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

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ABSTRACT

This report provides a brief review and discussion of the historical and legal development of the constitutionally-based prerogative of the President to maintain the confidentiality of documents or other materials or information that reflect presidential decisionmaking and deliberations. The evolving nature and scope of the presidential privilege is described and discussed and recent court decisions are analyzed to determine how they illuminate current interbranch information disputes.

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

Summary

Presidential claims of a right to preserve the confidentiality of information and documents in the face of legislative demands have figured prominently, though intermittently, in executive-congressional relations since at least 1792, when President Washington discussed with his cabinet how to respond to a congressional inquiry into the military debacle that befell General St. Clair's expedition. Few such interbranch disputes over access to information have reached the courts for substantive resolution, the vast majority achieving resolution through political negotiation and accommodation. In fact, it was not until the Watergate-related lawsuits in the 1970's seeking access to President Nixon's tapes that the existence of a presidential confidentiality privilege was judicially established as a necessary derivative of the President's status in our constitutional scheme of separated powers. Of the seven court decisions involving interbranch information access disputes, three have involved Congress and the Executive but only one of these resulted in a decision on the merits. One other case, involving legislation granting custody of President Nixon's presidential records to the Administrator of the General Services Administration, also determined several pertinent executive privilege issues.

The *Nixon* and post-Watergate cases established the broad contours of the presidential communications privilege. Under those precedents, the privilege, which is constitutionally rooted, could be invoked by the President when asked to produce documents or other materials or information that reflect presidential decisionmaking and deliberations that he believes should remain confidential. If the President does so, the materials become presumptively privileged. The privilege, however, is qualified, not absolute, and can be overcome by an adequate showing of need. Finally, while reviewing courts have expressed reluctance 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.

However, until the District of Columbia Circuit's recent ruling in *In re Sealed Case,* these judicial decisions had left important gaps in the law of presidential privilege which have increasingly become focal points, if not the source, of interbranch confrontations that has made their resolution more difficult. Among the more significant issues left open included whether the President has to have actually seen or been familiar with the disputed matter; whether the presidential privilege encompasses documents and information developed by, or in the possession of, officers and employees in the departments and agencies of the Executive Branch; whether the privilege encompasses all communications with respect to which the President may be interested or is it confined to presidential decisionmaking and, if so, is it limited to any particular type of presidential decisionmaking; and precisely what kind of demonstration of need must be shown to justify release of materials that qualify for the privilege. The unanimous panel in *In re Sealed Case* authoritatively addressed each of these issues in a manner that may have drastically altered the future legal playing field in resolving such disputes.

Contents

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[1] *See* Archibald Cox, *Executive Privilege*, 122 U. of Pa. L. Rev. 1383, 1395-1405 (1979). *See generally,* Mark J. Rozell, Executive Privilege: The Dilemma of Secrecy and Democratic Accountability (1994)(Rozell); 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); *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*, 121 F.3d 729 (D.C. Cir. 1997); *In re Grand Jury Proceedings*, 5 F. Supp. 2d 21 (D.D.C. 1998).

[4] *Senate Select Committee, supra; United States v. House of Representatives, supra;* and *United States v. AT&T, supra.*

[5] *Senate Select Committee, supra*.

[6] *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977).

the materials become presumptively privileged. The privilege, however, is qualified, not absolute, and can be overcome by an adequate showing of need. Finally, while reviewing courts have expressed reluctance 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.

However, until the District of Columbia Circuit's recent ruling in *In re Sealed Case,*[7] these judicial decisions had left important gaps in the law of presidential privilege which have increasingly become focal points, if not the source, of interbranch confrontations that has made their resolution more difficult. Among the more significant issues left open included whether the President has to have actually seen or been familiar with the disputed matter; whether the presidential privilege encompasses documents and information developed by, or in the possession of, officers and employees in the departments and agencies of the Executive Branch; whether the privilege encompasses all communications with respect to which the President may be interested or is it confined to presidential decisionmaking and, if so, is it limited to any particular type of presidential decisionmaking; and precisely what kind of demonstration of need must be shown to justify release of materials that qualify for the privilege. The unanimous panel in *In re Sealed Case* authoritatively addressed each of these issues in a manner that may have drastically altered the future legal playing field in resolving such disputes. A current dispute with Congress involving a presidential exercise of the pardon power has drawn a formal claim of privilege by President Clinton and may serve to amplify the law in this area. It is useful, however, before proceeding with a description and explication of *In re Sealed Case,* to review and understand the prior case law and how it has affected the positions of the disputants.

The Watergate Cases

In interbranch information disputes since the early 1980's, executive statements and positions taken in justification of assertions of executive privilege have frequently rested upon explanations of executive privilege made by the courts. To better understand the executive's stance in this area, and the potential impact on those positions of *In re Sealed Case,* we will chronologically examine the development of the judiciary's approach and describe how the executive has adapted the judicial explanations of the privilege to support its arguments.

In *Nixon* v. *Sirica,*[8] the first of the Watergate cases, a panel of the District of Columbia Circuit rejected President Nixon's claim that he was absolutely immune from all compulsory process whenever he asserted a formal claim of executive privilege, holding that while presidential conversations are "presumptively privileged"[9] the presumption could be overcome by an appropriate showing of public need by the branch seeking access to the conversations. In *Sirica,* "a uniquely powerful," albeit

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[7] 121 F.3d 729 (D.C. Cir. 1997).

[8] 487 F.2d 750 (D.C. Cir. 1973).

[9] 487 F.2d at 717.

undefined, showing was deemed to have been made by the Special Prosecutor that the tapes subpoenaed by the grand jury contained evidence necessary to carrying out the vital function of determining whether probable cause existed that those indicted had committed crimes.[10]

The D.C. Circuit next addressed the Senate Watergate Committee's effort to gain access to five presidential tapes in *Senate Select Committee on Presidential Campaign Activities v. Nixon*.[11] The appeals court initially determined that "[t]he staged decisional structure established in *Nixon v. Sirica"* was applicable "with at least equal force here."[12] Thus in order to overcome the presumptive privilege and require the submission of materials for court review, a strong showing of need had to be established. The appeals court held that the Committee had not met its burden of showing that "the subpoenaed evidence is demonstrably critical to the responsible fulfillment of the Committee's function."[13] The court held that, in view of the initiation of impeachment proceedings by the House Judiciary Committee, the overlap of the investigative objectives of both committees, and the fact that the impeachment committee already had the tapes sought by the Senate Committee, "the Select Committee's immediate *oversight* need for the subpoenaed tapes is, from a congressional perspective, merely cumulative."[14] Nor did the court feel that the Committee had shown that the subpoenaed materials were "critical to the performance of [its] *legislative functions."* [15] The court could discern "no specific legislative decisions that cannot responsibly be made without access to materials uniquely contained in the tapes or without resolution of the ambiguities that the [presidentially released] transcripts may contain."[16] The court concluded that the subsequently initiated and nearly completed work of the House Judiciary Committee had in effect preempted the Senate Committee: "More importantly,.., there is no indication that the findings of the House Committee on the Judiciary and, eventually the House of Representatives itself, are so likely to be inconclusive or long in coming that the Select Committee needs immediate access of its own."[17]

The D.C. Circuit's view in *Senate Select Committee* that the Watergate committee's oversight need for the requested materials was "merely cumulative" in light of the concurrent impeachment inquiry, has been utilized by the Executive as the basis for arguing that the Congress' interest in executive information is less compelling when a committee's function is oversight than when it is considering specific

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[10] *Id.*

[11] 498 F.2d 725 (D.C. Cir. 1974).

