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Legal Sidebar

The Hur Tapes and the President's Claim of Executive Privilege

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President Biden has asserted executive privilege over audio recordings of an interview he gave to Special Counsel Robert Hur (the "Hur tapes") that are being sought by the House Judiciary and House Oversight and Accountability Committees (the Committees) as part of their ongoing impeachment investigation. The Special Counsel conducted his October 2023 interview as part of his investigation into whether the President unlawfully retained classified documents at either his private residence or at the Penn Biden Center for Diplomacy and Global Engagement. In response to this assertion of executive privilege, the Committees have recommended that the House of Representatives hold Attorney General Merrick Garland, the custodian of the recordings and the recipient of the Committees' subpoenas, in criminal contempt of Congress.

This Sidebar addresses three features of this dispute that may be of interest to Congress. First, the Sidebar considers next steps for both the House and the Department of Justice (DOJ or Department). Historical practice may suggest that if the House approves this contempt, the DOJ is unlikely to prosecute Attorney General Garland. Second, the Sidebar clarifies the privilege being asserted by President Biden. Although colloquially using the umbrella term "executive privilege," the President appears to assert the law enforcement component of executive privilege. Third, the Sidebar addresses what impact, if any, the prior disclosure of the Biden interview transcript has on the strength of the Committees' legal claim for the audio recordings.

Legislative and Executive Next Steps

The legislative process for approving a criminal contempt of Congress citation is governed by 2 U.S.C. § 194. Under that statute, when a committee reports to the House or Senate that a witness has failed to comply with a subpoena (as the Committees have done here), the President of the Senate or the Speaker of the House is to "certify" the facts of the contempt "to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action." Although the statute does not expressly require approval of the contempt citation by the committee's parent chamber, both congressional practice and at least one judicial decision suggest that approval by the House or Senate may be necessary. If House leadership chooses to proceed with the Garland contempt, it could be likely that

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the matter would be put to the full chamber for its approval before the contempt citation will be sent to the DOJ for prosecution.

If the House approves the contempt citation, executive branch policy and practice may suggest that a prosecution would be unlikely. Both Republican and Democratic Administrations have contended that, despite its mandatory language, the criminal contempt statute "was not intended to apply and could not constitutionally be applied to an executive branch official who asserts the President's claim of executive privilege." The Department has relied on this position to decline to prosecute various executive branch officials for contempt of Congress, including at least two Attorneys General. In 2012, the DOJ declined to prosecute Attorney General Eric Holder for contempt of Congress after he refused to comply with a subpoena on the ground that the President had asserted executive privilege over the demanded documents. The DOJ took the same approach in 2019 after the House cited Attorney General William Barr for contempt following his refusal to comply with a committee subpoena for documents the President believed to be protected by executive privilege. In each case, the decision not to prosecute was communicated to Congress by the Deputy Attorney General, who reiterated DOJ's "long-standing position" that it "will not prosecute an official for contempt of Congress for declining to provide information subject to a presidential assertion of executive privilege."

In light of this practice, even if the contempt citation is approved by the House, the DOJ may be unlikely to seek an indictment against Attorney General Garland. In that case, the contempt citation could stand unenforced. Still, because the statute of limitations on the violation is five years, it is possible that a subsequent Administration could break from established executive branch policy and choose to take up the prosecution within that window.

The Question of Which Executive Privilege Applies

In his letter to the Committees, Attorney General Garland informed Chairman Jim Jordan and Chairman James Comer that "the President has asserted executive privilege over the requested audio recordings." There are various executive privileges that protect the confidentiality of different types of executive branch communications. None of these privileges is absolute, and even when applicable, all require that the executive's interest in confidentiality be balanced against Congress's need for the covered information.

Two common components of executive privilege would not appear to apply to the Hur tapes. For example, although the tapes involve the President, the content of the interview does not appear to pertain to the type of presidential decisionmaking that would generally implicate the presidential communications privilege. The deliberative process privilege, another commonly asserted component of executive privilege, seems similarly inapplicable. That privilege protects a broader swath of executive branch communications that are both "pre-decisional" and "deliberative." While the Hur interview is likely pre-decisional, as it occurred before the Special Counsel's ultimate charging decision, it does not appear to be "deliberative." The point of the interview was to gather factual information, and the tapes do not otherwise appear to reflect the Special Counsel's thought process. Consistent with this view, the Attorney General's letter, and the accompanying Office of Legal Counsel (OLC) analysis, make no mention of either the deliberative process or presidential communications privileges.

