presidential Investigation Education Project (PIEP), a joint initiative of the American Constitution Society and Citizens for Responsibility and Ethics in Washington, which promotes informed public evaluation of the legal and policy issues relating to the investigations of Russian interference in the 2016 election.

These comments describe the limitations of a legal strategy by the President to invoke executive privilege to refuse cooperation with the investigation by this Committee of alleged public corruption, obstruction of justice, and other abuses of power by the President and his associates. With respect to key information sought by this Committee, including Special Counsel Robert Mueller’s Report on the Investigation Into Russian Interference in the 2016 Presidential Election (“Mueller Report”) and underlying materials of Special Counsel Robert Mueller, and documents and testimony from former White House Counsel Donald McGahn, assertions of executive privilege rest on tenuous legal grounds. The applicability of executive privilege is outright implausible where much of the material in question concerns conduct that occurred before the President took office or has already been disclosed without an assertion of the privilege. Administration misconduct may also be subject to Congressional scrutiny even where a valid claim of privilege lies. Below we provide detail on the limited applicability of executive privilege to the documents and testimony the Committee is seeking to evaluate the Mueller Report and its implications.

I. The Contours of Executive Privilege

Executive privilege is a collection of related privileges intended to “resist disclosure of information the confidentiality of which [executive officials] felt was crucial to fulfillment of the unique role and responsibilities of the executive branch of our government.”¹ As discussed in

¹ *In re Sealed Case (Espy)*, 121 F.3d 729, 736 (D.C. Cir. 1997).

depth the May 2018 PIEP report on evidentiary privileges,² the executive confidentiality interests encompass two major categories of information³: (1) “presidential communications,” or direct communications with the president and information in the possession of the president’s close advisers that is “revelatory of the President’s deliberations;”⁴ and (2) “deliberative process” information consisting of “opinions, recommendations, or advice offered in the course of the executive’s decision-making process⁵ that are ““antecedent to the adoption of an agency policy.””⁶

Courts have drawn clear boundaries on the scope of executive privilege and have found that the public interest may outweigh even the legitimate assertion of the privilege. This section outlines major restrictions on the applicability of the privilege.

A. Inapplicability of Executive Privilege to Pre-Inauguration Communications

No court has recognized the presidential communications privilege with respect to communications that occurred before a president took office. As the federal district court recently explained in rejecting a claim that executive privilege applied to a document provided to President-elect Trump, neither presidential candidates nor presidents-elect have the

² Norman L. Eisen and Andrew M. Wright, Evidentiary Privileges Can Do Little To Block Trump-Related Investigations, *American Constitution Society and Citizens for Responsibility and Ethics in Washington*, June 2018, available at <https://s3.amazonaws.com/storage.citizensforethics.org/wp-content/uploads/2018/06/28214023/ACS-CREW-Report-Evidentiary-Privileges-Can-Do-Little-to-Block-Trump-Related-Investigations.pdf> (Prepared for the ACS/CREW Presidential Investigation Education Project).

³ See *Espy*, 121 F.3d at 735 n.2 (“[W]e refer to the privileges asserted by the White House more specifically as the presidential communications privilege, or presidential privilege, and the deliberative process privilege.”). The executive branch has also asserted its prerogative to claim privilege over other categories of information such as state secrets and open investigative files. See 26 Charles Alan Wright & Arthur R. Miller Edward H. Cooper, *Federal Practice & Procedure: Federal Rules of Evidence* § 5673 (1st ed.). The comments we are submitting today to the Committee in this document apply the narrower understanding of executive privilege to the Mueller Report and related testimony. While other potentially relevant privileges, such as the attorney-client privilege, the state secrets privilege, and the investigative files privilege may prove relevant to other congressional requests for executive branch material, we do not believe it is necessary to analyze their application in this context. See generally *In re Lindsey*, 158 F.3d 1263 (1998); Wright & Miller § 5664; *Id.* § 5681.

⁴ *Espy*, 121 F.3d at 745, 752 (holding that the presidential communications privilege covers not only communications by the president him- or herself, but also “communications made by presidential advisers in the course of preparing advice for the President . . . , even when those communications are not made directly to the President”); but see *id.* at 753 (“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 proceeding, and we take no position on how the institutional needs of Congress and the President should be balanced.”)