[12] 498 F.2d at 730-31.

[13] *Id.* at 731.

[14] *Id.* at 732 (emphasis supplied).

[15] *Id.* (emphasis supplied).

[16] *Id.* at 733.

[17] *Id.*

legislative proposals.[18] This approach, however, arguably misreads the carefully circumscribed holding of the court, and would seem to construe too narrowly the scope of Congress' investigatory powers.

The *Senate Select Committee* court's opinion took great pains to underline the unique and limiting nature of the case's factual and historical context. Thus it emphasized the overriding nature of the "events that have occurred since this litigation was begun and, indeed, since the District Court issued its decision."[19] These included the commencement of impeachment proceedings by the House Judiciary Committee, a committee with an "express constitutional source," whose "investigative objectives substantially overlap" those of the Senate Committee; that the House Committee was presently in possession of the very tapes sought by the Select Committee, making the Senate Committee's need for the tapes "from a congressional perspective, merely cumulative;" the lack of evidence indicating that Congress itself attached any particular value to "having the presidential conversations scrutinized by two committees simultaneously;" that the necessity for the tapes in order to make "legislative judgments has been substantially undermined by subsequent events," including the public release of transcripts of the tapes by the President; the transfer of four of five of the original tapes to the district court; and the lack of any "indication that the findings of the House Committee on the Judiciary and, eventually, the House of Representatives itself, are so likely to be inconclusive or long in coming that the Select Committee needs immediate access of its own."[20] The appeals court concluded by reiterating the uniqueness of the case's facts and temporal circumstances: "We conclude that the need demonstrated by the Select Committee in the peculiar circumstances of this case, including the subsequent and on-going investigation of the House Judiciary Committee, is too attenuated and too tangential to its functions to permit a judicial judgment that the President is required to comply with the Committee's subpoena."[21]

The Executive's position arguably ignores the roots of Congress' broad investigatory powers that reach back to the establishment of the Constitution and which have been continually reaffirmed by the Supreme Court. As George Mason recognized at the Constitutional Convention, Congress "are not only Legislators but

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[18] The proposition has been a persistent characteristic of the statements of the Reagan, Bush and Clinton Administrations. See, *e.g.*, Letter from Attorney General William French Smith to President Reagan, October 31, 1981, *reprinted in* 5 Op. OLC 27, 30 (1981) (Smith Letter/Watt); Memorandum to General Counsels' Consultative Group Re: Congressional Requests for Confidential Executive Branch Information, 13 Op. OLC 185, 192 (1989)(Barr Memo); Letter from Attorney General Janet Reno to President Clinton, September 20, 1996, at 2-3 (Reno Letter/Haiti); Letter from Attorney General Janet Reno to President Clinton, September 16, 1999 (Reno/FALN).

[19] 498 F. 2d at 731.

[20] *Id.* at 732-33.

[21] *Id.* at 733.

they possess inquisitorial power. They must meet frequently to inspect the Conduct of the public offices." [22] Woodrow Wilson remarked:

> Quite as important as legislation is vigilant oversight of administration; and even more important than legislation is the instruction and guidance in political affairs which the people might receive from a body which kept all national concerns suffused in a broad daylight of discussion. . . . The informing functions of Congress should be preferred even to its legislative function. The argument is not only that a discussed and interrogated administration is the only pure and efficient administration, but, more than that, that the only really self-governing people is that people which discusses and interrogates its administration.[23]

The Supreme Court has cited Wilson favorably on this point.[24] Moreover, the Court has failed to make any distinction between Congress' right to executive branch information in pursuit of its oversight function and in support of its responsibility to enact, amend, and repeal laws. In fact, the Court has recognized that Congress' investigatory power "comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste."[25] Thus, to read *Senate Select Committee* as downplaying the status of oversight arguably ignores the court's very specific reasons for not enforcing the committee's subpoena under the unique circumstance of that case and creates a distinction between oversight and legislating that has yet to be embraced by the courts.

Two months after the ruling in *Senate Select Committee,* the Supreme Court issued its unanimous ruling in *United States v. Nixon,*[26] which involved a judicial trial subpoena to the President at the request of the Watergate Special Prosecutor for tape recordings and documents relating to the President's conversations with close aides and advisors. For the first time, the Court found a constitutional basis for the doctrine of executive privilege in "the supremacy of each branch within its own assigned area of constitutional duties" and in the separation of powers.[27] But although it considered a president's communications with his close advisors to be "presumptively privileged," the Court rejected the President's contention that the privilege was absolute, precluding judicial review whenever it is asserted.[28] Also, while acknowledging the need for confidentiality of high level communications in the exercise of Article II

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[22] 2 The Records of the Constitutional Convention of 1787, at 206 (Max Farrand, ed., 1966).

[23] Woodrow Wilson, Congressional Government 195, 198 (Meridian Books 1956)(1885).

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

[25] *Watkins v. United States*, 354 U.S. 173, 187 (1957). See also, *McGrain v. Daugherty*, 272 U.S. 135, 177 (1926); *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504 n. 15(1975).

[26] 418 U.S. 683 (1974)(*Nixon* I).

[27] 418 U.S. 705, 706. *See also, id.* at 708, 711.

[28] *Id.* at 705, 706, 708.

powers, the Court stated that when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such communications," a confrontation with other values arises."[29] It held that "absent a need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of presidential communications is significantly diminished by production of" materials that are essential to the enforcement of criminal statutes.[30]

Having concluded that the claim of privilege was qualified, the Court resolved the "competing interests" -- the President's need for confidentiality vs. the judiciary's need for materials in a criminal proceeding -- "in a manner that preserves the essential functions of each branch,"[31] holding that the judicial need for the tapes, as shown by a "demonstrated, specific need for evidence in a pending criminal trial," outweighed the President's "generalized interest in confidentiality . . .".[32] The Court was careful, however, to limit the scope of its decision, noting that "we are not here concerned with the balance between the President's generalized interest in confidentiality . . . and congressional demands for information." [33]

In the last of the *Nixon* cases, *Nixon* v. *Administrator of General Services*[34], the Supreme Court again balanced competing interests in President Nixon's White House records. The Presidential Recordings and Materials Preservation Act granted custody of President Nixon's presidential records to the Administrator of the General Services Administration who would screen them for personal and private materials, which would be returned to Mr. Nixon, but preserve the rest for historical and governmental objectives. The Court rejected Mr. Nixon's challenge to the Act, which included an argument based on the "presidential privilege of confidentiality." [35] Although *Nixon* II did not involve an executive response to a congressional probe, several points emerge from the Court's discussion that bear upon Congress' interest in confidential executive branch information. First, the Court reiterated that the executive privilege it had announced in *Nixon* I was not absolute, but qualified.[36] Second, the Court stressed the narrow scope of that privilege. "In [*Nixon* I] the Court held that the privilege is limited to communications `in performance of [a President's] responsibilities . . . of his office' . . . and made in the process of shaping policies and making decisions."[37] Third, the Court found that there was a "substantial public interest[]" in preserving these materials so that Congress, pursuant to its "broad investigative power," could examine them to understand the events that led to

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[29] *Id.* at 706.

