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ENSURING EXECUTIVE BRANCH ACCOUNTABILITY

HEARING

BEFORE THE

SUBCOMMITTEE ON
COMMERCIAL AND ADMINISTRATIVE LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

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ENSURING EXECUTIVE BRANCH ACCOUNTABILITY

THURSDAY, MARCH 29, 2007

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCIAL
AND ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 1:30 p.m., in Room 2141, Rayburn House Office Building, the Honorable Linda Sánchez (Chairwoman of the Subcommittee) presiding.

Present: Representatives Sánchez, Conyers, Johnson, Delahunt, Cannon, and Jordan.

Ms. SÁNCHEZ. The hearing of the Committee on the Judiciary's Subcommittee on Commercial and Administrative Law will come to order.

And I will recognize myself for a short statement.

Since President George W. Bush came into office in 2001, the executive branch has been vocally resistant to transparency and accountability in its own Government practices.

Under this Administration's broad view of executive power, the executive branch has consistently rebuffed Congress's legitimate right to the information it needs to perform its article I legislative and oversight functions. In fact, this Administration seems to regard any attempt at oversight as an assault on the Constitution.

In instances such as Vice President Cheney's energy task force, the FBI's abuse of national security letters, and the botched Federal response to Hurricane Katrina, this Administration has failed to share necessary information that would ensure executive branch accountability.

The latest example of this Administration's unwillingness to be forthright with the Congress and the American public is the growing controversy over the firing of the U.S. attorneys.

On March 6, 2007, this Subcommittee held a hearing entitled, "H.R. 580, Restoring Checks and Balances in the Confirmation Process of United States Attorneys." The testimony heard at that hearing raised numerous and serious questions concerning a potential partisan scheme to purge Federal prosecutors.

As a result of that hearing, the Judiciary Committee is engaged in a formal investigation of the matter.

Evidence of shifting explanations for U.S. attorneys' dismissals, close coordination between the White House and Justice Department on the firings, and a White House plan to dismiss all 93 U.S.

attorneys has guided our investigation to Administration officials directly linked to the purge scheme.

Despite requests for voluntary information and testimony on the record from these officials, the White House has offered informal, private meetings without transcripts or oaths. Additionally, the White House has refused to produce information on internal White House communications involving this matter.

To date, the White House has ignored efforts to negotiate these conditions, and the President, using the blanket claim of executive privilege, has publicly stated that he is willing to go to the mat to prevent the information Congress is seeking from becoming public.

While I recognize the need for Presidents to receive candid and frank advice from aides, the courts have found that the presidential communications privilege is not absolute. In the seminal Supreme Court case of *U.S. v. Nixon,* the court held that the interest in the confidentiality of presidential communications was not sufficient to resist disclosure because of the strong public need for the information.

Based on the possibility that a crime of obstruction of justice or misleading Congress in the U.S. attorneys case may have taken place, executive privilege must give way to Congress's legitimate oversight responsibilities and the public need for information.

In fact, news reports that Karl Rove does 95 percent of his e-mailing from his Republican National Committee account indicates that these e-mails are not intended in his function as an advisor to the President and suggest that the claim of executive privilege may not even apply to Mr. Rove's e-mails.

The restrictive conditions offered by the White House are also based on President Bush's unfounded concerns about precedents that might be set if he allows his aides to testify. By contrast, there is ample precedent that presidential advisors of both political parties have testified before Committees and Subcommittees of Congress.

According to a report by the nonpartisan Congressional Research Service, presidential advisors have testified before Congress at least 74 times since 1944. Specifically, presidential advisors, ranging from Franklin Delano Roosevelt's assistant to several of Richard Nixon's advisors, have testified in public hearings before congressional Committees. Even a sitting President, President Gerald Ford, testified before the House Judiciary Committee about his rationale for pardoning President Richard Nixon.

More recently, White House advisors in the Clinton administration, two of whom we are pleased to have here today, frequently testified before Congress. And in contrast with his current viewpoint, President George W. Bush has allowed close advisors, such as Tom Ridge, then Assistant to the President for Homeland Security, and Condoleezza Rice, then Assistant to the President for National Security Affairs, to testify.

Given the substantial history of White House officials testifying before Congress and the questionable applicability of executive privilege in the U.S. attorney case, it is my hope that the Committee on the Judiciary and the White House can quickly come to an agreement and allow us to proceed with our investigation.

To help us further explore these issues, we have a truly notable witness panel. We are pleased to have John Podesta, former White House chief of staff to President Bill Clinton; Beth Nolan, former White House counsel to President Bill Clinton; Noel Francisco, former associate White House counsel to President George W. Bush; and Frederick A. O. Schwarz, Jr., senior counsel at the Brennan Center for Justice.

Accordingly, I very much look forward to hearing the testimony from these witnesses.

And I would now like to recognize my colleague and Ranking Member, Mr. Cannon, for his opening remarks.

Mr. CANNON. Thank you, Madam Chair.

I think I will ask unanimous consent to submit my written statement for the record.

Ms. SÁNCHEZ. So ordered.

Mr. CANNON. Thank you.

And I would just like to say—this is nothing new here. I look forward to information from the panel. I am actually quite honored that the people have come here today, who I think are sterling scholars and thoughtful people. And I expect that we will get some insight.

This hearing, of course, is not going to be all that significant, in the legal context. It is more, I view it, as a matter of informing us of what the parameters are. And we have people who were called by the majority and who served in Democratic Administrations; they are people who command a great respect and whose intellect I have actually experienced in the past, and look forward to hearing their insights here.

So thank you all for coming today. We appreciate it. I am personally honored by the fact that you would come down here to work with us on this issue.

This is the beginning of an issue—I would take slight exception to what the Chair has said about what is going on currently with the Attorney General and these U.S. attorneys. But that is actually not very important in the context of the information that you will help us to understand as we look forward to what we are going to do if we have a battle over getting information.

And just let me point out that whether you worked for the Clinton administration or the Bush administration, I am in Congress, and we up here on the dais are in Congress, and the staff behind us are careful of the prerogatives of Congress, and we actually care what the parameters are. So it is not so much a partisan issue as how we govern ourselves here in America.

So, thank you. I appreciate the opportunity to hear from you.

And, Madam Chair, I yield back.

[The prepared statement of Mr. Cannon follows:]

PREPARED STATEMENT OF THE HONORABLE CHRIS CANNON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF UTAH, AND RANKING MEMBER, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

Opening Statement of Subcommittee on Commercial and Administrative Law Ranking Member Chris Cannon, Hearing on "Ensuring Executive Branch Accountability," Thursday, March 29th, 1:00 p.m., 2141 RHOB

Oversight and executive privilege are two of the key instruments in our system of checks and balances. The importance of our oversight responsibilities should not be underestimated.

But the importance of executive privilege also should not be underestimated. It is intended to help ensure that the Executive is able to obtain a free flow of creative and wide-ranging ideas, as he implements

the statutory authority that we give, and all of the constitutional authority that Article II provides.

We want the President to have that information, so that he can most effectively implement our legislative designs and perform his constitutional functions. We need to respect the privilege, so that the flow of information is not chilled and the decision-making process is robust.

Neither branch should ever rush into a conflict over the privilege. The dance between Congress and the Executive Branch calls for the Executive to assert executive privilege responsibly, and not excessively.

But it also calls on Congress to conduct its oversight in a way that avoids needless conflict.

Otherwise, the dance can become a stampede, in which both Institutions can be injured.

From the time the US Attorneys controversy began through today, this controversy has been spackled with partisan accusations, partisan conclusions and partisan stratagems.

All of the information we have received may support reasonable and innocent interpretations concerning what really happened. More than one major news

outlet has concluded that the documentary evidence to date has yet to provide the smoking gun the majority is looking for.

Yet in the rush to grab headlines and the partisan upper hand, we risk destroying the very opportunity to obtain information that we say we seek.

In the other body, for example, the level of partisan accusation and pre-judgment of the evidence has become so bad that a key Department of Justice official – one from whom we need information – has already asserted her Fifth Amendment rights, and refuses to testify.

This official states that she is innocent. We do not know.

But she apparently fears that she has already been tried, convicted and condemned, before she even has had a chance to be heard, and before the evidence has been fully reviewed and weighed.

Thus, we are now unable to get information from her.

The White House does not seem to want a privilege battle. It made a reasonable offer to allow us to

interview witnesses and review documents that will help us sort this matter out.

But the majority rejected this offer. Senator Leahy said that the offer gave us "Nothing. Nothing. Nothing."

Because we didn't take up the President's offer, and see later if we needed more, that is precisely what we have from the White House at this point. Nothing, nothing, nothing – other than headlines, a hearing over executive privilege that has yet to be asserted, and a lot of politics.

I mention politics, because that is the key to understanding what this controversy is about, and whether and how it should continue.

If there's something we really need to oversee here – like dismissing a U.S. Attorney to shut down an investigation – let's oversee it, but that is not even credibly being suggested anymore.

So far, what the majority most consistently complains of is that traditional political considerations may have been introduced into the question of whether to retain eight prosecutors.

Political considerations, of course, frame the appointment of U.S. Attorneys in the first place.

Political considerations frame the law enforcement priorities that a President, who is responsible to the people, must choose to emphasize during his Administration.

Political considerations also help defuse the potential for rogue prosecutors. The unchecked, unaccountable prosecutor is a blight that has haunted civilized societies for centuries – someone with the potential for concentrating all of the intensity and

hatred of a lynch mob into one person, with all the power of the law behind him.

Political accountability of the prosecutor to the executive, who is politically accountable to the people, is the best antidote to prosecutorial abuse we have found in the federal system.

So if the inquiry is just into whether traditional politics have gone into the consideration of whether to retain eight prosecutors, who serve at the President's pleasure, and who have served their terms, let's move on.

It's not worth an executive privilege battle. This body has better things on which to use its time.

If there is more to it, let's find a better way to gather the information– one that doesn't tempt a constitutional confrontation over executive privilege.

The House Rules Committee is the custodian of a useful document on how to do oversight. I have it here in my hand.

This guide offers counsels that this inquiry hasn't yet followed, but which it should:

-- "Constitutional confrontations, fortunately, are rare, avoidable, and should be avoided."

-- "The first rule of successful oversight is that there must be in most instances intensive preparation . . . Rarely should an inquiry, for instance, begin with a subpoena for documents or for testimony at a hearing."