⁵ Gerald Wetlauffer, Justifying Secrecy: An Objection to the General Deliberative Privilege, 65 IND. L.J. 845, 851 (1990).

⁶ *Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Justice*, 658 F. Supp. 2d 217, 233 (D.D.C. 2009) (quoting *Jordan v. U.S. Dep’t of Justice*, 591 F.2d 753, 774 (D.C.Cir.1978)); see also *Espy*, 121 F.3d at 737 (“Two requirements are essential to the deliberative process privilege: the material must be predecisional and it must be deliberative.”); *Providence Journal Co. v. U.S. Dep’t of Army*, 981 F.2d 552, 557 (1st Cir. 1992) (holding that a document is predecisional if it (i) correlates to a specific agency decision, (ii) was “prepared . . . for the purpose of assisting the agency official charged with making the agency decision,” and (iii) was created prior to the decision to which it relates).

“constitutional power to make any decisions on behalf of the Executive Branch.”⁷ Similarly, regarding the deliberative process privilege, case law strongly supports the view that the privilege does not apply to campaign or transition periods.⁸ That is, the deliberative process privilege protects only “the pre-decisional deliberations of federal government agencies,”⁹ and neither campaign staff nor transition employees are part of a federal government agency or decision- or policy-making power.¹⁰

B. Inapplicability of Executive Privilege to Misconduct

Courts also have held that the presidential communications privilege is inapplicable to information concerning wrongdoing by members of the executive branch.¹¹ “[T]he Executive cannot, any more than the other branches of government, invoke a general confidentiality privilege to shield its officials and employees from investigations by the proper governmental institutions into possible criminal wrongdoing.”¹² However, mere allegations of wrongdoing or the existence of a criminal investigation are insufficient to overcome the privilege. Instead, a party seeking to obtain privileged presidential communications “must always provide a focused demonstration of need, even when there are allegations of misconduct by high-level officials.”¹³ Like the presidential communications privilege, the deliberative process privilege does not apply “where there is reason to believe the documents sought may shed light on government

⁷ *Fish v. Kobach*, No. 16-cv-2105, 2017 WL 1373882, at *6 (D. Kan. Apr. 17, 2017), review denied, No. 16-2105, 2017 WL 1929010 (D. Kan. May 10, 2017).

⁸ See *Illinois Inst. for Continuing Legal Educ. v. U.S. Dep’t of Labor*, 545 F. Supp. 1229, 1232-33 (N.D. Ill. 1982) (noting that “transition staff . . . is not within the executive branch of government and hence not an ‘agency’” within the meaning of a FOIA exemption premised on executive privilege); see also *Fish*, 2017 WL 1373882 at *6 (“No court has recognized the applicability of the executive privilege to communications made before a president takes office.”).

⁹ *Fish*, 2017 WL 1373882 at *5; see also *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975) (“The cases uniformly rest the [executive] privilege on the policy of protecting the decision making processes of government agencies and focus on documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.”) (internal citations and quotations omitted).

¹⁰ The Supreme Court has recognized that the privilege may extend to certain communications generated by former Presidents while they were in office, on the grounds that time limits for confidentiality assurances regarding discussions that occur between a president and his or her aides during the president’s tenure would undermine the goal of promoting frank and fulsome decision-making. *Nixon v. Administrator of General Services*, 433 U.S. 425, 439 (1977). While the district court in *Fish* underscored that this rationale “doesn’t directly translate to communications with presidents elect,” 2017 WL 1373882 at *5, there may be outlier circumstances, such as where a sitting president includes a president-elect in a decision, that provide justification for applying the privilege. See, e.g., *Wright & Miller*, § 5673 (“It is a reasonable inference from the cases and the policy of the executive privilege that it only applies to communications to the president during his term of office, though there is something to be said for extending the privilege to communications to a president-elect during the transition between administrations.”). It is also unlikely that most campaign and transition materials fall within the scope of the state secrets privilege; materials produced for security briefings of the candidate or president-elect and senior staff are among the only documents that would be likely to contain secrets of the U.S. government.

¹¹ *United States v. Nixon*, 418 U.S. 683, 712 (1974).

¹² *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974).