In this instance, the precise executive privilege being asserted by the President appears to be the law enforcement privilege—a component of executive privilege that the executive branch views as protecting information in open (and sometimes closed) law enforcement "files." The OLC letter states that the President may invoke executive privilege over "materials contained in law enforcement files . . . 'to preserve the integrity and independence of criminal investigations and prosecutions.'"

Much is unclear about the law enforcement privilege, including where the privilege comes from, what information it covers, and how an assertion of the privilege should be balanced against Congress's

investigative interests. According to the OLC, the executive branch has asserted the privilege, including to withhold information from the other branches, on various occasions "since the early part of the 19th century." Sometimes these assertions are made to protect information gathered as part of an *open* criminal investigation. When a matter is ongoing, the executive has argued that disclosing the content of law enforcement files threatens not only the executive's conduct of the investigation or prosecution, but also the due process and privacy rights of the target of the investigation.

The privilege has also been used by the executive to protect *closed* law enforcement investigations, like Special Counsel Hur's inquiry. This position is based on the notion that disclosure might "hamper prosecutorial decision-making in future cases" or "undermine the Executive Branch's 'long-term institutional interest in maintaining the integrity of the prosecutorial decision-making process,'" including by "chilling" voluntary cooperation in future investigations. With respect to the Hur tapes, the OLC warns that "production of these recordings . . . would raise an unacceptable risk of undermining the [DOJ's] ability to conduct similar high-profile criminal investigations—in particular, investigations where the voluntary cooperation of White House officials is exceedingly important."

Congress has generally resisted executive branch claims that the law enforcement privilege can be invoked to withhold information in closed cases. In one recent example—after Special Counsel Robert Mueller completed his investigation into Russian interference in the 2016 election and submitted his final report to Attorney General Barr, who then made the report public—President Donald Trump asserted the law enforcement privilege (among other privileges and confidentiality principles) to prevent the further disclosure of evidence gathered by the Special Counsel to Congress. The House Judiciary Committee objected to that assertion, questioning the applicability of the privilege and arguing that even if the privilege applied, it had been overridden by the Committee's and the public's need for the information. The Committee ultimately voted to recommend that Attorney General Barr be held in criminal contempt by the full House for his failure to comply. The full House instead authorized the Committee to file a civil lawsuit to enforce the subpoena. Ultimately, that case was never filed, as an accommodation was reached in which the Committee was given access to portions of the material the DOJ considered protected by the law enforcement privilege.

Despite recurring conflicts over congressional access to law enforcement information held by the DOJ, no court has been presented with the opportunity to assess how the law enforcement privilege applies, if at all, in congressional investigations. (The only court that came close to considering the application of the privilege in a congressional investigation declined to do so, instead urging the parties to reach a settlement.) That fact by itself is perhaps unsurprising to many observers, given that the legislative and executive branches often resolve investigative disputes over executive privileges without involving the judiciary (as occurred with the dispute over the evidence underlying the Mueller report). It was not until 2016 that a federal court first directly addressed conflicts between congressional subpoenas and the more commonly invoked deliberative process privilege.

The law enforcement privilege is "widely recognized by the federal courts" in other contexts, and Congress has explicitly recognized confidentiality for "records or information compiled for law enforcement purposes" under the Freedom of Information Act (FOIA). Still, FOIA does not provide agencies with "authority to withhold information from Congress," and cases that have discussed the law enforcement privilege in other contexts, like civil discovery, have suggested that the privilege derives from the common law. Although the Supreme Court recently suggested in dicta that recipients of a congressional subpoena "have long been understood to retain common law and constitutional privileges," Congress has generally not viewed itself as bound by common law privileges, at least not in the face of an exercise of the constitutionally based subpoena power.

Highlighting the overall lack of caselaw on the subject, the OLC letter does not cite any judicial precedent in its description of the scope of the law enforcement privilege. The letter instead relies on OLC's own opinions, including an opinion arising from an earlier congressional investigation of a special counsel. In

2008, a House Committee issued a subpoena for reports and notes connected to an interview Special Counsel Patrick Fitzgerald conducted with Vice President Richard Cheney during an investigation into the disclosure of Valerie Plame's identity as an intelligence operative. President George W. Bush asserted executive privilege over the requested documents, relying on an OLC opinion that argued, in part, that disclosure would "chill deliberations among future White House officials and impede future Department of Justice criminal investigations involving official White House conduct."