-- "Formal compulsory process should be the product of urgent need after a sufficient period of fact gathering and source checking."

-- "You shouldn't hold an investigative hearing unless you have a compelling horror story, a smoking gun to reveal, or a very important point to make."

-- "A concomitant to intensive preparation is cooperation within the committee at all levels. This includes dealing with the minority party members where possible. An effort must be made to keep all members informed in a timely fashion."

These counsels urge a gradual, bipartisan way of oversight.

One that works deliberately, and is designed to produce conclusions based on sound and shared reflection, not partisan pre-judgment.

One that seeks negotiated and staged solutions to the provision of Executive Branch information, such as that offered to us by Mr. Fielding.

One that urges us not to step up to the brink of constitutional confrontation that is executive privilege war, until we have exhausted all other means of obtaining information.

Madam Chairwoman, Mr. Chairman, I urge you to review these counsels and others supporting the same approach today.

And I ask you to commit yourselves to follow these counsels and this approach throughout the remainder of this investigation and throughout your oversight in this Congress.

The current approach is leading us to a stalemate without the information we need. Instead, the current approach gets us headlines, and calls for people's heads, and soundbites on the Sunday morning talk shows.

I yield back my time.

Ms. SÁNCHEZ. Thank you, Mr. Cannon.

I would now like to recognize Mr. Conyers, the Chairman of the Committee on the Judiciary, for an opening statement.

Mr. CONYERS. Madam Chair and distinguished witnesses, I ask unanimous consent to put my statement into the record.

Ms. SÁNCHEZ. Without objection, so ordered.

Mr. CONYERS. And all I want to remind us of is that this is indeed a very important hearing. This is not light. These witnesses are all experienced.

And were the Judiciary Committee to accept Mr. Fred Fielding's offer for off-the-record interviews without transcripts, maybe, as I have suggested, at a pub, that we would be accepting a process doomed to failure.

The mass firing of these U.S. attorneys has been shrouded in confusion and contradiction from the beginning. But in the last week, we learned that the Attorney General may have misled us about his role in the firings. A high-ranking Department of Justice official has asserted her constitutional right to use the fifth amendment. The Department of Justice has acknowledged that they misled us about Karl Rove's role in the firings.

So, in this context, does anyone not think that a transcript might be more than a little useful in helping us get to the truth?

We want to achieve a compromise with the White House on the U.S. attorney matter. I have written them two letters, which I ask be put into the record——

Ms. SÁNCHEZ. Without objection, they will be.

[The letters follow:]

JOHN CONYERS, JR., MICHIGAN
CHAIRMAN

LAMAR S. SMITH, TEXAS
RANKING MINORITY MEMBER

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

March 22, 2007

Mr. Fred F. Fielding
Counsel to the President
Office of Counsel to the President
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Mr. Fielding:

We are writing in response to your March 20 letter concerning our request for information relating to our investigation of the U.S. Attorney controversy. While we share the Administration's interest that the American people "hear the truth" concerning these matters, we cannot accept your proposal for a number of reasons, and would sincerely hope that your office will work with us to find a reasonable accommodation of the interests of both branches of government.

We write this because your proposal will not facilitate a full and fair inquiry. We believe the failure to permit any transcript of our interviews with White House officials is an invitation to confusion and will not permit us to obtain a straightforward and clear record. Also, limiting the questioning (and document production) to discussions by and between outside parties will further prevent our Members from learning the full picture concerning the reasons for the firings and related issues. As we are sure you are aware, limitations of this nature are completely unsupported by precedents applied to prior Administrations – both Democratic and Republican.

We would not be pursuing this matter absent the evidence of misconduct, misstatements and potential criminal wrongdoing that has already come to light. Among other things, the Department of Justice itself has acknowledged that its officials have misled Congress, with the Chief of Staff to the Attorney General resigning over his role in the matter. In addition, several U.S. Attorneys have testified that the firings may have been tied to improper contacts and threats. Evidence has also emerged that improper criteria may have been used not just for firing U.S. Attorneys, but also with decisions to retain them. Although there have been numerous and conflicting accounts concerning the process, there now appears to be little doubt that senior officials in the White House were involved in the firing plan, both in conception and implementation. Also, notwithstanding your characterization of the Department of Justice's provision of documentation and witnesses, the Department of Justice has failed to turn over a significant amount of critical information, and has not yet reached accord with us regarding witness interviews. Given these facts, it would be irresponsible if our Committee were to accept

the limitations proposed in your letter, which would severely impede our ability to get to the truth on behalf of the American people.

We have approached this matter with a high degree of caution and seriousness. This is why we initiated the matter with a non-compulsory request for documents on March 9. We accepted your request to meet on March 13, and, again, at your request, deferred taking any further action, based on the expectation that documents would be made available to us and an appropriate arrangement for questioning White House officials agreed to by the March 16 deadline you suggested. Although we did not hear from you on that date, we again accepted your request to defer action until we could meet, at your further request, on March 20. At that time we received your official proposal that would impose unprecedented restrictions on our access to relevant officials and materials. In order to protect our prerogatives, the Commercial and Administrative Law Subcommittee of the Judiciary Committee authorized Chairman Conyers to issue subpoenas with regard to these matters; but even then, Mr. Conyers indicated that he would not issue the subpoenas pending further efforts to reach accommodation with the White House.

It is in that spirit that we remain committed to seeking a cooperative resolution to this matter on a voluntary basis, consistent with the oversight responsibilities of the House and the Senate. We would be pleased to discuss further proposals from you to achieve these objectives that provide us with the records and information we need to complete our investigation while respecting your needs and interests. In the meantime, we also ask that you ensure the preservation of relevant White House documents, as defined in our March 9 letter.

We would ask that you contact the House Committee on the Judiciary office at your very earliest convenience so that we may resolve this matter. If you are willing to work in good faith, we can assure you that we are as well.

Sincerely,

John Conyers, Jr.
Chairman

Linda T. Sánchez
Chairwoman, Subcommittee on Commercial and Administrative Law

cc: Hon. Lamar S. Smith
Hon. Christopher B. Cannon

Congress of the United States
Washington, DC 20510

March 28, 2007

Fred Fielding, Esq.
Counsel to the President
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Dear Mr. Fielding:

When we met recently, each of us agreed to continue to talk and keep the lines of communication open. Nevertheless, we have not heard from you. It is now more than a week since the last set of meetings and almost a week since you received March 23rd letters from each of us inviting the White House to agree to provide the investigating committees of the Congress, both House and Senate, with access to witnesses, information and relevant documents.

As we have previously noted, political influence in federal law enforcement is a serious matter. We need to get to the bottom of what happened, why, how and who was involved in the mass firings of United States attorneys; the criteria used to retain U.S. Attorneys; and possible misstatements to Congress. The fact that recent disclosures have called into question previous statements made by the Attorney General and a high ranking Department of Justice official asserted her fifth amendment rights magnifies the need for a prompt, thorough, and fair investigation.

Allow us to share another step you might consider. At the most recent Senate Judiciary Committee business meeting, Senators from both sides of the aisle made a number of statements seeking White House cooperation. Senator Specter, the Committee's Ranking Republican, said that despite what you, the President and the President's spokesman have been saying, the President was, in fact, willing to negotiate. Senators Hatch and Sessions suggested that the Committee proceed with preliminary interviews of the White House senior staff and then consider whether to authorize subpoenas and compel testimony. Given the terms included in your March 20 letter, that seemed to us disingenuous, to appear to accept your limited proposal and then ultimately to ignore the limitation that there be no follow up testimony to the off-the-record interview you demanded.

We do believe your willingness to provide documents is worth pursuing. We hope that you will reconsider your "all or nothing" approach with respect to documents you identified that you would be willing to provide. We urge you to provide all relevant documents without delay. The White House documents to and from the Department of Justice and with third parties, such as Republican state party officials, should be provided without delay. You have acknowledged your willingness to provide those to us previously.

That would narrow the dispute over White House documents to those you refer to as "internal". We believe that these are important to our investigation, as well. For example, if there is a memorandum or an e-mail from Karl Rove to Harriet Miers initiating consideration of firing some United States attorneys in order to impede an investigation, that would be very important for the Committees to know. Thus, while we do not agree with you that what you describe as "internal" White House documents should be off limits, we recognize that you view them as a separate category and you disagree whether those should be shared with the Committees. Recognizing we have a dispute over those documents should not delay the Committees receiving the other documents that you indicate you are willing to provide.

If we can narrow our dispute, we may then be able to work through it by agreeing, for example, that we initially designate as "Committee Confidential" what you refer to as "internal" White House documents. We could then consider a process by which we would consult with you prior to making them public.

In addition, we have become increasingly sensitized over the last several days to the White House staff wearing several "hats" and using Republican National Committee and campaign e-mail addresses. In fact, as Chairman Waxman has recently pointed out, congressional investigations, including this one, "have uncovered evidence that White House staff have used nongovernmental e-mail accounts to conduct official government business."

As Chairman Waxman has also pointed out, many exchanges between Jack Abramoff and White House officials were conducted via non-government e-mail accounts. Indeed, he quotes exchanges that suggest that Mr. Abramoff and White House officials were using the nongovernmental accounts specifically to avoid creating a White House "record" of the communications.

We hope you agree that such sleight of hand should not be used to circumvent and compromise the comprehensiveness of our investigation. In this matter we have already received a document showing communications between D. Kyle Sampson, the Attorney General's former chief of staff, and J. Scott Jennings, the Special Assistant to the President and Deputy Director of Political Affairs at the White House (who you offered for an off-the-record interview), in which Mr. Jennings does not use his White House e-mail account but an e-mail account at the Republican National Committee designated "gwb43.com." There is another, similar use of a nongovernmental e-mail account in an exchange including Mr. Jennings and Monica Goodling, the Justice Department official who was the White House liaison and who recently invoked her privilege against self incrimination.

Accordingly, we trust that you will be collecting and producing e-mails and documents from all e-mail accounts, addresses and domains and that you are not artificially limiting your production to the official White House e-mail and document retention system.

Again, we urge you to continue to work with us so that we can achieve our mutual goal of getting to the truth in this matter

Sincerely,

PATRICK LEAHY
Chairman
Senate Judiciary Committee

JOHN CONYERS, JR.
Chairman
House Judiciary Committee

cc: The Hon. Arlen Specter
The Hon. Lamar Smith

Mr. CONYERS [continuing]. Offering to meet and discuss their concerns. And so far, we wait patiently, and even sometimes less patiently, for a response.