¹³ *Espy*, 121 F.3d at 746.

misconduct . . . on the grounds that shielding internal government deliberations in this context does not serve 'the public's interest in honest, effective government.'"¹⁴

The Department of Justice's policies also are instructive on this issue. Departmental guidelines state that DOJ's principles regarding protecting the integrity of prosecutorial decision-making "will not be employed to shield documents which contain evidence of criminal or unethical conduct by agency officials from proper review,"¹⁵ suggesting that any claim of privilege will be diminished in circumstances where it would shield evidence of misconduct by the president or other executive officers.

C. Congress's Interests in Disclosure May Outweigh Legitimate Application of Executive Privilege

Even where a communication by a President or his aides may constitute information subject to executive privilege, Congress's legislative interest in disclosure may outweigh executive confidentiality concerns.¹⁶ The Supreme Court has recognized that "the power of inquiry – with process to enforce it – is an essential and appropriate auxiliary to the legislative function."¹⁷ When considering whether Congress can overcome an assertion of executive privilege, courts evaluate "whether the information requested is essential to the responsible fulfillment of [Congress's] functions," "whether there is an available alternative which might provide the required information without forcing a showdown on the claim of privilege," and "the circumstances surrounding and the basis for the Presidential assertion of privilege."¹⁸

The Department of Justice's practices in investigations of presidential misconduct are instructive. In every investigation that has produced evidence of possibly impeachable offenses, DOJ has ensured that Congress could access investigative materials. In Watergate, Special Prosecutor Leon Jaworski had a grand jury transmit a report to Congress containing a summary of findings and accompanying evidence.¹⁹ In the 1990s, Independent Counsel Kenneth Starr transmitted to

¹⁴ *Espy*, 121 F.3d at 738 (quoting *Texaco P.R., Inc. v. Dep't of Consumer Affairs*, 60 F.3d 867, 885 (1st Cir. 1995)); see also *id.* at 746 ("[T]he [deliberative process] privilege disappears altogether when there is any reason to believe government misconduct occurred."); *Alexander v. FBI*, 186 F.R.D. 170, 177–78 (D.D.C. 1999) ("[I]f there is 'any reason' to believe the information sought may shed light on government misconduct, public policy (as embodied by the law) demands that the misconduct not be shielded merely because it happens to be predecisional and deliberative.").

¹⁵ Assertion of Executive Privilege in Response to Congressional Demands for Law Enforcement Files, 6 Op. O.L.C. 31, 36 (1982), available at <https://www.justice.gov/file/22886/download>.

¹⁶ See *Espy*, 121 F.3d at 753 ("The President's ability to withhold information from Congress implicates different constitutional considerations than the President's ability to withhold evidence in judicial proceedings.").

¹⁷ *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927); see also *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 505 (1975) (noting that the issuance of a congressional subpoena "pursuant to an authorized investigation is . . . an indispensable ingredient of lawmaking").

¹⁸ *United States v. Am. Tel. & Tel. Co.*, 419 F. Supp. 454, 460 (D.D.C. 1976).

¹⁹ Referral to the United States House of Representatives pursuant to Title 28, United States Code, § 595(c), *Office of the Independent Counsel*, Sept. 9, 1998, available at <https://www.washingtonpost.com/wp-srv/politics/special/clinton/icreport/5intro.htm#L8>.

Congress a voluminous report and appendix that included a host of grand jury materials, including a transcript and video of the president's grand jury testimony.²⁰

II. The Limited Reach of Executive Privilege Regarding the Mueller Report, Testimony of White House Counsel Don McGahn, and Related Matters

The President formally notified the Committee of his "protective assertion" of executive privilege regarding the redacted portions of the Mueller Report and underlying material and evidence subpoenaed by the Committee,²¹ and former White House Counsel Don McGahn has declined to provide the Committee documents and testimony at the direction of the White House.²² In each of these cases, executive privilege is a legally tenuous basis for refusing the Committee's requests because of both waiver and public interest considerations.²³