The House never tried to enforce that subpoena, but private groups did attempt to obtain the same documents via FOIA. That litigation centered on FOIA's explicit protections for law enforcement records when disclosure "could reasonably be expected to interfere with enforcement proceedings," but there was language in the opinion suggesting that the FOIA provision was "co-extensive" with the law enforcement privilege. The district court held that the DOJ's concern for "the potential harm that disclosure could cause" to future "hypothetical" proceedings was too speculative. The court reasoned that the "DOJ has not—and cannot—describe with any reasonable degree of particularity the subject matter of the hypothetical proceedings, the parties involved, when such proceedings might occur, or how the information withheld here might be used by those hypothetical parties to interfere with these hypothetical proceedings." The court further noted that the DOJ's proposed category of "reasonably anticipated" proceedings "could encompass any law enforcement investigation during which law enforcement might wish to interview senior White House officials"—a category the court described as "breathtakingly broad."

This requirement for identifying harm to a "reasonably anticipated" future law enforcement proceeding stems from an interpretation of FOIA's statutory language. To the extent that the law enforcement privilege is "coextensive" with the FOIA exemption, it may inform Congress's views of how to weigh the executive's concern that disclosure of the Hur tapes may harm theoretical future investigations.

Effect of Previous Disclosures

At the conclusion of his investigation, Special Counsel Hur was required by DOJ regulation to provide the Attorney General with a "confidential report explaining the prosecution or declination decisions reached by the Special Counsel." The Attorney General chose to make that report public. He also later provided Congress with transcripts of Special Counsel Hur's interview with President Biden. Some have suggested that these disclosures should affect the President's privilege claim and may even constitute waiver of any protections that would have otherwise been afforded the audio recordings.

Like other privileges, the executive privileges may be waived either explicitly, for example by a statement relinquishing the privilege, or sometimes implicitly, for example by voluntarily disclosing otherwise protected information. Once waived, a privilege can no longer protect covered information from compelled disclosure. The general standards for whether the executive privileges have been waived appear to be forgiving for the Executive, as they are animated by the principle that waiver of these privileges "should not lightly be inferred." Still, the extent to which executive branch actions may implicitly result in waiver of the privilege is the subject of significant uncertainty.

The most thorough discussion of waiver of executive privileges comes from the D.C. Circuit's 1997 decision in *In re Sealed Case*—a case involving a grand jury subpoena for documents connected to a publicly disclosed White House report on misconduct by a former Secretary of Agriculture. There, the D.C. Circuit stated that the voluntary release of a document to parties outside the White House waives the privilege for "the document or information specifically released." Release of the report did not, however, "constitute waiver of any privileges attaching to the documents generated in the course of producing the report" or "related materials." In other words, the court found waiver as to the specific documents released (i.e., the final report and other disclosed documentation), but "not for related materials" (i.e., the underlying evidence). This "limited approach," the court noted, was much more restrictive than the

waiver standard applied to attorney-client privilege, which generally provides that disclosure to third parties waives the privilege for not only that communication, "but often as to all other communications relating to the same subject matter."

The narrowness of *In re Sealed Case*'s approach to waiver of executive privileges through voluntary disclosure—especially with regard to material closely related to a disclosed document—was apparent in its discussion of a specific piece of evidence known as "document 63." Although the White House had previously disclosed the typewritten text of document 63, it withheld from the grand jury a version of the same document which included additional handwritten notes that were not on the disclosed version. The D.C. Circuit concluded that by "voluntarily reveal[ing]" the document to someone "outside the White House" the Administration had "waived its privileges regarding the typed text of document 63." The White House had not, however, waived its privilege claims for the undisclosed handwritten notations, despite their intimate relation to the disclosed document.

In re Sealed Case might not answer the waiver question at issue in the Hur tapes, at least in part because the handwritten notes on document 63 contained substantive material not included in the original release, whereas it is not clear that the interview audiotapes contain substantive material not in the transcripts. Still, the case appears to support the general principle that courts will not lightly view prior disclosures as amounting to waiver of all later claims of the privilege for materials other than those actually disclosed.