I hope that over the recess cooler heads will prevail and we can develop a process to allow us to get to the truth.

And so, the witnesses today are important in discussing executive branch accountability. And I congratulate the Chairwoman of this Committee on holding this hearing.

[The prepared statement of Mr. Conyers follows:]

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, MEMBER, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW, AND CHAIRMAN, COMMITTEE ON THE JUDICIARY

Today we consider whether the White House is subject to legitimate congressional oversight, particularly where evidence of misconduct if not worse exists.

For more than 200 years, most of us had understood that congressional oversight was the very bed rock of our system of checks and balances. Unfortunately, last week, this Committee received an unprecedented "take it or leave it" offer from the White House, denying us access to relevant documents as well as on the record interviews with witnesses. The question before us today is whether such actions are consistent with law, precedent or any reasonable notion of checks and balances.

I can find nothing in the text or spirit of the Constitution which would allow an across the broad assertion of executive privilege. To the extent courts have recognized privilege, it has generally been when advice was given directly to the President, and it has been limited to specific communications only, not broad categories of information as asserted by this White House. What is puzzling to me is how such a privilege can even exist where the President himself has essentially denied any substantive knowledge of the firings. If this is the case, there would be very little privileged advice to the President that warrants protection.

It also seems odd to be asserting privilege for communications that emanated not within the White House but from the Republican National Committee (RNC). I have a hard time believing the Constitution was intended to protect these emails, especially when there are indications they may have been sent from the RNC in order to circumvent the usual procedures for saving and storing emails.

We have an entire host of precedents indicating that congressional committees are entitled to call White House witnesses to interviews and hearings and to receive White House documents. Several of the witnesses testifying before us today have all been hauled before congressional panels and have turned over thousands of pages of White House communications. The Bush Administration allowed White House staff to testify before the House Oversight Committee two weeks ago. And some of us remember when President Ford himself testified before this Committee concerning the pardoning of President Nixon.

If this Committee were to accept Mr. Fielding's offer of off the record interviews without transcripts, we would be accepting a process doomed to failure. The mass firing of U.S. Attorneys has been shrouded in confusion, contradiction and outright falsehoods from the very beginning. Within the last week alone we learned that the Attorney General may have misled us about his role in the firings; a high ranking Department of Justice official was forced to assert her Fifth Amendment rights; and the Department acknowledged they misled us about Karl Rove's role in the firings. In this context, does anyone not think that a transcript might be a little useful in helping us get to the truth?

As I have stated repeatedly, I hope we can achieve a reasonable compromise with the White House on the U.S. Attorney matter. I have written them two letters, offering to meet and discuss their concerns. So far, both letters have been ignored. I hope that over the recess cooler heads will prevail, and we can develop a process to allow us to get to the truth. We hope to hear from today's witnesses about the importance of Executive Branch accountability, including the need for the White House to provide requested information.

Ms. SÁNCHEZ. I thank the gentleman for his statement.

And, without objection, other Members' opening statements will be included in the record.

Without objection, the Chair will be authorized to declare a recess of the hearing. I understand that we have votes expected shortly.

I have wonderful, glowing introductions for each of you, but I am going to dispense with those because we are very interested in getting to your testimony. And I appreciate all your willingness and your patience with the hearing today.

Without objection, your full statements will be placed into the record, so we are going to ask that you limit your oral statements to 5 minutes.

You will note that we have a lighting system—I am sure most of you are familiar—that starts with a green light. At 4 minutes, it turns yellow. And then right at 5 minutes, we would ask that when you see that red light you try to wrap up your testimony.

After each witness has presented his or her testimony, Subcommittee Members will be permitted to ask questions subject to the 5-minute limit.

Mr. Podesta, we would like to jump in and have you proceed with your testimony.

TESTIMONY OF JOHN D. PODESTA, FORMER WHITE HOUSE CHIEF OF STAFF TO PRESIDENT CLINTON, PRESIDENT AND CEO, CENTER FOR AMERICAN PROGRESS

Mr. PODESTA. Thank you, Madam Chair and Chairman Conyers. Thank you, both of you, for the invitation.

And, Mr. Cannon, thank you for your kind remarks.

Mr. Delahunt tried to give us a little extra time here, and I appreciate that, but I am glad we didn't set any precedent about not having a transcript of the hearing.

So, as I noted in my prepared comments, I have a somewhat unusual perspective, having served as both a senior White House official and a senior congressional aide. I spent almost 10 years, most of that time on the Senate Judiciary Committee. So I have a healthy appreciation for the responsibility of each branch to defend its own constitutional prerogatives.

I have to say, it is a pleasure to be here as a private citizen. Mr. Johnson, it was always worse to be here as a Government employee with my own private counsel and being on the receiving end of those billable hours.

So I appreciate the opportunity to talk to you.

The text of the Constitution, of course, says nothing about the right of Congress to demand information from the executive branch or the right of the executive to withhold it. Yet the Supreme Court has long recognized the power to investigate and the attendant power to use compulsory process. And they are inherent in the legislative function vested in Congress by article I of the Constitution.

So our system of checks and balances requires that Congress have the ability to obtain information it needs to make the laws and to oversee and investigate the activities of the executive branch. It also requires that the President have the ability to resist demands for disclosures of information that could threaten important national security interests, particularly disclosures that would harm the national security or foreign relations of the United States, but also including those that would jeopardize ongoing

criminal investigations or interfere with the ability to obtain frank and candid advice.

President Clinton, from time to time, invoked the privilege when he felt it was necessary to protect presidential communications and deliberations from overly broad and intrusive requests for information. But he also understood that the privilege was not unqualified, that the public interests protected by the claim of privilege must be weighed against those that would be served by the disclosure.

I think he appreciated that even where the privilege applies, it is not absolute. It can be overcome by a strong showing that the information request is focused, that there are not other practical means of obtaining the information, and that the information is genuinely needed by the Committee and is demonstrably critical to the responsible fulfillment of the Committee's functions.

I think, since this President Bush and particularly since Vice President Cheney came into office, I think one of their exercises has been to increase the power of the executive, to some extent, at the expense of both other branches of Government.

And I would note that because I think it is ironic, in that the greater the power the White House accumulates, the greater I think is the need for congressional access to White House documents and personnel.

Such scrutiny I think is especially needed to investigate allegations of misconduct by the White House officials. Unlike executive branch agencies, there is no I.G. in the White House. The White House is not subject to the Freedom of Information Act. Only Congress can provide appropriate oversight and accountability.

In my prepared statement, I noted numerous examples of presidential advisors who have testified in front of congressional Committees. They have included White House chiefs of staff, national security advisors, White House counsels, amongst others. I added a few, for those keeping accurate count, who have read the CRS report on this.

I, in my own time, testified four times under oath before congressional Committees. I did so with the support of the President, who authorized my testimony. I made no claim of executive privilege. On each of those occasions, I raised my right hand, I swore to tell the whole truth and nothing but the truth. And I am proud that I did it, and I am proud that the President gave me the opportunity to do so.

I detail some other experience that I had in that regard, as well.

I would just make two points, because I know my time is short.

One I think is that this inquiry that you are currently involved in is, I think, particularly important. At the heart of congressional oversight and investigations, I think in the history of investigations, have been ones that ensured the fair administration of justice. And I think that that is what this inquiry is all about.

And I would just, if I could, reflect for a moment on the question of U.S. attorneys and the importance of this hearing.

It has been said that U.S. attorneys serve at the pleasure of the President. And, of course, that is true. But the fact that the President has the power to remove a U.S. attorney doesn't make it proper for him to do so. It depends, really, on the reason.

I put forward some different reasons, from poor performance to strong policy disputes. I think some of those are quite legitimate.

But I think one reason that is not legitimate is if the removal occurred to try to influence the conduct of an ongoing case or if the White House was viewing this as the U.S. attorney not pursuing the case with great enough vigor. I think that is where you cross the line.

I don't know that those are the circumstances, but I think this is a legitimate inquiry to determine whether that is, in fact, what is at the bottom of these firings or at least some of these firings in this matter.

Thank you.

[The prepared statement of Mr. Podesta follows:]

PREPARED STATEMENT OF JOHN D. PODESTA

Thank you, Madame Chair, and members of the subcommittee. I am John Podesta, President and Chief Executive Officer of the Center for American Progress. I am also a Visiting Professor of Law at the Georgetown University Law Center, where I teach a course on Congressional Investigations.

I served as Chief of Staff to President Bill Clinton from 1998 to 2001. I previously served in other roles in the White House, including Assistant to the President and Staff Secretary from 1993–1995, and Deputy Chief of Staff from 1997–1998.

Having appeared before congressional committees a number of times as a senior White House aide, let me say what a pleasure it is to be testifying today as a private citizen—albeit one with a deep respect for and intimate knowledge of the institution of the presidency and the important role that institution, regardless of occupant, plays in the leadership of our country and the world.

I also have some experience in back of the dais, Madame Chair, having served as Counselor to former Senate Democratic Leader Tom Daschle, Chief Counsel for the Senate Agriculture Committee, and Chief Minority Counsel for the Senate Judiciary Subcommittees on Patents, Copyrights, and Trademarks; Security and Terrorism; and Regulatory Reform.

My service in both Congress and the White House gave me a healthy appreciation for the responsibility of each branch to defend its constitutional prerogatives.

The text of the Constitution says nothing about the right of Congress to demand information from the executive branch—or the right of the executive to withhold it. Yet the Supreme Court has long recognized that the power to investigate and the attendant use of compulsory process are inherent in the legislative function vested in the Congress by Article I of the Constitution.[1]

Our system of checks and balances requires that Congress have the ability to obtain the information it needs to make the laws and to oversee and investigate the activities of the executive branch. And it also requires that the president have the ability to resist demands for disclosures of information that could threaten important national interests, particularly disclosures that would harm the national security or foreign relations of the United States, and including those that would jeopardize ongoing criminal investigations or interfere with his ability to obtain frank and candid advice.

President Clinton from time to time invoked the privilege when he felt it was necessary to protect presidential communications and deliberations from overly broad and intrusive requests for information.