A. Infirmities with Executive Privilege Claims Concerning the Mueller Report

First, the President has waived executive privilege over almost all of the Mueller Report. Most of the report has already been released publicly, and there is likely significant overlap between the material for which privilege has been explicitly waived and the material that the President now seeks to protect. Barr himself has argued that, while the President "would have been well within his rights" to exert executive privilege over the Mueller Report, "the President confirmed that, in the interests of transparency and full disclosure to the American people, he would not assert privilege over the Mueller Report."²⁴ Importantly, the President may have already waived any

²⁰ Report and Recommendation, In re Report and Recommendation of June 5, 1972 Grand Jury Concerning Transmission of Evidence to the House of Representatives (March 1, 1974), available at <https://www.archives.gov/research/investigations/watergate/roadmap>. In addition, in the late 1990s, Special Counsel John Danforth, who was appointed to investigate the FBI's role in and investigation of the *Waco* incident published an extensive report clearing the government of wrongdoing. See Final Report to the Deputy Attorney General Concerning the 1993 Confrontation at the Mt. Carmel Complex, Office of the Special Counsel, Nov. 8, 2000, available at <https://upload.wikimedia.org/wikipedia/commons/8/85/Danforthreport-final.pdf>.

²¹ Letter from Stephen E. Boyd, Assistant Attorney General, Department of Justice, to Jerrold Nadler, Chairman, House Committee on the Judiciary (May 8, 2019), available at https://judiciary.house.gov/sites/democrats.judiciary.house.gov/files/documents/Chairman%20Nadler%20letter_8%20May%202019%20%28003%29.pdf.

²² Letter from Pat A. Cipollone, White House Counsel, to Jerrold Nadler, Chairman, House Committee on the Judiciary (May 7, 2019), available at <http://cdn.cnn.com/cnn/2019/images/05/07/pacletter05.07.2019.pdf>.

²³ These comments address the applicability of executive privilege to key documents and testimony sought by the Committee, and do not focus on the additional argument advanced by the Department of Justice's Office of Legal Counsel in several administrations that senior White House officials such as McGahn have absolute immunity from congressional process for testimony. See, e.g., *Immunity of the Assistant to the President and Director of the Office of Political Strategy and Outreach From Congressional Subpoena*, 38 Op. O.L.C. ____, 2014 WL 10788678 (July 15, 2014), available at <https://www.justice.gov/file/30896/download>; *Immunity of the Former Counsel from Compelled Congressional Testimony*, 31 Op. O.L.C. 191 (2007). It merits note, however, that this absolute immunity position was addressed and squarely rejected by the district court of the District of Columbia in *Committee on the Judiciary, U.S. House of Representatives v. Miers*, 558 F.Supp. 2d 53, 99-107 (D.D.C. 2008).

²⁴ Attorney General William P. Barr Delivers Remarks on the Release of the Report on the Investigation into Russian Interference in the 2016 Presidential Election, Department of Justice, Apr. 18, 2019, available at <https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-release-report-investigation-russian>.

claim to executive privilege over the bulk of the underlying material when he voluntarily allowed the Department of Justice to release to the public the conversations that McGahn and others disclosed to the Special Counsel in hundreds of hours of interviews.²⁵ Whether disclosure of this information to investigators constituted waiver of the privileges is an open question.²⁶

Second, large portions of the materials assembled by Mueller are outside of the scope of executive privilege based on the fact that they occurred before President Trump took office. This likely includes nearly all of Volume I of the Mueller Report, which details the Trump Campaign's numerous, repeated communications with Russia and Russia-linked individuals, all of which occurred prior to Trump's inauguration.²⁷ Volume I is also where the vast majority of the redactions can be found.²⁸ No court has recognized an assertion of executive privilege over documents or information regarding pre-administration conduct, and it is difficult to imagine a credible claim that Volume I concerns presidential decision-making.