[30] *Id.*

[31] *Id.* at 707.

[32] *Id.* at 713.

[33] *Id.* at 712 n. 19.

[34] 433 U.S. 425 (1977)(*Nixon* II).

[35] *Id.* at 439.

[36] *Id.* at 446.

[37] *Id.* at 449 (citations omitted).

President Nixon's resignation "in order to gauge the necessity for remedial legislation."[38]

Post-Watergate Cases

Two post-Watergate cases, both involving congressional demands for access to executive information, demonstrate both the judicial reluctance to involve itself in the essentially political confrontations such disputes represent but also the willingness to intervene where the political process appears to be failing.

In *United States v. AT&T,*[39] the D.C. Circuit was unwilling to balance executive privilege claims against a congressional demand for information unless and until the political branches had tried in good faith but failed to reach an accommodation.[40] In that case, the Justice Department had sought to enjoin AT&T's compliance with a subpoena issued by a House subcommittee. The subcommittee was seeking FBI letters requesting AT&T's assistance with warrantless wiretaps on U.S. citizens allegedly made for national security purposes. The Justice Department argued that the executive branch was entitled to sole control over the information because of "its obligation to safeguard the national security."[41] The House of Representatives, as intervenor, argued that its rights to the information flowed from its constitutionally-implied power to investigate whether there had been abuses of the wiretapping power. The House also argued that the court had no jurisdiction over the dispute because of the Speech or Debate Clause.

The court rejected the "conflicting claims of the [Executive and the Congress] to absolute authority."[42] With regard to the executive's claim, the court noted that there was no absolute claim of executive privilege against Congress even in the area of national security:

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

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[38] *Id.* at 453.

[39] 567 F.2d 121 (D.C. Cir. 1977).

[40] This was the second time the case was before the court. After its initial review it was remanded to the district court to allow the parties further opportunity to negotiate an accommodation. *See* 551 F.2d 384 (D.C. Cir. 1976).

[41] *Id.* at 127 n.17.

[42] *Id.* at 128.

> Senate, consent to treaties and the appointment of ambassadors.[43]

Likewise, the court rejected the congressional claim that the Speech or Debate Clause was "intended to immunize congressional investigatory actions from judicial review. Congress' investigatory power is not, itself, absolute."[44]

According to the court, judicial intervention in executive privilege disputes between the political branches is improper unless there has been a good faith but unsuccessful effort at compromise.[45] There is in the Constitution, the court held, a duty that the executive and Congress attempt to accommodate the needs of each other:

> The framers, rather than attempting to define and allocate all governmental power in minute detail, relied, we believe, on the expectation that where conflicts in scope of authority arose between the coordinate branches, a spirit of dynamic compromise would promote resolution of the dispute in the manner most likely to result in efficient and effective functioning of our governmental system. Under this view, the coordinate branches do not exist in an exclusively adversary relationship to one another when a conflict in authority arises. Rather, each branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation.[46]

The court refused to resolve the dispute because the executive and the Congress had not yet made that constitutionally-mandated effort at accommodation. Instead, the court "encouraged negotiations in order to avoid the problems inherent in [the judiciary] formulating and applying standards for measuring the relative needs of the [executive and legislative branches]."[47] The court suggested, however, that it would resolve the dispute if the political branches failed to reach an accommodation.[48] The court-encouraged negotiations ultimately led to a compromise. Subcommittee staff was allowed to review some unedited memoranda describing the warrantless wiretaps

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[43] *Id.* at 128.

[44] *Id.* at 129.

[45] *Id.* at 127-28.

[46] *Id.* at 127 (footnote omitted).

[47] *Id.* at 130.

[48] *Id.* at 123, 126.

and report orally to subcommittee members. The Justice Department retained custody of the documents.[49]

The federal district court in the District of Columbia displayed the same reluctance to intervene in an executive privilege dispute with Congress in *United States v. House of Representatives.*[50] There the court dismissed a suit brought by the Justice Department seeking a declaratory judgment that the Administrator of the Environmental Protection Agency (EPA) "acted lawfully in refusing to release certain documents to a congressional subcommittee" at the direction of the President.[51] The Administrator based her refusal upon President Reagan's invocation of executive privilege against a House committee probing the EPA's enforcement of hazardous waste laws. The court dismissed the case, without reaching the executive privilege claim, on the ground that judicial intervention in a dispute "concerning the respective powers of the Legislative and Executive Branches . . . should be delayed until all possibilities for settlement have been exhausted."[52] "Compromise and cooperation, rather than confrontation, should be the aim of the parties." [53] As the Court of Appeals had done in *United States v. AT&T*, the district court in *United States v. House of Representatives* encouraged the political branches to settle their dispute rather than invite judicial intervention. Only if the parties could not agree would the court intervene and resolve the interbranch dispute.[54] Ultimately the branches did reach an agreement and the court did not need to balance executive and congressional interests.[55]

Executive Branch Positions On The Scope of Executive Privilege

Not surprisingly, the executive branch has developed an expansive view of executive privilege in congressional investigations, taking maximum advantage of the vague and essentially undefined terrain within the judicially recognized contours of the privilege. Thus, executive branch statements have identified four areas that are asserted to be presumptively covered by executive privilege: foreign relations and military affairs, two separate topics that are sometimes lumped together as "state secrets," law enforcement investigations, and confidential information that reveals the executive's "deliberative process" with respect to policymaking. Typically, the executive has asserted executive privilege based upon a combination of the deliberative process exemption and one or more of the other categories. As a consequence, much of the controversy surrounding invocation of executive privilege has centered on the scope of the deliberative process exemption. The executive has argued that at its core this category protects confidential predecisional deliberative

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[49] *Id.* at 131-32.

[50] 556 F.Supp. 150 (D.D.C. 1983).

[51] *Id.* at 151.

[52] *Id.* at 152.

[53] *Id.* at 153.

[54] *Id.* at 152.

[55] *See* Devins, *supra,* at 118-120.

material.[56] Justifications for this exemption often draw upon the language in *United States v. Nixon* that identifies a constitutional value in the President receiving candid advice from his subordinates and awareness that any expectation of subsequent disclosure might temper needed candor.[57] The result has been a presumption by the executive that its predecisional deliberations are beyond the scope of congressional demand. "Congress will have a legitimate need to know the preliminary positions taken by Executive Branch officials during internal deliberations only in the rarest of circumstances".[58] According to this view, the need for the executive to prevent disclosure of its deliberations is at its apex when Congress attempts to discover information about ongoing policymaking within the executive branch. In that case, the executive has argued, the deliberative process exemption serves as an important boundary marking the separation of powers. When congressional oversight "is used as a means of participating directly in an ongoing process of decisionmaking within the Executive Branch, it oversteps the bounds of the proper legislative function."[59]

The executive has also argued that because candor is the principal value served by the exemption, its protection should extend beyond predecisional deliberations to deliberations involving decisions already made. "Moreover, even if the decision at issue had already been made, disclosure to Congress could still deter the candor of future Executive Branch deliberations."[60] Executives have also taken the position that the privilege covers confidential communications with respect to policymaking well beyond the confines of the White House and the President's closest advisors. The

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[56] See Smith letter, *supra* note 18, 5 Op. OLC at 28-31; Barr Memo, *supra* n.18, 13 Op. OLC at 187-190; Reno/FALN letter, *supra* n. 18.