But he also understood that the privilege is not unqualified: that the public interests protected by the claim of privilege must be weighed against those that would be served by the disclosure. He appreciated that even where the privilege applies, it is not absolute. It can be overcome by a strong showing that the information request is focused, that there are not other practical means of obtaining the information, and that the information is genuinely needed by the Committee and is "demonstrably critical to the responsible fulfillment of the Committee's functions."[2]

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[1] E.g. *McGrain v. Daugherty* 273 US 135 (1927); *Sinclair v. United States* 279 U.S. 263 (1929); *Watkins v. United States* 354 U.S. 178 (1957)

[2] *See Senate Select Committee on Presidential Campaign Activities v. Nixon,* 498 F.2d 725 (D.C.Cir. 1974).

Some in the present administration appear to believe that presidential advisers are immune from giving testimony on the theory that Congress does not have jurisdiction to oversee the Office of the President.

No president in our country's history has attempted to make such an extraordinary claim and no precedent provides a legal justification to support that perspective. But I was not surprised by this justification for the White House's refusal to cooperate in the Judiciary Committee's legitimate inquiries into the recent sacking of the U.S. Attorneys. It is part and parcel of the larger campaign that has occupied the Bush administration from the moment the president took office: to increase the power of the executive at the expense of the other branches of government.

The irony is that the greater the power that the White House accumulates, the greater is the need for congressional access to White House documents and personnel. Such scrutiny is especially needed to investigate allegations of misconduct by White House officials. Unlike executive branch agencies, the White House has no inspector general to investigate abuses and it is not subject to the Freedom of Information Act. Only Congress can provide appropriate oversight and accountability.

When the president unreasonably refuses to cooperate with its inquiries, Congress can prevail only if it musters the political will to do so.

In 1973, President Nixon attempted to block congressional testimony by members of the White House staff. He claimed, "Under the doctrine of separation of powers, the manner in which the president personally exercises his assigned powers is not subject to questioning by another branch of government. If the president is not subject to such questioning, it is equally appropriate that members of his staff not be so questioned, for their roles are in effect an extension of the presidency." [3]

Yet within months, Congress had summoned a parade of witnesses from the Nixon White House to testify in connection with the Watergate affair.

Post-Watergate presidents were more cooperative. President Ford agreed to testify in person on the circumstances leading to his decision to pardon President Nixon.

In 1980, President Carter instructed all members of the White House staff to cooperate fully with the Senate Judiciary Committee in its investigation of Billy Carter's connections with the Libyan government.

In 1987, President Ronald Reagan waived executive privilege for his entire staff during the Iran-Contra affair.

In 1994, I was one of numerous Clinton administration officials called to testify before congressional panels investigating the failed Madison Guaranty Savings and Loan and the White Water Development Corporation.

All in all, the Congressional Research Service reports that presidential advisers have testified before congressional committees at least 73 times since 1944—including individuals occupying the most senior positions in the White House from Chiefs of Staff to National Security Advisors to White House Counsels.[4]

For those interested in keeping an accurate count, I can add several more instances not covered by the CRS review.

In 1995, I testified before the Government Reform and Oversight Committee, during Chairman Clinger's tenure, concerning an internal White House review I had conducted concerning the firing of employees working in the White House travel office.

In 2001, I, together with Ms. Nolan and our colleague Bruce Lindsey testified before the Government Reform and Oversight Committee, chaired by Congressman Burton concerning pardons granted by President Clinton.

While I was no longer a White House employee at the time of those two appearances, the testimony I gave solely concerned actions, duties and advice I gave to the president while a senior White House employee and would clearly have been subject to claims of executive privilege.

On each of these occasions, I did so with the support of the president, who had authorized my testimony and made no claim of executive privilege. And on each of these occasions, I came into a public hearing room, in front of television cameras, with a full transcript being kept; I raised my right hand, I swore to tell the truth, the whole truth and nothing but the truth and I am proud of the fact that I did so and proud of the president for giving me the opportunity to do so.

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[3] Richard Nixon, *Remarks Announcing Procedures and Developments in Connection with the Watergate Investigations* (Apr 17, 1973), in *Public Papers of the Presidetns of the United States: Richard Nixon,* 1973, at 299, quoted in Louis Fisher, *Congressional Access to Information: Using Legislative Will and Leverage,* 52 *Duke L.J.* 323 at 394–95 (2002).

[4] Harold C. Relyea and Jay R. Shampansky, *Presidential Advisers' Testimony Before Congressional Committees: An Overview,* CRS Report for Congress (April 14, 2004).

Again, for the record, I also gave depositions, under oath, to committee counsel in both the House and the Senate. And in 1993, I appeared informally before separate partisan caucuses of this committee and took questions for several hours with respect to the travel office matter I previously mentioned.

Given that experience, I would like to comment on the current investigation of the circumstances surrounding the firing of the U.S. Attorneys.

At stake is a question of whether there was interference in the administration of justice for political ends. The history of Congressional oversight and investigations is replete with instances of Congressional Committees exercising their jurisdiction to ensure the fair administration of justice.

From Teapot Dome, to the ITT investigation, to Watergate, to Waco, Congress has a long history of investigating allegations of interference by the White House with the Department of Justice and other law enforcement agencies.

Indeed, the heart of the Whitewater investigation concerned whether the White House had improper contacts with the Treasury Department on whether or not to refer the Madison Guaranty case to the Justice Department for enforcement action. While one can question the excess of spending more than $60 million in a series of investigations that two independent counsels concluded involved no criminal activity and outside reviews concluded involved no ethical transgressions, no one questioned the right of the Congressional Committees to pursue their investigations or the need for the White House to cooperate.

Simply put, issues surrounding the administration of justice are paramount and constitute the heart of a legitimate legislative inquiry.

That is why we are here today.

This committee, and its Senate counterpart, have clear jurisdiction over the matter under investigation and a legitimate need to hear from key White House officials—on the record and under oath. No other means exists to ascertain what communication occurred inside the White House among White House aides and between White House Officials and Department of Justice officials concerning the true motivations for the firings.

It has been said many times in the course of this affair that U.S. Attorneys "serve at the pleasure of the president." As a matter of law, this is a non-debatable proposition. Once confirmed, they can be removed for any reason, or for no reason at all.

But that cannot be the end of the story. The fact that the president has the power to remove them doesn't make it proper for him to do so. Depending on the reason for his actions, it may be highly improper and even illegal.

Many different reasons have been suggested for these dismissals. Indeed, the Attorney General has offered quite a few different explanations himself. Obviously until your inquiry has been completed we will not know the truth of the matter. But we can try to separate out the legitimate reasons from illegitimate ones.

The first reason is "poor performance." This was the reason originally given by the Department, and it is a perfectly appropriate reason to fire somebody. Unfortunately, it appears that was not the reason in any but perhaps one of these cases.

The second reason is to give the job to somebody else. It has been established that this was the reason for at least one dismissal, and perhaps others. For those who value loyalty and experience, this is not an attractive reason, and it certainly is a departure from long established practice. But it is not improper unless the replacement is unqualified to serve.

The third reason is that the U.S. Attorney has policy differences with Main Justice. There are indications that this may have been the reason for one or more of the dismissals. If so, it does not seem an improper reason to me. It is the prerogative of the president to set policy, and it is reasonable for him to expect that his appointees will carry it out.

The final reason is that the president and his allies in Congress were unhappy with the particular prosecutions a U.S. Attorney was bringing—or failing to bring. This is the crux of the matter. If the president fires a U.S. Attorney to obstruct or interfere with a pending prosecution or to influence the course of a prospective prosecution, he has crossed the line. Such interference is not only improper but depending on the circumstances may be illegal as well.

In other words, while it is true that U.S. attorneys are "political appointees," they are not ordinary political appointees. They wield extraordinary power in this country—the power to protect our families and communities from harm, and the power to destroy innocent lives and reputations. Attorney General Robert Jackson said in 1940, "The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous."[5]

[5] Robert Jackson, The Federal Prosecutor, Address Delivered at the Second Annual Conference of the United States Attorneys (April 1, 1940).

Once they take their oath of office, the 93 U.S. Attorneys are the personification of the system of justice in this country. If that system is to command popular respect, they must be beyond reproach. That is why it is essential that they be seasoned professionals and not just political hacks who do the bidding of the president who appointed them in the prosecution of justice. And that is why it is essential that the Congress get to the bottom of why these U.S. Attorneys were fired.

Unfortunately, the inability or unwillingness of the White House to give the Congress and the American people a straight and complete answer on this matter means that we do not know exactly why the eight U.S. Attorneys were fired (and I would add one more, the firing of Frederick Black, the former interim U.S. Attorney for Guam and the Commonwealth of the Northern Mariana Islands).

This is the concern which makes it imperative that this committee get the facts so it can determine precisely what happened in these cases.

Let me sum up. As a former senior White House advisor, I believe deeply in the independence of the executive branch and the need for presidents to receive candid, unvarnished advice from their advisors. These are important constitutional considerations that should be thoroughly weighed and seriously guarded. Yet they must also be balanced against the legitimate needs of Congress to oversee and, where necessary, investigate the actions of the White House. Congress should be cautious in its assertions a need for the testimony of presidential advisors, limiting such assertion to circumstances in which disclosure would clearly serve the national interest. This seems to me to be clearly one of those times.

This is not just a case about shifting explanations of underlying conduct that was legitimate; it is a case where the legitimacy of the conduct itself is seriously in doubt, and where the inconsistency of the explanations and the invocation of the 5th Amendment privilege by a senior Justice Department aide have deepened that doubt. Nor is this merely a political fishing expedition. There is more than enough evidence here to raise profound concerns—the smoke is rising and it needs to be investigated.

The underlying issue at stake—whether the executive branch illegitimately ordered the removal of independent U.S. attorneys to advance outside interests or partisan political needs—is a serious matter related to a core element of our constitutional system—the administration of justice.

Cooperation and honesty by the White House could allay many doubts and start to restore some credibility for the executive branch. As I have previously noted, from Presidents Clinton, Reagan, Carter, and Ford, going all the way back to President Washington presidents have permitted senior aides to testify in Congressional investigations. It is time for President Bush to show some of the same kind of healthy flexibility.

If the White House will not adhere to these standards, then the Congress should intervene to ensure that justice is being served by in a fair and impartial manner. The American public must be confident that its courts and prosecutors are independent and unbiased in the administration of justice.

I thank you for inviting me today, and would be happy to answer any and all questions you may have.

Ms. SÁNCHEZ. Thank you for your testimony, Mr. Podesta.

Ms. Nolan?