Third, executive privilege is not absolute and cannot be used to cover up evidence of misconduct – significant evidence of which is outlined in Mueller's Volume II on obstruction of justice. In this case, Volume II of the Mueller Report contains compelling evidence that President Trump obstructed justice – so compelling that more than 900 former federal prosecutors from both Democratic and Republican administrations signed a letter explaining that Trump would have been indicted for obstruction if he were not a sitting president.²⁹ As the former prosecutors noted, the question of whether any other person would have been indicted “are not matters of close professional judgment.”³⁰

Simply put, even valid assertions of privilege can be overcome by the public interest in disclosure to Congress – especially in situations that involve executive misconduct. Here, the public interest in rooting out and preventing corruption in our government and ensuring a secure and functional election process going forward outweighs the executive interest in maintaining confidentiality. Where particularly sensitive information is at stake, such as material that may be

²⁵ The Mueller Report drew heavily from McGahn's contemporaneous recollections of the President's obstructive behavior, which were memorialized in a daily diary kept by his chief of staff Annie Donaldson. Those notes, and McGahn's testimonial recollections, will likely corroborate a number of Mueller's most damning findings, including that the President ordered McGahn to fire the Special Counsel, and later, ordered McGahn to create an internal record denying that he attempted to fire Mueller. *See, e.g.,* Report On The Investigation Into Russian Interference In The 2016 Presidential Election (“Mueller Report”), Special Counsel Robert S. Mueller III, March 2019, available at <https://www.justice.gov/storage/report.pdf>, Vol. II, at pg. 31 n.145., n.148.

²⁶ *See Peck v. United States*, 514 F. Supp. 210, 213 (S.D.N.Y.), on reargument, 522 F. Supp. 245 (S.D.N.Y. 1981) (“[W]e find that voluntary disclosure of a significant portion of the privileged matter of the Rowe Report in the Summary waived the qualified official information privilege.”); *but see Citizens for Responsibility & Ethics in Washington*, 658 F. Supp. 2d at 238 (finding that Vice President Dick Cheney's failure to invoke executive privileges when making statements to the Special Counsel “did not preclude the White House's future reliance on those privileges”). For an overview of the issues regarding waiver of government privileges, *see* Wright & Miller § 5692.

²⁷ *See* Muller Report, Vol. I, at pg. 4-13.

²⁸ Matt Stieb, [the Most Redacted Sections of the Mueller Report](http://nymag.com/intelligencer/2019/04/the-most-redacted-sections-of-the-mueller-report.html), *New York*, Apr. 18, 2019, available at <http://nymag.com/intelligencer/2019/04/the-most-redacted-sections-of-the-mueller-report.html>

²⁹ [Statement by Former Federal Prosecutors](https://medium.com/@dojalumni/statement-by-former-federal-prosecutors-8ab7691c2aa1) (May 6, 2019), available at <https://medium.com/@dojalumni/statement-by-former-federal-prosecutors-8ab7691c2aa1>.

³⁰ *Id.*

relevant to an ongoing prosecution, Congress and the executive can – as they have in the past³¹ – work out an accommodation to ensure that Congress has access to the information necessary to fulfill its constitutional responsibilities.

B. Infirmities Concerning Executive Privilege Claims Over Documents and Testimony from Former White House Counsel Donald F. McGahn, II

Similar arguments apply to the testimony and documents of individuals who provided evidence and testimony to the Special Counsel and who could be called by congressional committees to testify. This point can be illustrated by considering the subjects that former White House Counsel Donald F. McGahn, II might address in testimony before this committee.³² As explained above, President Trump cannot exert executive privilege to prevent McGahn from testifying about conversations and conduct that has already been disclosed in the Mueller Report. To the extent that McGahn's testimony regarding any of this material was subject to executive privilege, the privilege has been waived.

It bears emphasis that the unredacted, already publicly released portions of the Mueller Report describe in great detail the central role played by White House Counsel McGahn in two incidents where the President appeared to attempt obstruction of justice, and discuss several other obstruction-related incidents where McGahn may have insight and knowledge.

First, according to the Mueller Report, in June 2017, the President sought to have McGahn terminate Special Counsel Mueller. The Mueller Report states that after news outlets reported that the President was under investigation for obstruction of justice, the President called McGahn at home and directed him to call the Acting Attorney General and say that the Special Counsel had conflicts of interest and must be removed. McGahn did not carry out the direction, however, deciding that he would resign rather than trigger what he regarded as a potential Saturday Night Massacre.³³ According to the Mueller Report, McGahn told Trump that such a call to Rosenstein would “look like still trying to meddle in [the] investigation” and “knocking out Mueller” would be “[a]nother fact used to claim obstruction of justice.”³⁴

The Mueller Report states that there is substantial evidence of each of the three elements required for an obstruction of justice charge for this episode. With respect to whether the