[57] See, *e.g.*, 418 U.S. at 705. See also, Smith Letter, *supra*, note 18, 5 Op. OLC at 29; Memorandum for All Executive Department and Agency General Counsel's Re: Congressional Requests to Departments and Agencies Protected By Executive Privilege, September 28, 1994, at 1, 2 (Cutler Memo); Letter from Jack Quinn to Hon. William A. Zellif, Jr., Oct. 1, 1996, at 1 (Quinn Letter/FBI); Memorandum from President Bush to Secretary of Defense Richard Cheney Re: Congressional Subpoena for an Executive Branch Document, August 8, 1991, at 1 (Bush Memo).

[58] Smith Letter/Watt, *supra* n. 18 at 31; see also *id.* at 30 ("congressional oversight interest will support a demand for predecisional, deliberative documents in the possession of the Executive Branch only in the most unusual circumstances"). *Accord*, Barr Memo, *supra* n.185 at 192 ("Congress will seldom have any legitimate legislative interest in knowing the precise predecisional positions and statements of particular Executive Branch officials".).

[59] Smith Letter/Watt, *supra* n. 18 at 30; *see also* Statement of Assistant Attorney General William H. Rehnquist, reprinted in Executive Privilege: The Withholding of Information by the Executive: Hearings Before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, 92d Cong. 1st Sess. 424 (Rehnquist Statement). ("The notion that the advisors whom he has chosen should bear some sort of a hybrid responsibility to opinion makers outside of the government, which notion in practice would inevitably have the effect of diluting their responsibility to him, is entirely inconsistent with our tripartite systems of government. The President is entitled to undivided and faithful advice from his subordinates, just as Senators and Representatives are entitled to the same sort of advice from their legislative and administrative assistants, and judges to the same sort of advice from their law clerks".).

[60] Smith Letter/Watt, *supra* n. 18, 5 Op. OLC at 29.

Eisenhower Administration took the most expansive approach, arguing that the privilege applied broadly to advice on official matters among employees of the executive branch.[61] The Nixon Administration appears to have taken a similar view, arguing that the privilege applied to decisionmaking at a "high governmental level," but conceding that the protected communication must be related to presidential decisionmaking.[62] The Reagan Justice Department appears to have taken a slightly narrower view of the scope of the privilege, requiring that the protected communications have some nexus to the presidential decisionmaking process.[63]

The Bush Administration took the position that recommendations made to senior department officials and communications of senior policymakers throughout the executive branch were protected by executive privilege without regard to whether they involved communications intended to go to the President.[64] Finally, the Clinton administration has taken the similarly expansive position that all communications within the White House[65] or between the White House and any federal department or agency[66] are presumptively privileged.

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[61] See Rozell, *supra*, at 44-46.

[62] In his prepared statement to the Subcommittee on Separation of Powers of the Senate Judiciary Committee, Assistant Attorney General Rehnquist distinguished between "those few executive branch witnesses whose sole responsibility is that of advising the President" who "should not be required to appear [before Congress] at all, since all of their official responsibilities would be subject to a claim of privilege" and "the executive branch witness . . . whose responsibilities include the administration of departments or agencies established by Congress, and from whom Congress may quite properly require extensive testimony," subject to "appropriate" claims of privilege. Rehnquist Statement, *supra* n. 10 at 427. Moreover, in colloquy with Senator Helms, Mr. Rehnquist seemed to accept that the privilege protected only communications with some nexus to presidential decisionmaking:

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

Id. at 439-40.

[63] See Memorandum for the Attorney General Re: Confidentiality of the Attorney General's Communications in Counseling the President, 6 0p. OLC 481, 489 (1982)(Olson Memo).

[64] Bush Memo, *supra* n. 57 at 1. Letter from General Counsel, DOD, Terrence O'Donnell to Hon. John Conyers, Jr., Oct. 8, 1991, at 5 (O'Donnell Letter).

[65] See, *e.g.*, Cutler Memo, *supra* n. 57 at 2.

[66] See, *e.g.*, Cutler Memo, *supra* n. 57 at 2 (Communications between White House and departments or agencies, including advice to or from to White House); Reno/FALN letter, (continued...)

The executive has acknowledged some limits to its use of executive privilege. Thus, presidents have stated they will not use executive privilege to block congressional inquiries into allegations of fraud, corruption, or other illegal or unethical conduct in the executive branch. The Clinton Administration has announced that "[i]n circumstances involving communications relating to investigations of personal wrongdoing by government officials, it is our practice not to assert executive privilege, either in judicial proceedings or in congressional investigations and hearings."[67] Similarly, the Reagan Administration policy was to refuse to invoke executive privilege when faced with allegations of illegal or unethical conduct: "[T]he privilege should not be invoked to conceal evidence of wrongdoing or criminality on the part of executive officers."[68] A significant application of this policy came in the Iran/Contra investigations when President Reagan did not assert executive privilege and even made "relevant excerpts" of his personal diaries available to congressional investigators.[69]

The executive has often tied its willingness to forego assertion of privilege claims to the recognized exceptions to the deliberative process exemption, stating that it would not seek to protect materials whose disclosure "would not implicate or hinder" the executive decisionmaking processes.[70] Thus, "factual, nonsensitive materials -- communications from the Attorney General [or other executive branch official] which do not contain advice, recommendations, tentative legal judgments, drafts of documents, or other material reflecting deliberative or policymaking processes -- do not fall within the scope of materials for which executive privilege may be claimed as a basis of nondisclosure."[71]

Recent administrations have stated that their policy "is to comply with congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch."[72] Executive

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[66](...continued)
supra n. 18.

[67] Cutler Memo, *supra* n. 8 at 1.

[68] Congressional Subpoenas of Department of Justice Investigative Files, 8 Op. OLC 315 (1984). *Accord* Smith Letter/EPA, *supra* n. 18 at 36 ("These principles will not be employed to shield documents which contain evidence of criminal or unethical conduct by agency officials from proper review".).

[69] *See* David Hoffman, "President Offers to Share Iran Sales Notes with Hill; Aides Reversed on Memoir Materials", *Washington Post*, February 3, 1987, at A1.

[70] Olson Memo, *supra* n. 62 at 486.

[71] *Id.*; see also Smith Letter/EPA, *supra* n. 18 at 32 ("policy does not extend to all material contained in investigative files. . . The only documents which have been withheld are those which are sensitive memoranda or notes by . . . attorneys and investigators reflecting enforcement strategy, legal analysis, lists of potential witnesses, settlement considerations, and similar materials the disclosure of which might adversely affect a pending enforcement action, overall enforcement policy, or the rights of individuals".).