If the DOJ's prior disclosures of the transcripts are not viewed as amounting to an outright waiver of executive privileges, the disclosures could nonetheless impact the balancing that has become the hallmark of interbranch disputes over the executive privileges. As noted, the executive privileges are not absolute. Instead, proper application of a privilege turns on a "flexible, case by case, ad hoc" weighing of the executive's need for confidentiality against Congress's need for access. Although the precise test to be applied is uncertain, "the bottom-line question has been whether a sufficient showing of need for disclosure has been made so that the claim of presidential privilege 'must yield[.]'" Thus, even if information is covered by a privilege, release may still be considered appropriate if Congress's need for the information outweighs the executive's interest in confidentiality.

The DOJ's many previous disclosures regarding Special Counsel Hur's investigation, including the interview transcripts, would likely influence any such balancing. Whether those disclosures favor access by Congress, however, may depend on various factors.

In the 2016 litigation surrounding the House subpoena for documents relating to Operation Fast and Furious and a presidential assertion of the deliberative process privilege, a federal district court found prior executive branch disclosures to *decrease* the Executive's interest in confidentiality, allowing Congress to overcome the asserted privilege. In *Committee on Oversight and Reform v. Lynch*, the district court, having noted that a DOJ Inspector General report had already "laid bare" much of the information sought, questioned what harm disclosure to Congress could cause "when the department has already elected to release a detailed inspector general report that quotes liberally form the same records." According to the court, the prior disclosures thus tempered any harm that would result from further related disclosures, resulting in the court concluding that the privilege—in this case the deliberative process privilege—had been "outweighed" by the Congress's "legitimate need."

In the 1974 case of *Senate Select Committee v. Nixon*, however, the D.C. Circuit appears to have viewed the effect of previous disclosures quite differently. In determining that the Senate Select Committee had "failed to make the requisite showing" necessary to overcome President Nixon's presidential communications privilege claim, the court was swayed by the fact that the President had released partial transcripts of the subpoenaed recordings and that the House Judiciary Committee, in its impeachment investigation, already had copies of the tapes. Rather than diminishing the President's interest in confidentiality, the court instead viewed these disclosures as "substantially undermin[ing]" the Committee's oversight and legislative need for the recordings. According to the court, Congress's

legislative tasks could be fulfilled using the disclosed transcripts because the Committee could identify "no specific legislative decisions that cannot responsibly be made without access to materials uniquely contained in the tapes." Under these "unique" circumstances, prior disclosures by the executive branch appear to have reduced, rather than improved, the likelihood of Congress obtaining additional information, at least when previous disclosures made the information demanded available to Congress (even if only in a limited or partial form).

The facts of *Senate Select Committee* may initially suggest a direct analogy to the Committee's current efforts to obtain the Hur tapes. To illustrate, in *Senate Select Committee*, the committee argued, as the Committees are now arguing, that "inflection and tone of voice that the tapes would supply are indispensable to a correct construction of the conversations." At the same time, there are significant differences between the two disputes. First, the executive privilege at issue in *Senate Select Committee* was the presidential communications privilege, which is arguably the strongest component of executive privilege and the only executive privilege that the Supreme Court has expressly acknowledged is rooted in the Constitution. The current dispute, as discussed, involves the law enforcement component of executive privilege, the strength and scope of which is much less developed.

Second, the Senate investigation at issue in *Senate Select Committee* was a traditional legislative investigation, while the current investigation is an impeachment investigation. As described more fully in this CRS report, there appear to be several reasons that Congress's interest in access to information in an impeachment investigation might weigh more heavily against an invocation of executive privilege. For example, Congress's constitutional role in addressing misconduct by federal officials may, arguably, afford impeachment investigations a greater degree of deference than other investigations when weighed against executive branch confidentiality interests. Moreover, the need for specific factual evidence in an impeachment investigation may be greater than in a legislative investigation. In this sense, *Senate Select Committee's* conclusion that the transcripts were adequate for legislating, as such decisions normally do not depend "on precise reconstruction of past events," would not apply to the Committees' current impeachment investigation, in which past events play a significant role.

It remains to be seen precisely how the House might respond to the President's assertion of the law enforcement privilege over the Hur tapes. If the House seeks to litigate the matter, either in lieu of or in conjunction with a criminal contempt citation, the resulting case could have a significant impact not only on the law enforcement privilege, but also the House's authority to access information in an impeachment investigation.

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