³¹ See, e.g., Rachel Bade & John Gerstein, *FBI hands over Clinton email interview summary to Congress*, *Politico*, Aug. 16, 2018, available at <https://www.politico.com/story/2018/08/fbi-clinton-email-documents-to-congress-227069> (reporting that the FBI provided the House Oversight Committee with details about the contents of investigatory document as well as FBI interview reports); Darren Samuelsohn, *Democrats want to know why Justice Department released FBI texts*, *Politico*, Dec. 14, 2017, available at <https://www.politico.com/story/2017/12/14/fbi-agents-text-message-justice-department-congress-democrats-297737> (reporting that DOJ released texts between two DOJ employees that were the subject of an ongoing investigation by the department's Inspector General).

³² The Committee noticed a hearing for McGahn's testimony. See *Oversight of the Report by Special Counsel Robert S. Mueller, III: Former White House Counsel Donald F. McGahn, II*, available at <https://judiciary.house.gov/legislation/hearings/oversight-report-special-counsel-robert-s-mueller-iii-former-white-house>.

³³ Mueller Report, Vol. II, pg. 4.

³⁴ *Id.*, Vol. II, pg. 81-82 (quoting Donaldson 5/31/17 Notes).

President's request that McGahn fire the Special Counsel constituted an obstructive act, the Mueller Report states that "substantial evidence . . . supports the conclusion that the President went further and in fact directed McGahn to call Rosenstein to have the Special Counsel removed."³⁵ In addition, "This evidence shows that the President was not just seeking an examination of whether conflicts existed but instead was looking to use asserted conflicts as a way to terminate the Special Counsel."³⁶

The Mueller Report further indicates that there was likely a nexus to a qualifying proceeding because "[s]ubstantial evidence indicates that by June 17, 2017, the President knew his conduct was under investigation by a federal prosecutor who could present any evidence of federal crimes to a grand jury."³⁷

And finally, with respect to the President's intent, the Mueller Report states that "[s]ubstantial evidence indicates that the President's attempts to remove the Special Counsel were linked to the Special Counsel's oversight of investigations that involved the President's conduct and, most immediately, to reports that the President was being investigated for potential obstruction of justice."³⁸ The Mueller Report further states that "[t]here also is evidence that the President knew that he should not have made those calls to McGahn."³⁹

The Mueller Report also highlights a related episode that features McGahn. The Mueller Report states that in January 2018, President Trump engaged in a multi-pronged effort to get McGahn to make untrue statements and create false records when reports surfaced that the President had asked McGahn to fire the special counsel. According to the Mueller Report, "[o]n January 26, 2018, the President's personal counsel called McGahn's attorney and said that the President wanted McGahn to put out a statement denying that he had been asked to fire the Special Counsel and that he had threatened to quit in protest."⁴⁰ It further notes:

McGahn's attorney spoke with McGahn about that request and then called the President's personal counsel to relay that McGahn would not make a statement. McGahn's attorney informed the President's personal counsel that the Times story was accurate in reporting that the President wanted the Special Counsel removed."⁴¹

The Mueller Report also says that President Trump asked White House Staff Secretary Rob Porter to intervene with McGahn:

Porter told McGahn that he had to write a letter to dispute that he was ever ordered to terminate the Special Counsel. McGahn shrugged off the request, explaining that the media reports were true. McGahn told Porter that the President had been insistent on firing the Special Counsel and that McGahn had planned to resign rather than carry out the order, although he had not personally told the

³⁵ *Id.*, Vol. II, pg. 88.

³⁶ *Id.*, Vol. II, pg. 89.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Mueller Report, Vol. II, pg. 90.

⁴⁰ *Id.*, Vol. II, pg. 114. *See also id.*, Vol. II, pg. 5-6.

⁴¹ *Id.*, Vol. II, pg. 114.