[72] Cutler Memo, *supra* n. 57 at 1. *Accord* Memorandum from President Reagan for the (continued...)

privilege will be invoked only after "careful review,"[73] in the "most compelling circumstances,"[74] and only after the executive has done "the utmost to reach an accommodation" with Congress.[75] The Bush Administration limited the formal claims of executive privilege to those instances where the effort to accommodate had failed and Congress had issued a subpoena.[76] The duty to seek an accommodation is the result of the uncertain boundaries between executive and legislative interests.[77] This uncertainty imposes upon each of the branches an "obligation. . . to accommodate the legitimate needs of the other",[78] and a duty to conduct "good faith" negotiations.[79] Avoiding the disclosure of embarrassing information is not a sufficient reason to withhold information from Congress.[80] In fact it has been averred that invocation of the privilege should not even be considered in the absence of a "demonstrable justification that Executive withholding will further the public interest."[81]

Where negotiations have faltered and the President has made a formal claim of executive privilege, the executive will likely argue (as the Clinton Administration has in its latest invocations of executive privilege[82]) that the investigating committee has not made the showing required under *Senate Select Committee v. Nixon* that the subpoenaed evidence is "demonstrably critical to the responsible fulfillment of the Committee's functions."[83] As has been indicated above, since at least the Reagan Administration, each executive has argued that Congress's interest in executive information is less compelling when the Committee's function is oversight than when it is considering specific legislative proposals.

In sum, then, in the absence of further judicial definition of executive privilege since the Nixon cases, the executive, through presidential statements, Office of Legal Counsel Opinions, and, most recently, White House Counsel directives, has attempted to effect a practical expansion of the scope of the privilege. The key vehicle has been

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[72](...continued)
Heads of Executive Departments, and Agencies Re: Procedures for Governing Responses to Congressional Requests for Information, November 4, 1982 (Reagan Memo).

[73] Cutler Memo, *supra* n. 57 at 1.

[74] Reagan Memo, *supra* n. 71, at 1.

[75] Barr Memo, *supra* n. 18, at 185.

[76] *Id.* at 185, 186.

[77] Rehnquist Statement, *supra* n. 61, at 420.

[78] Smith Letter/Watt, *supra* n. 18, at 31.

[79] Reagan Memo, *supra* n. 71, at 1.

[80] Rehnquist Statement, *supra* n. 61, at 422.

[81] *Id.*

[82] Letter from Attorney General Janet Reno to President Clinton, September 20, 1996, at 2-3 (Reno Letter/Haiti); Letter from Attorney General Reno to President Clinton, September 30, 1996, at 2 (Reno Letter/FBI); Letter from Attorney General Reno to President Clinton, September 16, 1999 (Reno Letter/FALN).

[83] 498 F.2d at 731.

the notion of deliberative process. Developed under the Freedom of Information Act to provide limited protection for the predecisional considerations of agency officials, it has been melded with the recognized presidential interest in confidentiality of his communications with his close advisors to include pre-and post-decisional deliberations and the factual underpinnings of those decisional processes, and is argued to reach policy deliberations and communications of department and agency officials and employees in which the President may have an interest. The Clinton Administration has sought to make this doctrinal expansion effective by centralizing scrutiny and control of all potential claims of executive privilege in the White House Counsel's Office. In a memorandum dated September 28, 1994, from White House Counsel Lloyd Cutler to all department and agency general counsels, agency heads were instructed to directly notify the White House Counsel of any congressional request for "any document created in the White House . . . or in a department or agency, that contains deliberations of, or advice to or from the White House" which may raise privilege issues. The White House Counsel is to seek an accommodation and if that does not succeed, he is to consult with the Attorney General to determine whether to recommend invocation of privilege to the President. The President then determines whether to claim privilege, which is then communicated to the Congress by the White House Counsel.[84]

The Cutler memo modifies President Reagan's 1982 establishment of a more decentralized procedure. Under the Reagan memorandum if the head of an agency, with the advice of agency counsel, decided that a substantial question was raised by a congressional information request, the Attorney General, through the Office of Legal Counsel, and the White House Counsel's Office, was promptly notified and consulted. If one or more of the presidential advisors deemed the issue substantial, the President was informed and decided, and the decision was to be communicated by the agency head to the Congress. The Reagan memo also contrasts with the Cutler memo in that it had a far narrower definition of what the privilege covered. The Reagan memo pinpointed national security, deliberative communications that form part of the decisionmaking process, and other information important to the discharge of Executive Branch constitutional responsibilities.[85]

In addition, recent administrations have aggressively challenged congressional efforts to engage in oversight, often based on the *Senate Select Committee* decision, but also on a broad view of the insulation presumed to be provided by prosecutorial discretion when congressional investigations of agency law enforcement activities is involved.

Establishing the White House Counsel's Office as a central clearinghouse and control center for presidential privilege claims appears to have had the effect of diminishing the historic role of the Justice Department's Office of Legal Counsel as the constitutional counselor to the President and limiting agencies' ability to deal informally with their congressional overseers, which is likely to have been its principal objective. An apparent consequence has been a more rapid escalation of individual interbranch information disputes clashes, a widening and hardening of the differences

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[84] Cutler Memo, *supra* n. 18 at 2-3.

[85] Reagan Memo, *supra* n. 71 at 2.

in the legal positions of the branches on privilege issues, and an increased difficulty in resolving disputes informally and quickly. President Clinton has formally asserted executive privilege four times and has resolved a number of disputes under the pressure of imminent committee actions on contempt citations and subpoena issuances.[86] In addition, the Clinton Administration has litigated, and lost, significant privilege cases in the last two years.[87] One, *In re Sealed Case,* to which we now turn, arguably undermines many key executive assumptions about the privilege just detailed and thus may reshape the nature and course of future presidential privilege disputes.

Implications and Potential Impact of *In Re Sealed Case* For Future Executive Privilege Disputes

In *In re Sealed Case,*[88] the appeals court addressed several important issues left unresolved by the Watergate cases: the precise parameters of the presidential executive privilege; how far down the chain of command the privilege reaches; whether the President has to have seen or had knowledge of the existence of the documents for which he claims privilege; and what showing is necessary to overcome a valid claim of privilege.

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

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[86] See Appendix A for a compilation of executive privilege claims from the Kennedy through the Clinton Administrations.

[87] *Clinton v. Jones*, 117 S Ct. 1636 (1997)(no temporary presidential immunity from civil suit for unofficial acts); *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997), *cert. denied* 117 S.Ct. 2487 (1997)(claims of attorney-client and work product privilege denied); *In re Sealed Case,* 121 F.3d 729 (D.C. Cir 1977)(claims of executive privilege rejected); *In re Sealed Case*, 124 F.3d 230 (D.C. Cir. 1997)(claims of attorney-client and work product privilege denied); *In re Sealed Case*, 148 F. 3d 1073, (D.C. Cir. 1998) (claim of "protective function" privilege denied); *In re Bruce R. Lindsey (Grand Jury Testimony)*, 148 F. 3d 1100 (D.C. Cir. 1998) (claims of attorney-client and work product privilege denied).

[88] 121 F.3d 729 (D.C. Cir. 1997).

of the grand jury's need for the documents. The appeals court panel unanimously reversed.