TESTIMONY OF BETH NOLAN, FORMER WHITE HOUSE COUNSEL TO PRESIDENT CLINTON, PARTNER, CROWELL & MORING

Ms. NOLAN. Thank you, Madam Chair and Mr. Cannon and Members of the Subcommittee. I am Beth Nolan, a partner in the law firm of Crowell & Moring, and I served as counsel to the President in the Clinton administration.

Congress has heard numerous assertions that it may not compel the testimony of White House officials. Too frequently, these claims are made as if there are absolutes in this area.

We have little case law illuminating the contours of executive privilege. But what we do have makes one thing perfectly clear: The President's constitutional authority to assert executive privilege is not absolute but is instead to be balanced against the legiti-

mate needs of the coordinate branches of Government in undertaking their constitutionally assigned responsibilities.

Under this approach, each branch has a constitutional duty to consider, respect and accommodate the needs of the other.

As a general matter, I agree with the proposition that the President's White House advisors should not be called to testify before Congress or even to provide interviews without careful congressional consideration of the needs justifying such a request. To use one standard we have heard much-repeated lately, Congress should not use White House officials to engage in fishing expeditions.

But close advisors to the President have indeed been subpoenaed by congressional Committees, testified under oath, had their testimony transcribed and made part of the public record, and been called back for subsequent testimony.

I, like Mr. Podesta, personally testified four times before congressional Committees on matters directly related to my White House duties: three times while I was serving in the White House and once soon after President Clinton left office. My testimony was conducted under oath, with a transcript.

At least some of those appearances were also made pursuant to subpoena, sometimes without even the opportunity offered to appear voluntarily. On those occasions, the President did not assert a privilege to preclude my testimony.

On another occasion, the President, upon recommendation of the Attorney General, asserted the privilege in response to a subpoena from a congressional Committee seeking my testimony. The Attorney General relied on the longstanding view of the Justice Department that the President and his immediate advisors should be considered immune from compelled congressional testimony, but, appropriately, also considered the balance of executive and legislative interests in the particular matter to conclude that my testimony was protected from congressional compulsion.

I subsequently testified before that same Committee with respect to the same subject, presidential pardons, after the President waived any privileges he might have asserted—different presidential pardons, I should mention.

This personal history makes clear that historically there have been no absolutes in this arena. And there should be none. Despite Justice Department precedents that speak in terms of a general immunity from testimony, the White House has offered a number of advisors for testimony over the years, recognizing that the privilege must give weight to the legitimate needs of Congress in certain investigations or oversight.

I am still troubled by how often, when I was in the White House, we received subpoenas as the first indication of congressional interest and by the great numbers of White House advisors who were called to testify—procedures that raise questions about whether Congress always sought to accommodate the legitimate interests of the executive.

But those troubling elements don't seem to be present here. Instead, there has been an exchange between the White House and Congress, leading to Mr. Fielding's offer to provide four White House witnesses, only with significant limitations.

This offer might be sufficient in another situation, because it is a balance. But here, legitimate and serious questions have been raised in at least two areas: whether U.S. attorneys were replaced to affect the prosecution or non-prosecution of particular cases; and whether full and accurate information has been provided to Congress with respect to this matter.

Under those circumstances, it seems that Congress has not just a right but, indeed, a responsibility to investigate the allegations. Because the constitutional interests of Congress are particularized and strong in this matter, they deserve to be given great weight in the accommodation process.

In my view, the current offer on the table from the White House, if indeed the President is unwilling to consider further compromise, deprives Congress of the cooperation from the executive branch to which it is entitled.

[The prepared statement of Ms. Nolan follows:]

PREPARED STATEMENT OF BETH NOLAN

Statement of Beth Nolan

Before the Committee on the Judiciary
Subcommittee on Commercial and Administrative Law
United States House of Representatives

Hearing on "Ensuring Executive Branch Accountability"

March 29, 2007

Thank you Madam Chair and members of the Committee. I am Beth Nolan, a litigation partner in the law firm of Crowell & Moring LLP.[1] I served in the White House as Counsel to the President in the Clinton Administration. I also served as Deputy Assistant Attorney General in the Justice Department's Office of Legal Counsel, as Associate Counsel to the President, and as a career attorney in the Office of Legal Counsel during the Reagan Administration. For a number of years, I was a constitutional law professor at The George Washington University.

In the course of this Committee's investigation into the Administration's decision to remove eight U.S. Attorneys from office, Congress has heard numerous assertions that it may not compel the testimony of White House officials, or that the testimony of White House officials may be called for only under a special set of circumstances deemed not present here. Too frequently, these claims are made as if there are absolutes in this area, or as if one must be either "for" executive privilege or "against" it, without regard to context.

We have little case law illuminating the contours of executive privilege, but what we do have makes one thing absolutely clear: the President's constitutional authority to assert executive privilege is not absolute, but is instead to be balanced against the legitimate needs of the coordinate branches of government in undertaking their constitutionally assigned responsibilities. The seminal Supreme Court case on executive privilege is, of course, *United States v. Nixon*, in which the Court held that a privilege is a qualified one that may be outweighed by countervailing needs.

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[1] The views expressed in this statement are my own.

As a general matter, I agree with the proposition that the President's White House advisers should not be called to testify before Congress—or even to provide interviews—without careful congressional consideration of the needs justifying such a request. To use one standard we have recently heard much repeated, Congress should not use White House officials to engage in "fishing expeditions." But I can assure you that, despite the impression that some have recently sought to create, the testimony of White House advisers is far from unprecedented. Close advisers to the President have indeed been subpoenaed by congressional committees, testified under oath, had their testimony transcribed and made part of the public record—and been called back for subsequent testimony. As the Congressional Research Service has reported, there have been at least 73 occasions since 1944 when White House advisers have testified before Congress.[2]

I personally testified four times before congressional committees on matters directly related to my White House duties—three times while I was serving in the White House and once soon after President Clinton left office. I was also deposed by congressional committee staff during my service in the White House. My testimony was conducted under oath and in the presence of a stenographer who made a transcript of the proceedings. At least some of those appearances were also made pursuant to subpoena, without even the opportunity to appear voluntarily. On those occasions, the President did not assert a privilege to preclude my testimony.

On another occasion, the President, upon recommendation of the Attorney General, asserted a privilege in response to a subpoena from the Committee on Government Reform and Oversight of the House of Representatives seeking my testimony with respect to pardons the President had decided to grant before I became his Counsel.[3] The Attorney General relied on the longstanding view of the Justice Department's Office of Legal Counsel that "[t]he President and his immediate advisers—that is, those who customarily meet with the President on a regular or frequent basis—should be deemed absolutely immune from testimonial compulsion by a

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[2] Congressional Research Service Report for Congress, *Presidential Advisers' Testimony Before Congressional Committees: An Overview* (updated April 14, 2004). *See They've Testified Before*, Washington Post B2 (Mar. 25, 2007).

[3] *See* Memorandum to the President from Janet Reno, Attorney General, re *Assertion of Executive Privilege with Respect to Clemency Decision* (September 16, 1999).

congressional committee."[4] Recognizing the absence of judicial precedent for this position, however, the Attorney General appropriately also considered the balance of executive and legislative interests in the particular matter to conclude that my testimony was protected from congressional compulsion under the particular circumstances of that request. I subsequently testified before that same committee with respect to other pardons, after the President waived any privileges he might have asserted with respect to such testimony, just as he had done on prior occasions.

I start with this personal history to make clear that there historically have been no "absolutes" in this arena—and there should be no absolutes. Sometimes it is appropriate for the President to decline to provide his White House advisers for testimony. Other times, it is appropriate to allow them to provide the information requested by Congress, sometimes in a private meeting, other times in an open hearing. Similarly, it is sometimes appropriate for Congress to require the testimony of such advisers, and at other times, Congress should exercise restraint in this area. It is not an evasion but rather a statement of the law and practice in this area, to say that it all depends on the circumstances.

It is for this reason, despite Justice Department precedents that speak in terms of a general immunity from testimony, that the White House has offered a number of advisers for testimony over the years. The executive branch practice recognizes that the privilege must give way to the legitimate needs of Congress in certain investigations or oversight. It is not a failure to protect the privilege, but a recognition of its dynamic quality, to offer White House advisers for testimony in some circumstances.

The view that White House aides may never be compelled to testify before Congress is not only inconsistent with the historical record, but also has never been adopted by a court or, to my knowledge, presented for judicial resolution. What is clear from *United States v. Nixon*[5] is that executive privilege is constitutionally rooted in the separation of powers. The public interest in a President receiving

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[4] *See* Memorandum from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, Re: *Power of Congressional Committee to Compel Appearance or Testimony of 'White House Staff'* (Feb. 5, 1971). *See also, e.g.*, Memorandum from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel (July 29, 1982).

[5] 418 U.S. 683 (1974). *See also* Nixon v. Administrator of General Services, 433 U.S. 425 (1977).

"candid, objective, and even blunt or harsh opinions" justifies a presumptive privilege for communication with the President or among those who advise and assist the President. The presumptive privilege, however, must be balanced against the competing interests of a coordinate branch of government. In *Nixon*, therefore, the Court recognized the privilege but found that a generalized assertion of the need for confidentiality did not outweigh the judiciary's need for evidence in a criminal proceeding.

The Supreme Court has not addressed how this balancing would be done in the context of a congressional demand for information, although the D.C. Circuit Court of Appeals had applied a balancing approach prior to *Nixon*.[6] That court subsequently affirmed that neither the executive nor legislative branch has an absolute power in this sphere—either to withhold or demand information from the other—and that both have a constitutional duty to respect and accommodate the needs of the other.[7] It also made clear that the court would be reluctant at best to intervene in an executive privilege dispute between the two political branches, finding instead that the Framers expected "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 government system."[8] This "spirit of dynamic compromise" is an essential part of the constitutional accommodation process that is at the heart of the resolution of executive privilege disputes: "[E]ach 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."[9]

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[6] Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 731 (D.C. Cir. 1974) (congressional committee may overcome executive privilege only if it demonstrates that information is "demonstrably critical to the responsible fulfillment of the Committee's functions").

[7] United States v. AT&T, 567 F.2d 121 (D.C. Cir. 1977).

[8] United States v. AT&T, 567 F.2d at 127.

[9] United States v. AT&T, 567 F.2d at 127. *See also* United States v. House of Representatives, 556 F. Supp. 150 (D.D.C. 1983) (declining to resolve executive privilege dispute in absence of sufficient compromise and cooperation between the branches).