President he intended to quit. Porter told McGahn that the President suggested that McGahn would be fired if he did not write the letter. McGahn dismissed the threat, saying that the optics would be terrible if the President followed through with firing him on that basis. McGahn said he would not write the letter the President had requested.⁴²

Here, too, the Mueller Report states that there is evidence supporting each of the three elements required for an obstruction of justice. With respect to the President's request that McGahn make false statements and create a false record, the Mueller Report considers and rejects benign explanations of the President's conduct and concludes that "evidence indicates that by the time of the Oval Office meeting the President was aware that McGahn did not think the story was false and did not want to issue a statement or create a written record denying facts that McGahn believed to be true."⁴³ The Mueller Report continues, "The President nevertheless persisted and asked McGahn to repudiate facts that McGahn had repeatedly said were accurate."⁴⁴

The Mueller Report further indicates that there was likely a nexus to a qualifying proceeding: "Because McGahn had spoken to Special Counsel investigators before January 2018, the President could not have been seeking to influence his prior statements in those interviews. But because McGahn had repeatedly spoken to investigators and the obstruction inquiry was not complete, it was foreseeable that he would be interviewed again on obstruction-related topics."⁴⁵ In addition, the Mueller Report states that "the President's efforts to have McGahn write a letter 'for our records' approximately ten days after the stories had come out – well past the typical time to issue a correction for a news story – indicates the President was not focused solely on a press strategy, but instead likely contemplated the ongoing investigation and any proceedings arising from it."⁴⁶

The Mueller Report also states with respect to the President's intent that "[s]ubstantial evidence indicates that in repeatedly urging McGahn to dispute that he was ordered to have the Special Counsel terminated, the President acted for the purpose of influencing McGahn's account in order to deflect or prevent further scrutiny of the President's conduct towards the investigation."⁴⁷

Finally, the Mueller Report also notes that McGahn played a role in several other episodes relating to the evidence of the President's obstruction of justice, including:

- McGahn told the President that Flynn had made a false statement and that his conduct was potentially criminal.⁴⁸ (McGahn's testimony about what he told the President could help explain the President's state of mind when he met privately with FBI Director Comey and asked Comey let Flynn go.)

⁴² Mueller Report, Vol. II, pg. 116.

⁴³ *Id.*, Vol. II, pg. 119.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*, Vol. II pg. 119-20.

⁴⁷ *Id.* Vol. II pg. 120.

⁴⁸ Mueller Report, Vol II pg. 46.

- “In early March, the President told White House Counsel Donald McGahn to stop Sessions from recusing. And after Sessions announced his recusal on March 2, the President expressed anger at the decision and told advisors that he should have an Attorney General who would protect him. That weekend, the President took Sessions aside at an event and urged him to ‘unrecuse.’”⁴⁹
- McGahn counseled the president to avoid direct contacts with the Justice Department, which the President ignored.⁵⁰
- The Mueller Report indicates that McGahn has personal knowledge of efforts by the President to get then-Attorney General Sessions to resign: “. . . while aboard Marine One on the way to Norfolk, Virginia, the President told Priebus that he had to get Sessions to resign immediately.” The Mueller Report continues, “Priebus believed that the President’s request was a problem, so he called McGahn and asked for advice, explaining that he did not want to pull the trigger on something that was ‘all wrong.’ . . . McGahn told Priebus not to follow the President’s order and said they should consult their personal counsel, with whom they had attorney-client privilege.”⁵¹ According to the Report, “McGahn and Priebus discussed the possibility that they would both have to resign rather than carry out the President’s order to fire Sessions.”⁵²

In each of these cases, McGahn’s testimony about materials that have already been disclosed to the public could shed light on the evidence that President Trump obstructed justice. Even if there were a colorable claim of executive privilege, that privilege would be outweighed by the public interest in preventing and addressing executive branch misconduct.

III. Conclusion

Executive privilege does not provide the President with a means to avoid congressional oversight and accountability. As explained above, scope of valid privilege claims is narrow. A significant portion of the conduct described in the Mueller Report is not subject to executive privilege and the privilege has likely been waived in other cases due to the public disclosure of communications and information. Even in cases where a valid privilege claim might lie, the fact that the privileged material concerns presidential and executive branch misconduct strengthens Congress’s claim that disclosure of that material is in the public interest.

⁴⁹ *Id.*, Vol. II, pg. 3.

⁵⁰ *Id.*, Vol. II pg. 4.

⁵¹ *Id.*, Vol. II, pg. 95.

⁵² *Id.*, Vol. II, pg. 95-96.