At the outset, the court's opinion carefully distinguishes 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 decisionmaking. But the deliberative process privilege applies to executive branch officials generally, is a common law privilege which requires a lower threshold of need to be overcome, and "disappears altogether when there is any reason to believe government misconduct has occurred."[89]

On the other hand, the court explained, the presidential communications privilege is rooted in "constitutional separation of powers principles and the President's unique constitutional role" and applies only to "direct decisionmaking by the President."[90] 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."[91] The presidential privilege applies to all documents in their entirety[92] and covers final and post-decisional materials as well as pre-deliberative ones.[93]

Turning to the chain of command issue, the court held that 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 inability of the deliberative process privilege to provide advisers with adequate freedom from the public spotlight" and "the need to provide sufficient elbow room for advisers to obtain information from all knowledgeable sources."[94] Thus the privilege will "apply both to communications which these advisers solicited and received from others as well as those they authored themselves. The privilege must also extend to

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[89] 121 F.3d at 745, 746; see also *id.* at 737-738 ("[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'").

[90] Id. at 745, 752. See also *id.* at 753 ("...these communications nonetheless are ultimately connected with presidential decisionmaking".).

[91] Id. at 754. See also *id.* at 757.

[92] 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. 121 F.3d at 737.

[93] Id. at 745.

[94] *Id.* at 752.

communications authored or received in response to a solicitation by members of a presidential adviser's staff."[95]

The court, however, was acutely aware of the dangers to open government that a limitless extension of the privilege risks and carefully cabined its reach by explicitly confining it to White House staff, and not staff in the agencies, and then only to White House staff that has "operational proximity" to direct presidential decisionmaking.

> We are aware that such an extension, unless carefully circumscribed to accomplish the purposes of the privilege, could pose a significant risk of expanding to a large swath of the executive branch a privilege that is bottomed on a recognition of the unique role of the President. In order to limit this risk, the presidential communications privilege should be construed as narrowly as is consistent with ensuring that the confidentiality of the President's decisionmaking process is adequately protected. Not every person who plays a role in the development of presidential advice, no matter how remote and removed from the President, can qualify for the privilege. In particular, the privilege should not extend to staff outside the White House in executive branch agencies. Instead, the privilege should apply only to communications authored or solicited and received by those members of an immediate White House advisor's staff who have broad and significant responsibility for investigation and formulating the advice to be given the President on the particular matter to which the communications relate. Only communications at that level are close enough to the President to be revelatory of his deliberations or to pose a risk to the candor of his advisers. *See* AAPS, 997 F.2d at 910 (it is "operational proximity" to the President that matters in determining whether "[t]he President's confidentiality interests" is implicated)(emphasis omitted).
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> Of course, the privilege only applies to communications that these advisers and their staff author or solicit and receive in the course of performing their function of advising the President on official government matters. This restriction is particularly important in regard to those officials who exercise substantial independent authority or perform other functions in addition to advising the President, and thus are subject to FOIA and other open

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[95] Id.

> government statutes. See *Armstrong v. Executive Office of the President*, 90 F.3d 553, 558 (D.C. Cir. 1996), *cert denied* -- U.S. ---, 117 S.Ct. 1842, 137 L. Ed.2d 1046 (1997). The presidential communications privilege should never serve as a means of shielding information regarding governmental operations that do not call ultimately for direct decisionmaking by the President. If the government seeks to assert the presidential communications privilege in regard to particular communications of these "dual hat" presidential advisers, the government bears the burden of proving that the communications occurred in conjunction with the process of advising the President.[96]

The appeals court's limitation of the presidential communications privilege to "direct decisionmaking by the President" makes it imperative to identify the type of decisionmaking to which it refers. A close reading of the opinion makes it arguable that it is meant to encompass only those functions that form the core of presidential authority, involving what the court characterized as "quintessential and non-delegable Presidential power."[97] In the case before it the court was specifically referring to the President's Article II appointment and removal power which was the focal point of the advice he sought in the Espy matter. But it seems clear from the context of the opinion that the description was meant to be in juxtaposition with the appointment and removal power and in contrast with "presidential powers and responsibilities" that "can be exercised or performed without the President's direct involvement, pursuant to a presidential delegation of authority or statutory framework."[98] 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.[99]

The appeals court, then, would appear to be confining the parameters of the newly formulated presidential communications privilege by tying it to those Article II functions that are identifiable as "quintessential and non-delegable," which would appear to include, in addition to the appointment and removal powers, the commander-in-chief power, the sole authority to receive ambassadors and other public ministers, the power to negotiate treaties, and the power to grant pardons and reprieves. On the other hand, decisionmaking vested by statute in the President or

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[96] Id. (footnote omitted).

[97] Id. at 752.

[98] Id. at 752-53.

[99] See, *e.g., Kendall ex rel. Stokes v. United States*, 37 U.S. (12 Pet.) 522, 612-613 (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).

agency heads such as rulemaking, environmental policy, consumer protection, workplace safety and labor relations, among others, would not necessarily be covered. Of course, the President's role in supervising and coordinating (but not displacing) decisionmaking in the executive branch remains unimpeded. But his communications in furtherance of such activities would presumably not be cloaked by constitutional privilege.

Such a reading of this critical passage of the court's opinion is consonant with the court's view of the source and purpose of the presidential communications privilege and its expressed need to confine it as narrowly as possible. Relying on *Nixon I,* the *In re Sealed Case* court identifies "the President's Article II powers and responsibilities as the constitutional basis of the presidential communications privilege... Since the Constitution assigns these responsibilities to the President alone, arguably the privilege of confidentiality that derives from it also should be the President's alone."[100] Again relying on *Nixon* I, the court pinpoints the essential purpose of the privilege: "[Tlhe privilege is rooted in the need for confidentiality to ensure that presidential decisionmaking is of the highest caliber, informed by honest advice and knowledge. Confidentiality is what ensures the expression of 'candid, objective, and even blunt or harsh opinions' and the comprehensive exploration of all policy alternatives before a presidential course of action is selected."[101] The limiting safeguard is that the privilege will apply in those instances where the Constitution provides that the President alone must make a decision. "The presidential communications privilege should never serve as a means of shielding information regarding governmental operations that do not call ultimately for direct decisionmaking by the President."[102]

It may be noted that in at least one analogous instance the White House divulged documents sought by a congressional committee which argued the more limited reading of *Espy*. When *In re Sealed Case* was decided, the House Resources Committee was in the midst of an inquiry of President Clinton's utilization of the Antiquities Act of 1906,[103] which authorizes the President, in his discretion, to declare by public proclamation objects of historic or scientific interest on federal lands to be national monuments, by reserving parcels that "shall be confined to the smallest area compatible with the proper care and management to the objects to be protected." The Act establishes no special procedures for the decision to declare a national monument and contains no provision for judicial review. Shortly before the 1996 presidential election, President Clinton reserved 1.7 million acres in Utah by proclamation. Central to the Committee's inquiry as to the propriety and integrity of the decisionmaking process that lead to the issuance of the presidential proclamation were the actions of the Council on Environmental Quality (CEQ), an office within the Executive Office of the President with about the same degree of advisory proximity as that of the White House Counsel's Office. Requests for physical production of documents from CEQ met with limited compliance: an offer to view 16 documents

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[100] 121 F.3d at 748.

[101] Id. at 750.

[102] *Id.* at 752.

[103] 16 U.S.C. 431 (1994).

at the White House. The Committee believed that it required physical possession in order to determine the propriety of the process and issued a subpoena which was not complied with on the return date.