Negotiation, or what is frequently called the accommodation process, is not merely a possible strategy in these disputes but rather a long-recognized constitutional imperative. "Negotiation between the two branches should . . . be viewed as a dynamic process affirmatively furthering the constitutional scheme."[10] This negotiation is one in which each branch asserts its legitimate constitutional interests but recognizes—and seeks to accommodate—the legitimate constitutional interests of the other branch. Of course, each branch must engage in the accommodation process for it to work properly.

We should expect both the legislative and executive branches to assert vigorously their authorities in our constitutional system, and we can expect that each will resist inappropriate incursions on their powers. We can therefore expect that a President will defend executive power, consistent with the role of the executive in a constitutional system with coordinate branches of government that also have powers that should be exercised. This is just what the Framers expected, that the ambition of one branch would work to counteract the ambition of the other.[11] Nonetheless, while a President should be expected to vigorously argue for presidential prerogatives, he should do so with proper respect for coordinate branches, and not solely to maximize presidential power or withhold relevant information.

President Clinton defended the privilege when it was appropriate. But he also made his advisers available to testify before Congress to answer questions. I am still troubled by how often we received subpoenas as the first indication of congressional interest, a procedure that fails to accord proper respect to the legitimate interests of the executive branch and the importance of the constitutional accommodation process. And I am still troubled by the number of White House advisers who were called to testify on a range of matters, suggesting that Congress may not have always appropriately narrowed its requests to achieve its constitutional objectives in a manner sufficiently respectful of the President's constitutional prerogatives.

But those troubling elements are not present in today's dispute. A presumptive privilege argues for restraint when Congress seeks the testimony of White House

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[10] United States v. AT&T, 567 F.2d at 130.

[11] THE FEDERALIST NO. 51 (Alexander Hamilton and James Madison).

officials, but does not preclude Congress from requiring such testimony in appropriate circumstances. Serving the White House with congressional subpoenas not as a last resort, but as the first contact from Congress on the matter, would in almost all cases be inconsistent with the constitutional responsibilities of Congress, but Congress has not done so here.

As I understand it, the House and Senate Judiciary Committees reached out to Fred Fielding, Counsel to President Bush, by letter, requesting information on these matters. I do not know if there were conversations prior to this letter, but there were subsequent discussions between Members and Mr. Fielding regarding this request, after which Mr. Fielding sent a letter on March 20 offering to provide four White House officials[12] for interviews with a number of conditions. Under Mr. Fielding's conditions, the interviews must be:

- limited to the subject of communications between the White House and persons outside the White House (including Members of Congress) on the subject of the requests for resignations;
- conducted privately, with questioning from a limited number of Members of Congress, who may have committee staff present;
- conducted without an oath;
- conducted without a transcript;
- conducted on agreement that there will be no subsequent subpoenas; and
- conducted in the presence of a representative from the Office of the Counsel to the President, and personal counsel if desired.

Mr. Fielding also offered to provide to the Committees copies of a limited category of documents.[13]

Mr. Fielding's letter makes no reference to executive privilege, but it clearly relies on the principles and language of executive privilege, referring specifically to the "accommodation" process, the "constitutional prerogatives of the Presidency," and the "requirements of the constitutional separation of powers."

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[12] The four are the former Counsel to the President, Harriet Miers; the Deputy Chief of Staff and Senior Advisor Karl Rove; a Deputy Counsel; and a Special Assistant to the President in the Office of Political Affairs.

[13] Letter to The Honorable Patrick Leahy, John Conyers, Arlen Specter, Lamar Smith, and Linda Sanchez from Fred F. Fielding, Counsel to the President (March 20, 2007).

Subsequent to the issuance of this letter, statements from the President and White House officials have made clear that the White House views this offer as the end of the negotiation process.

Mr. Fielding's offer might be sufficient in another situation. But when we consider the interests of each branch here—the President's legitimate interest in receiving confidential advice, which under our constitutional system is deemed to enhance the quality of presidential decisionmaking itself, and Congress's legitimate interests in receiving information relevant to its legislative and oversight functions to enhance its ability to make appropriate judgments in its sphere of responsibility—it appears that Congress's specific interests in this matter call for substantially more accommodation from the White House.

This is not a case in which Congress is merely curious about an appointment decision. Instead, legitimate and serious questions have been raised in at least two areas: whether U.S. Attorneys were replaced to affect the prosecution or non-prosecution of individual cases and whether full and accurate information has been provided to Congress with respect to this matter. Information already provided to Congress from the Justice Department raises significant questions that relate directly to the White House advisers whose testimony is sought in these matters.

Under these circumstances, where the essential principle of impartial prosecutorial discretion has been called into question, Congress has not just a right but indeed a constitutional responsibility to investigate the allegations. Because the constitutional interests of Congress are particularized and strong in this matter, they deserve to be given great weight in the accommodation process. In my view, the current offer on the table from the White House deprives Congress of the cooperation from the Executive Branch to which it is entitled.

Ms. SÁNCHEZ. Thank you, Ms. Nolan. And you came in just at the 5-minute mark. I am impressed. [Laughter.]

Ms. NOLAN. Thanks.

Ms. SÁNCHEZ. Great panel, so far.

Mr. Francisco, please proceed.

TESTIMONY OF NOEL J. FRANCISCO, FORMER ASSOCIATE COUNSEL TO PRESIDENT GEORGE W. BUSH, PARTNER, JONES DAY

Mr. FRANCISCO. Madam Chairman, Ranking Member, Members of the Subcommittee, my name is Noel Francisco. I am a partner at the law firm of Jones Day and formerly served as associate counsel to President George W. Bush and Deputy Assistant Attorney General in the Office of Legal Counsel.

Thank you for inviting me to testify today.

"If there is a principle in our Constitution more sacred than another, it is that which separates the legislative, executive and judicial powers." Those are the words of James Madison.

Our founding fathers recognized that the division of power among three separate branches of Government was essential to the preservation of liberty.

As Alexander Hamilton explained, "The separation of powers ensures that the two greatest securities the people can have for the faithful exercise of any delegated power are the restraints of public opinion and the opportunity of discovering with facility and clearness the misconduct of the people they trust."

By locating power in separate and distinct branches of Government, the people know who is responsible for its exercise and accountable for its abuse.

The present inquiry into the President's decision not to reappoint eight United States attorneys threatens a constitutional confrontation that would undermine our constitutional structure and the liberties it protects. In that system of separated powers, it is the President's exclusive prerogative to appoint and remove United States attorneys.

That nondelegable power of the President is not shared with the legislative branch. Nor is the confidential advice of the President's closest advisors subject to congressional review. The President has a constitutional privilege over those discussions, recognized by the Supreme Court as falling within his executive privilege.

No one would tolerate a demand by the President that a Member of this body divulge the confidential advice he or she receives from senior staff members in deciding whether or not to vote against a bill. By the same token, no one should tolerate a demand that the President divulge the confidential advice that he receives.

The constitutional structure protects the branches from each other, but, more importantly, the balance that it creates protects the liberty of the people by dispersing and diluting governmental power.

Requiring the President to divulge confidential advice would be particularly inappropriate here, in light of the information that the President has agreed to provide. Indeed, it is my understanding that the only information that the President has not agreed to pro-

vide pertains to internal White House communication, including the public, sworn testimony of certain senior White House advisors.

But this testimony is precisely that for which executive privilege provides the strongest protection. Unlike members of the Cabinet, these senior White House advisors have no operational authority. Their sole function is to provide the President with advice in order to assist in the execution of his constitutional duties and responsibilities. Demanding the sworn testimony of these senior White House advisors is tantamount to demanding the sworn testimony of the President himself.

This is why Presidents of both political parties have consistently maintained that executive privilege is at its strongest with respect to these senior advisors. As the late Chief Justice Rehnquist once explained, "Such individuals should not be required to appear before Congress at all."

Here, the question of executive privilege is a narrow one: Does Congress's power to conduct oversight entitle it to demand that the President divulge the advice of his closest advisors on a quintessential and nondelegable presidential power? With all due respect, I believe that that question answers itself.

At a minimum, however, Congress would have to examine the extensive information that it does have, specifically identify the need for the information that it seeks, and establish that the incremental information is, in the words of the D.C. Circuit, "demonstrably critical to the fulfillment of its function."

At this early stage in the proceedings, however, I do not believe that Congress could possibly overcome the privilege that presumptively attaches to these core, internal White House communications.

In the end, however, it is doubtful whether such a confrontation between Congress and the President will be in either's interest. Historically, the President has not exerted executive privilege over the whole range of privileged information, but instead——

Ms. SÁNCHEZ. Mr. Francisco? Your time is running short. If you could just summarize and conclude.

Mr. FRANCISCO. I will, Madam Chairman.

Instead, the President and the Congress generally seek to seek an accommodation, as some of our other witnesses have explained.

I think that the President has attempted to do that here by putting on the table what I view to be an eminently reasonable offer. And I think that that offer provides the proper framework within which these negotiations can begin.

Speaking as a citizen and as someone who has devoted much of my professional career to studying these issues, I, for one, would hope that this is the manner in which the present controversy, too, would be resolved.

Thank you.

[The prepared statement of Mr. Francisco follows:]

PREPARED STATEMENT OF NOEL J. FRANCISCO

Madame Chairman, Ranking Member, and Members of the Subcommittee:

My name is Noel John Francisco. I am a partner at the law firm of Jones Day. I served as Associate Counsel to President George W. Bush from 2001 to 2003, and Deputy Assistant Attorney General in the Department of Justice's Office of Legal

Counsel from 2003 to 2005. It is an honor to appear before you to discuss the important issue of Executive Privilege.

"If there is a principle in our Constitution . . . more sacred than another, it is that which separates the Legislative, Executive, and Judicial powers." 1 Annals of Cong. 581 (Joseph Gales ed., 1834) (remarks of James Madison). Our Founding Fathers recognized that the division of power among three separate branches of government was essential to the preservation of liberty. As Alexander Hamilton explained, this separation of powers ensures "the two greatest securities [the people] can have for the faithful exercise of any delegated power"—"the restraints of public opinion" and "the opportunity of discovering with facility and clearness the misconduct of the persons they trust." *The Federalist* No. 70. In short, by locating power in separate and distinct branches of government, the People know who is responsible for its exercise and accountable for its abuse.