During intense negotiations, the White House claimed the documents were covered by the presidential communications privilege, even as defined by *In re Sealed Case*. In a letter to the Committee, the White House Counsel's Office argued that the opinion did not confine the privilege to just core Article II powers, but included presidential decisionmaking encompassed within the Article II duty to take care that the laws be faithfully executed. It asserted that since the President had the sole authority to designate a monument by law, that decision process, including deliberations among and advice of White House advisers, was covered. The Committee in reply letters disagreed, arguing that *In re Sealed Case* would not encompass a statutory delegation of decisional authority. On the eve of a scheduled Committee vote on a resolution of contempt, the White House produced all the documents.[104]

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

FALN Clemency Controversy

A currently evolving interbranch dispute may provide the vehicle for illuminating the correct understanding of *Espy*. On August 11, 1999, President Clinton signed a conditional clemency offer for 16 persons convicted between 1981 and 1989 of felonies reportedly to further the cause of Puerto Rican independence. The 16 individuals were believed to have been associated with or leaders of two organizations that used criminal violence to bring notice to the cause of independence: the *Fuerzas Armadas de Liberacíon Nacional (FALN)* and *Los Macheros*. The connection

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[104] *See* 143 Cong. Rec. E2259-2272 (daily ed. Nov. 9, 1997)(Remarks of Hon. James V. Hansen presenting staff study of committee actions and documents in regard to the establishment of the Grand Staircase-Escalante National Monument). *See also* Ruth Larson, "White House Yields Papers on Utah Wilderness Decision," Wash. Times, October 23, 1997, A3. Of course, the White House action cannot be deemed a concession of the legal argument in the absence of an explanation for its decision to disclose the material.

between these individuals and certain crimes of violence is a matter of dispute, but their convictions were not for such violent crimes. On September 7, 1999, 12 of the offerees accepted conditional clemencies, and on September 9 two others also accepted. Two individuals rejected clemency.[105]

The clemency offer has become quite controversial in Congress. On September 9, 1999, the House adopted H.Con.Res 180, a resolution in opposition to the clemency offer, and several committees have begun oversight investigations. One, the House Committee on Government Reform, on September 1, 1999, issued subpoenas seeking documents from the Bureau of Prisons, the office of the Pardon Attorney in the Justice Department, and the White House Counsel's Office, and also sought testimony from certain named officials in these entities seeking information with respect to aspects of the decisional process that led to the clemency offer. On September 16, 1999, Attorney General Reno advised the President that a "compelling argument can be made . . . that Congress has no authority whatsoever to review a President's clemency decision."[106] The Attorney General reasoned that the pardon power, which is vested in the President by Article II, sec. 2, cl. 1 of the Constitution, "is unquestionably an *exclusive* province of the Executive Branch,"[107] citing the Supreme Court's 1871 ruling in *United States* v. *Klein*.[108] Thus, she concluded, "Congress' oversight authority does not extend to the process employed in connection with a particular clemency decision, to the materials generated or the discussions that took place as part of that process, or to the advice or views the President received in connection with a clemency decision."[109] The Attorney General alternatively urged that even if the Committee can demonstrate a legitimate oversight role, it can satisfy its informational needs from non-privileged documents.[110]

With respect to the compelled testimony of Administration officials, the Attorney General recurred to "the longstanding position of the executive branch that 'the President and his immediate advisors are *absolutely immune* from testimonial compulsion by a Congressional committee,'" citing past statements to that effect by various Justice Department officials,[111] advising the President to instruct subpoenaed White House Counsel not to appear. On the same date, the Deputy White House Counsel advised the Chairman of the House Government Reform Committee that "the President's authority to grant clemency is not subject to legislative oversight," and that, with the advice of the Attorney General, the President had directed her to claim executive privilege.

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[105] See, Keith Bea, *Clemency for Certain Advocates of Puerto Rican Independence: Summary of Developments and Perspectives*, CRS Report RS20331.

[106] Reno/FALN Letter, *supra* n. 18 at 2.

[107] *Id.* (emphasis supplied).

[108] 80 U.S. (13 Wall.) 128, 147 (1871).

[109] *Id.* quoting *Senate Select Committee*.

[110] *Id* at 2-3.

[111] *Id*. at 4-5 (emphasis supplied).

The privilege claim raises a number of issues. The very breadth of privilege claimed in this instance is questionable if it is understood to absolutely preclude Congress' legitimate oversight role. However, if what the Attorney General and the White House are saying is that Congress may not directly interfere with the exercise of the pardon, then the statements are unexceptionable. Indeed, that is precisely what the Supreme Court's ruling in *Klein* stands for. There the Court found that Congress had impermissibly attempted to change the effect of a presidential pardon by statutorily directing the courts in specified instances to treat the pardons as evidence of guilt and to declare them null and void.[112] That is not the situation here. Congress is not seeking to legislatively overturn the clemency grants or otherwise change or interfere with them.

The question, then, is the legitimacy of Congress's oversight interest. It could be argued that the constitutional vesting of pardon authority exclusively in the President, one not to be shared with any other branch, makes it a uniquely "core" presidential power, insulating it from all congressional scrutiny. However, positing an extreme case, not apparently in issue in the present circumstances, could it be seriously contended that credible evidence of granting pardons for material gain might not plausibly be argued to be an impeachable offense? Or if the record on which the presidential clemency decision was made might contain evidence that the release of one or more of the individuals would pose a clear and present threat to national security or public safety and was ignored, could it not similarly qualify for congressional inquiry? Apart from the remote possibility of impeachment, could not the investigation of the decisional process also reveal instances of poor administration, arbitrary and capricious behavior, abuse, waste, fraud, corruption or unethical conduct which Congress can potentially address legislatively or by fulfilling its public informing function?

But demonstrating that the exercise of the pardon power is not absolutely insulated from congressional review does not vitiate the qualified nature of the presidential privilege. A committee must demonstrate its need and the unavailability of sought-after documents and information elsewhere. The necessary degree of a showing of need may vary depending on where the documents sought were generated. If *Espy* is to be read generously, pre-existing documents and information about the individuals generated during their imprisonment are most likely not to be covered by a claim of executive privilege, even if they were part of the record on which White House advisors made their recommendations. The work product of the office of the Pardon Attorney (which is to be presented to the Attorney General for her recommendation to the President or to the White House Counsel) is more problematic, but *Espy* appears to make a distinction between officers and support personnel within the White House and remote officers and employees in executive agencies who prepare documents that may go into "direct presidential decisionmaking." Operational proximity to the President is stated by the appeals court to be the checkpoint for coverage by the privilege.

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[112] 80 U.S. at 148 ("[The Court] is required [by Congress] to disregard pardons granted by proclamation on condition, through the condition has been fulfilled, and to deny them legal effect.").

The advice the Attorney General or the White House Counsel renders directly to the President would clearly be covered by the privilege under *Espy*. The question for a court would then be whether a sufficient level of need has been demonstrated by the Committee to overcome the privilege. It would be difficult to speculate on any eventual outcome at this juncture in the proceedings.

But the possibility that a reviewing court, or the Supreme Court, would find the exercise of the pardon power special or distinct from other so-called core constitutional authorities is not out of the question. Thus the pardon power may be distinguished from other core presidential functions-appointments, national security, foreign affairs- by the fact that it is not a shared power as are all the others. The consequence in that event might be a ruling that only a high degree of credible evidence will satisfy the need requirement, and the privilege might be extended to cover deliberations in the Justice Department as well because they are deemed integral to the pardon decisional process.

Finally, with respect to the "longstanding" White House policy of not allowing White House officials to testify with respect to potentially privileged communications, it may be noted that such a policy has been honored in the breach.[113] Those "deviations" may be explained by White House considerations of the political consequences of a failure to produce the aides.[114] If past experience is a teacher, political accommodation is the most likely outcome.[115]

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[113] See Louis Fisher, White House Aides Testifying Before Congress, 27 Presidential Studies Quarterly 139 (1997) (Fisher) (Cataloging over 100 instances between 1972 and 1997 in which White House aides were allowed to testify before congressional committees).

[114] See, Fisher, *supra* n. 113, at 139.

[115] See, Devins, supra n. 2.

Appendix A

Presidential Claims of Executive Privilege From The Kennedy Through The Clinton Administrations.

Following is a brief, summary recounting of assertions of presidential claims of executive privilege from the Kennedy through the Clinton Administrations.

1. Kennedy

President Kennedy established the policy that he, and he alone, would invoke the privilege. Kennedy appears to have utilized the privilege twice with respect to information requests by congressional committees. In 1962, the President directed the Secretary of Defense not to supply the names of individuals who wrote or edited speeches requested by a Senate subcommittee investigating military Cold War education and speech review policies. The chairman of the subcommittee acquiesced to the assertion. The President also directed that his military adviser, General Maxwell Taylor, refuse to testify before a congressional committee examining the Bay of Pigs affair. See Rozell, "Executive Privilege: The Dilemma of Secrecy and Democratic Accountability" (1994), at 46-47 (Rozell).

2. Johnson

President Johnson, although he announced that he would follow the Kennedy policy of personal assertion of executive privilege, apparently did not do so in practice. Rozell, *supra*, n.1 at 47-48, catalogues three instances in which executive officials refused to comply with congressional committee requests for information or testimony which involved presidential actions but did not claim they were directed to do so by the President.

3. Nixon

President Nixon asserted executive privilege six times. He directed Attorney General Mitchell to withhold FBI reports from a congressional committee in 1970. In 1971 Secretary of State Rogers asserted privilege at the President's direction to withhold information from Congress with respect to military assistance programs. A claim of privilege was asserted at the direction of the President to prevent a White House advisor from testifying on the IT&T settlement during the Senate Judiciary Committee's consideration of the Richard Kleindienst nomination for Attorney General in 1972. Finally President Nixon claimed executive privilege three times with respect to subpoenas for White House tapes relating to the Watergate affair: once with respect to a subpoena from the Senate Select Committee; again with respect to a grand jury subpoena for the same tapes by Special Prosecutor Archibald Cox; and finally with respect to a jury trial subpoena for 64 additional tapes issued by Special Prosecutor Leon Jaworski. Rozell, *supra*, at 66-72.

4. Ford and Carter

President Ford directed Secretary State Kissinger to withhold documents during a congressional committee investigation relating to State Department recommendations to the National Security Council to conduct covert activities in 1975. President Carter directed Energy Secretary Duncan to claim executive privilege in the face of a committee's demand for documents relating to the development and implementation of a policy to impose a petroleum import fee. Rozell, *supra* at 89-96; 101-106.

5. Reagan

President Reagan directed the assertion of executive privilege before congressional committees three times: by Secretary of the Interior James Watt with respect to an investigation of Canadian oil leases (1981-82); by EPA Administrator Ann Burford with respect to Superfund enforcement practices (1982-83); and by Justice William Rehnquist during his nomination proceedings for Chief Justice with respect to memos he had written when he was Assistant Attorney for the Office of Legal Counsel in the Department of Justice (1986). Rozell, *supra*, at 115-123.

6. Bush

President Bush asserted privilege only once, in 1991, when he ordered Defense Secretary Cheney not to comply with a congressional subpoena for a document related to a subcommittee's investigation of cost overruns in, and cancellation of, a Navy aircraft program. Rozell, *supra*, at 134-135.

7. Clinton

President Clinton has apparently discontinued the policy of issuing *written* directives to subordinate officials to exercise executive privilege. Thus, in some instances, it is not totally clear when a claim of privilege by a subordinate was orally directed by the President even if it was shortly withdrawn. The following documented assertions may arguably be deemed formal invocations. 4 of the assertions occurred during grand jury proceedings. We list the individual assertions and briefly identify them in view of the time structures of this request.

i. Kennedy Notes (1995)(executive privilege initially raised but never formally asserted)(Senate Whitewater investigation). Sen. Rept. No. 104-191, 104th Cong., 1st Sess. (1995).
ii. White House Counsel Jack Quinn/Travelgate investigations (1996)(House Government Reform). H. Rept No. 104-598, 104th Cong., 2d Sess. (1996).
iii. FBI-DEA Drug Enforcement Memo (1996)(House Judiciary)
iv. Haiti/Political Assassinations Documents (1996)(House International Relations)
v. *In re Grand Jury Subpoena Duces Tecum*, 112 F. 3d 910 (8th Cir. 1997)(executive privilege claimed and then withdrawn in the district court. Appeals court rejected applicability of common interest

doctrine to communications with White House counsel's office attorneys and private attorneys for the First Lady)

vi. *In re Sealed Case*, 121 F. 3d 729 (D.C. Cir. 1997)(Espy case)(executive privilege asserted but held overcome with respect to documents revealing false statements)

vii. *In re Grand Jury Proceedings*, 5 F. Supp. 2d 21 (D.D.C. 1998)(executive privilege claimed but held overcome because testimony of close advisors was relevant and necessary to grand jury investigation of Lewinski matter and was unavailable elsewhere).

The September 9, 1998, Referral to the House of Representatives by Independent Counsel Kenneth Starr detailed the following previously undisclosed presidential claims of executive privilege (viii - xiii) before grand juries that occurred during the Independent Counsel's investigations of the Hubbell and Lewinski matters. H. Doc. 105-310, 105th Cong., 2d Sess. (1998).

viii. Thomas "Mack" McLarty (1997)(claimed at direction of President during Hubbell investigation but withdrawn prior to filing of a motion to compel).

ix. Nancy Hernreich (claimed at direction of President but withdrawn prior to March 20, 1998 hearing to compel)

x. Sidney Blumenthal (claim rejected by District Court, 5 F. Supp. 2d 21 (D.D.C. 1998). Dropped on appeal).

xi. Cheryl Mills (claimed on August 11, 1998)

xii. Lanny Breuer (claimed on August 4, 1998 and denied by Judge Johnson on August 11. *In re Grand Jury Proceeding*. Unpublished Order (Under Seal) (August 11, 1998).

xiii. Bruce Lindsey (claimed on August 28, 1998).

H. Doc. 105-310, 105th Cong, 2d Sess. 206-209 (1998).

xiv. FALN Clemency (claimed at direction of President by Deputy Counsel to the President Cheryl Mills on September 16, 1999 in response to subpoenas by House Government Reform Committee).