The present inquiry into the President's decision not to reappoint eight United States Attorneys threatens a constitutional confrontation that would undermine our constitutional structure and the liberties it protects. In that system of separated powers subject to limited checks and balances, it is the President's exclusive prerogative to appoint and remove United States Attorneys. That non-delegable power of the President is not shared with the Legislative Branch; nor is the confidential advice of the President's closest advisors concerning whom to appoint or remove from these positions subject to congressional review. The President has a constitutional privilege over those discussions—recognized by the Supreme Court as falling within his Executive Privilege. *See United States v. Nixon*, 418 U.S. 683, 705–06 (1974). No one would tolerate a demand by the President that a Member divulge the confidential advice he receives from senior staff members on whether to vote for or against a bill (or in the Senate, for or against a nominee). By the same token, no one should tolerate a demand that the President divulge the confidential advice he receives on whom to appoint or remove from the position of United States Attorney. The President and Congress's role in this regard is both constitutionally prescribed and constitutionally limited. These constitutional strictures protect the Branches from each other; but more importantly, the balance that they create protects the liberty of the citizenry by spreading and diluting governmental power.

It is understandable that this body would have less sympathy for the President's point of view. Congress is, after all, a co-equal branch of our government, with its own vital role and constitutional duties. Our constitutional structure, however, is not designed to protect the President or the Congress. It is designed to protect the People. As Justice Kennedy has elegantly stated, "[w]hen structure fails, liberty is always in peril." *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 468 (1989) (Kennedy, J., concurring in the judgment). The Constitution thus also recognizes the danger of Executive or Judicial encroachment on Congress's ability to carry out its functions—a recognition embodied in, among other places, the Speech and Debate Clause.

Requiring the President to divulge confidential advice would be particularly inappropriate in light of the information that the President has agreed to provide. It is my understanding that the President has agreed to produce the following:

- Department of Justice officials, who will testify to their role in the removal of the eight United States Attorneys and their conversations with the White House;
- Department of Justice e-mails and memoranda related to this issue, including e-mails and memoranda exchanged between the Department of Justice and the White House;
- White House e-mails and memoranda exchanged with any outside entity, including the Department of Justice and Members of Congress;
- –Non-public interviews of specified senior White House advisers about their communications with outside entities, including the Department of Justice and Members of Congress.

I understand that the only information that the President has not agreed to provide pertains to internal White House communications, including the public, sworn testimony of certain White House advisors. Thus, the present dispute appears to be limited to this last category of information.

The incremental information that the President has not agreed to provide is precisely the information for which Executive Privilege provides the strongest protection. Unlike members of the Cabinet or other agency employees, the White House Staff has no operational authority. It cannot prosecute criminals. It cannot issue binding rules and regulations. It cannot sign an Executive Order. Instead, its sole function is to provide the President with advice in order to assist the President in

the execution of his constitutional duties and responsibilities. Thus, demanding the sworn testimony of these senior White House advisors is tantamount to demanding the sworn testimony of the President himself. It necessarily follows that the importance of confidentiality with respect to this small group of presidential advisers is particularly acute. This is why the historical view of the Executive Branch is that "the few individuals whose sole duty is to advise the President should never be required to testify because all of their duties are protected by executive privilege." CRS Report for Congress, *Presidential Advisers' Testimony Before Congressional Committees: An Overview* (April 14, 2004), at p. 27.

This is not a partisan issue. To be sure, presidential administrations have differed somewhat as to the outer contours of Executive Privilege. For example, according to the Congressional Research Service, President Eisenhower, a Republican, "took the most expansive approach [to Executive Privilege], arguing that the privilege applied broadly to advice on official matters among employees of the executive branch." CRS Report for Congress, *Presidential Claims of Executive Privilege: History, Law, Practice and Recent Developments* (Sept. 21, 1999), at p. 11. The Congressional Research Service reports that the Clinton administration likewise took the "expansive position that all communications within the White House and any federal department and agency [were] presumptively privileged." *Id.* In contrast, "[t]he Reagan Justice Department appears to have taken a slightly narrower view of the scope of the privilege." *Id.* But regardless of the outer boundaries, presidents of both political parties have consistently maintained that the privilege is at its strongest with respect to the President's senior White House advisors—"the few individuals whose sole duty is to advise the President." *Presidential Advisers' Testimony Before Congressional Committees, supra.* As the late Chief Justice Rehnquist explained while serving in the Department of Justice, such individuals "should not be required to appear [before Congress] at all." U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Separation of Powers, *Executive Privilege: The Withholding of Information by the Executive,* hearings, 92nd Cong., 1st sess. (Washington: GPO, 1971), p. 427. "[T]he aim," said the Chief Justice, "is not for secrecy of the end product—the ultimate Presidential decision is and ought to be a subject of the fullest discussion and debate, for which the President must assume undivided responsibility. But few would doubt that the Presidential decision will be a sounder one if the President is able to call upon his advisers for completely candid and frequently conflicting advice with respect to a given question." *Id.* at 425.

This view has also been validated by the few court cases addressing claims of Executive Privilege. Understandably, the federal judiciary has been reluctant to resolve inherently "political" disputes between the President and Congress—including disputes over information held by one of the branches. *See, e.g., United States v. AT&T,* 551 F.2d 384, 395–96 (D.C. Cir. 1976); *United States v. The House of Representatives of the United States,* 556 F.Supp. 150, 152–53 (D.D.C. 1983). But in the only instance in which a federal court did resolve such a dispute, it held that Congress's "asserted power to investigate and inform" was, standing alone, insufficient to overcome a claim of privilege and so refused to enforce the congressional subpoena. *Senate Select Committee on Presidential Campaign Activities v. Nixon,* 498 F.2d 725, 731–32 (D.C. Cir. 1974). Other cases, which have generally arisen in the context of criminal investigations and prosecutions, have likewise recognized that internal White House communications are at the core of the protections of Executive Privilege. *See, e.g., In re Sealed,* 121 F.3d at 752 (the privilege encompasses "communications authored or solicited and received by those member's of an immediate White House adviser's staff who have broad and significant responsibility for investigating and formulating the advice to be given the President on the particular matter to which the communications relate"); *see also Association of American Physicians and Surgeons v. Clinton (AAPS),* 997 F.2d 898, 909 (D.C. Cir. 1993) (the "Article II right to confidential communications attaches . . . to discussions between [the President's] senior advisors," because "Department Secretaries and White House aides must be able to hold meetings to discuss advice they secretly will render to the President").

Finally, it bears re-emphasizing that the issue here—the appointment and removal of United States Attorneys—is a "quintessential and non-delegable Presidential power." *In re Sealed,* 121 F.3d at 753. United States Attorneys are political appointees who may be removed by the President for any reason—good or bad—or for no reason at all. They exercise extraordinary power. The decisions of United States Attorneys can deprive individuals of their liberty and, in some cases, their lives. Ultimately, it is not the unelected United States Attorneys who are accountable for these decisions, but the President, who alone in the Executive Branch is answerable to the People. Indeed, the only way that United States Attorneys may be held democratically accountable for their decisions (short of impeachment) is

through the President. This is why "confidentiality is particularly critical in the appointment and removal context; without it, accurate assessments of candidates and information on official misconduct may not be forthcoming." *In re Sealed,* 121 F.3d at 753. Indeed, Executive Privilege is at its zenith when it applies to the President's decisions regarding his appointment power. *Cf. Public Citizen v. Department of Justice,* 491 U.S. 440, 466–67 (1988); *id.* at 468–69 (Kennedy, J., concurring in the judgment).

Here, the question of Executive Privilege is a narrow one: Does Congress's power to conduct oversight entitle it to demand that the President divulge the advice of his closest advisors on a "quintessential and non-delegable Presidential power"? With all due respect, I believe that the question answers itself. Indeed, in my view, it is arguable that Congress can *never* require that the President divulge these confidential communications, as the Executive Branch has consistently maintained.

At a minimum, however, Congress would need to exhaust all other avenues for obtaining this information and then demonstrate why it needs the information withheld. *Cf. Cheney v. United States District Court,* 542 U.S. 367, 388 (2004). Thus, Congress would first have to examine the extensive information that the President has made available to it—testimony from Department of Justice officials, communications within the Department of Justice and between the Department of Justice and the White House, and non-public interviews of White House officials. It would then have to specifically identify why it needs the information that it does not have. And finally, it would have to establish that the incremental information it seeks—information at the core of Executive Privilege—is "demonstrably critical to the responsible fulfillment of [its] functions." *Senate Committee,* 498 F.2d at 731–32. At this early stage of the proceedings, however, there is no such record, in the absence of which Congress could not, in my view, possibly overcome the privilege that presumptively attaches to these core, internal White House communications.

In the end, however, it is doubtful whether such a confrontation between Congress and the President will be in either's interest. Historically, the President has not asserted Executive Privilege over the full range of privileged information. Instead, as a matter of comity between the branches, the President typically has attempted to accommodate Congress's legitimate need for information with the President's equally legitimate need to safeguard confidential communications. That is what the President appears to be doing here, where he has agreed to provide Congress with all relevant information save a limited amount relating to his closest, most confidential advisors. And even with respect to these individuals, the President stands ready to provide Congress with informal, non-public interviews. This seems to me to be an eminently reasonable offer, and one which provides the framework in which the present controversy may be resolved without provoking a constitutional confrontation involving all three branches of our government. Speaking as a citizen and as someone who has devoted much of my professional career to the respective roles of the President, Congress, and the Judiciary, it is the way that I for one would hope that this matter would be resolved.

This concludes my prepared statement. I would be happy to answer any questions that you may have.

Ms. SÁNCHEZ. Thank you, Mr. Francisco.

Mr. Schwarz?

TESTIMONY OF FREDERICK SCHWARZ, JR., SENIOR COUNSEL, BRENNAN CENTER FOR JUSTICE, NYU SCHOOL OF LAW

Mr. SCHWARZ. Thank you, Madam Chairman.

Thank you, everybody else.

I just want to make two points out of my written testimony, based on my experience as chief counsel of the Church Committee 30 years ago that investigated the most sensitive national security matters.

During our hearings, we heard and took sworn testimony from high-ranking presidential advisors—national security advisors—from the White House in the Truman, Eisenhower, Kennedy, Johnson and Nixon administrations. So, again, there are precedents for that being done.

Another point from our experience in the Church Committee is: Watch out for labels, like the label, "national security," which we dealt with all the time, which is just so vague. And here, you are hearing the label, "performance." Well, "performance" just doesn't tell you anything about what it actually means. And I would suppose that President Nixon, when he fired Archibald Cox, would say, "The reason I fired him was because of his performance."

Now, another point, historical point, is that I think you have to look at executive privilege in terms of what actual powers the White House officials now have.

When this Constitution started, there weren't any White House officials. There was President Washington and then the secretary of the state and the secretary of the treasury. Then we started to have White House officials. Now the White House officials, clearly, de facto have the power to tell the departments what to do.

So, it seems to me, without knowing your record completely, that is what is involved here—not a question of advice to the President, but instructions from these people to the departments. And I think that raises quite different questions on the theory of executive privilege.

Another point I suggest in my written testimony is that it would be a good thing for this Committee to do a more comprehensive analysis of the Justice Department. I know you have done that, to some extent, on the Civil Rights Department, but another area where I think you particularly should be paying attention is the Office of Legal Counsel.

It is the Office of Legal Counsel that has set the nation down a course that has been extremely harmful to our national reputation and has been extremely harmful to the efforts to combat terrorism. Because by condoning torture and actions such as warrantless wiretapping and writing opinions to that effect, which include a theory which is one that both Republicans and Democrats in the Congress and in the country should be very concerned about, which is a theory that the President has the right to violate congressional laws—that is a theory which has been in the OLC opinions.

Now, most of those opinions have not yet been released; they have been kept secret. And there is no justification for keeping secret an opinion of the Office of Legal Counsel that determines the law and which also decides that the President has the power to disregard the law.

So the final point that I would make—and, Madam Chairman, I am shooting to finish in less than 5 minutes, and I expect appropriate kudos for that if I do—— [Laughter.]

Ms. SÁNCHEZ. You will win the prize of the panel.

Mr. SCHWARZ. The final point I would make is that I think this Committee, particularly, along with the Intelligence Committees, should take a very close look at the subject of secrecy—excessive classification. I think any objective person would say we have too much that is kept secret, stamped "secret."

When we did the Church Committee, we concluded, after our year and a half of investigation of five Administrations, Roosevelt through Nixon, all of which abused their national security powers, both Republican and Democratic Administrations, we concluded that secrecy stamps were used very, very often to protect the Ad-

ministration from embarrassment and to protect them from the American public knowing things they had been doing that were wrong.

Congress has given the President wide power to determine classification. And I think you should, in a very careful way—this is something that is very serious and merits extensive thought—you should look at how secrecy stamps have been used and whether there is not a need in the national interest to reduce the amount of stuff that is kept secret and away from the American public.

Thank you very much.

[The prepared statement of Mr. Schwarz follows:]

PREPARED STATEMENT OF FREDERICK A. O. SCHWARZ, JR.

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Committee on the Judiciary

Subcommittee on Commercial and Administrative Law

U.S. House of Representatives

Hearing on "Ensuring Executive Branch Accountability"

Testimony of Frederick A. O. Schwarz Jr.

Senior Counsel, Brennan Center for Justice at New York University School of Law

March 29, 2007

I. Introduction

The Brennan Center thanks the Subcommittee on Commercial and Administrative Law for holding this hearing on "Ensuring Executive Branch Accountability." I am especially grateful to have the chance to share with you my own experience with congressional oversight, as well as the Brennan Center's recent research and analysis of the proper Separation of Powers, as it pertains to this Subcommittee and to the House Judiciary Committee's important inquiries into the recent performance of the Justice Department.

The fundamental premises of my testimony are simple: The Constitution assigns Congress a necessary and vital role conducting oversight of the activities of the executive branch. Experience demonstrates this can be done even where there are issues of critical law enforcement or national security at stake. Experience also demonstrates that in the absence of congressional oversight, national security and law enforcement powers often are misused, either for partisan ends or in ways that harm innocent Americans and also national security.

The question of improper removals of United States Attorneys has been the focus of this subcommittee's investigation. But there is also a clear need for a much more searching inquiry into the Department of Justice, and in particular its strategic use of national security powers in improper ways. This Subcommittee and the Senate Judiciary Committee's inquiries these past weeks have been models of care and diligence worth emulating. I would urge though that you consider broader inquiry into the Justice Department's recent lapses, which encompass in particular the conduct of the Office of Legal Counsel and the Civil Rights Divisions. A carefully planned and responsibly managed congressional inquiry into the Department as a whole would be an important service to the rule of law today.

II. Background Experience

I am now Senior Counsel at the Brennan Center for Justice at New York University School of Law. I have been privileged to enjoy considerable experience as a lawyer in both private practice and in government service. Between 1975 and 1976, I served as Chief Counsel to the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activity (1975-1976), known as the Church Committee for its Chair, the late Senator Frank Church of Idaho. Subsequently, I served as Corporation Counsel for the City of New York under Mayor Edward I. Koch from 1982 to 1986. In 1989, I chaired the commission that revised New York City's charter. I currently chair the New York City Campaign Finance Board. For many years I was also a partner at a leading New York City corporate law firm.

In addition to being Chief Counsel for the Church Committee and running a large government law office, my most relevant experience to this hearing is as co-author (with Aziz Huq, a colleague at the Brennan Center) of *Unchecked and Unbalanced: Presidential Power in a Time of Terror*, published by the New Press and released last week. *Unchecked and Unbalanced* grapples with the problem of how to retain the Constitution's system of Checks and Balances – a system that was meant both to protect our liberties and to reduce the likelihood of foolish and foolhardy mistakes, even in times when the nation faces grave and undisputed threats. The book documents how the Justice Department has abetted the use of torture, the traducing of the 1949 Geneva Conventions and wholesale spying on Americans in the homeland. This, I believe, is the larger context against which this Subcommittee necessarily considers the matter of the removal of United States attorneys today.

III. Four Basic Principles of Oversight

As chief counsel to the Church Committee, I was responsible for helping to investigate the most sensitive parts of our national security apparatus. It is my conviction based on this experience that it is perfectly feasible to conduct meaningful oversight into alleged executive branch misuse of law enforcement and security related powers.

In summary, here are key principles I would draw from my experience:

- Congressional oversight is essential to ensuring the fair and effective deployment of law enforcement and national security powers. On matters as diverse as political corruption and counter-terrorism, Congress serves the nation best when it vigorously ensures that federal law is applied in a fair, just, and effective manner.

- Oversight, therefore, need not be a partisan matter. Neither Republicans nor Democrats want a system where prosecutors are fired on partisan grounds. No one wants the "national security" or the "executive privilege" label to be applied to obscure partisan goals or to hide abusive exercises of power. Oversight is a shared responsibility. And before facts are fully aired, nobody should prejudge the matter.

- Far too much information about governmental conduct is kept secret. There are, of course, legitimate secrets. They should be protected. But, as the Church Committee concluded thirty years ago, many secrecy stamps serve no national interest. Rather, they shield governmental mistakes and misdeeds from public sight. This no less true of assertions of "executive privilege," which should not be treated as having the talismanic effect of shutting down all inquiry. It is Congress's duty to sift responsibly claims of secrecy or privilege to determine the credible from the flawed.

- The Church Committee showed that Congress has several procedural means to handle secrecy claims. Even in the case where a presidential advisor can make a colorable claim that some of their testimony is covered by a privilege, Congress should proceed to secure testimony, and use the means deployed by the Church Committee to ensure a full airing of the matter under investigation.

Applying these principles, Congress has the power and the capacity to conduct effective oversight not only of the prosecutors' removal, but also of the broader gamut of issues thrown up by recent Justice Department conduct. There is no question that oversight must be careful and scrupulously fair as well as diligent. But there is no question in my mind that a fuller inquiry is today both feasible and necessary.

IV. The Experience of the Church Committee

a. The Difficulties Facing Congressional Oversight

Conscientious and responsible congressional oversight is an essential part of America's experiment in constitutional government.[1] This task, however, is complicated by the realities of modern executive branch administration. For the first century and a half of American life, Congress dwarfed the executive branch in manpower and administrative capacity and the Departments dwarfed the White House.[2] Only after the 1936 Brownlow Committee did presidential staff begin to grow by leaps and bounds.[3] The president (and the vice president) now wield an enormous staff of policy-makers and executors, from White House Counsels to National Security Advisors. In many instances, these officers have more power than department heads subject to Article II Advice and Consent requirements. The balance of administrative power, in short, has shifted from Article I to Article II and from the Departments to the White House, shifts with pronounced consequences especially in the secretive national security arena. That presidential advisors should be the focus of intense congressional scrutiny today, therefore, ought not to be at all surprising.

Oversight in sensitive areas of law enforcement and national security faces heightened difficulties. Because the Church Committee was the first post-war body to conduct a thorough investigation into the conduct of American intelligence agencies, and the consequences of that conduct, it confronted those difficulties directly.

Until the 1970s, informed debate on the proper role of intelligence agencies, and their control by presidents and other high executive branch officials, was rare. Senate and House Committees on the CIA had no written records. They asked no tough questions. And they often indicated that they preferred *not* to know what was being done. The FBI also got a free ride. The lack of congressional oversight, however, permitted grave harms to Americans' constitutional liberties and permitted foolish uses of

[1] The Supreme Court has affirmed the constitutionally committed breadth of congressional inquiry power on numerous occasions. *See, e.g., Eastland v. United States Servicemen's Fund*, 421 US 491, 509 (1975) ("The scope of [Congress'] power of inquiry . . . is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."); *McGrain v. Daugherty*, 273 U.S. 135 (1927); *Watkins v. United States*, 178, 187 (1957) (holding that: "The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.").

[2] "As late as the 1930s, White House staff could barely be described in the plural." Andrew Rudalevige, THE NEW IMPERIAL PRESIDENCY: RENEWING PRESIDENTIAL POWER AFTER WATERGATE 43 (2006). The Brownlow Commission, formally known as the President's Committee on Administrative Management, looked at the president's capacity to manage the executive branch and recommended expansion of the White Staff and increased presidential control over departmental structure and civil servants. *Ibid.*

[3] *Ibid.*; *see also* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2274-75 (2001)

American power overseas that were inconsistent with Jefferson's wisdom in the Declaration of Independence that we show a decent respect for the opinions of mankind.[4] It was not until the Church Committee's extensive investigations that the extent of this harm was revealed.[5]

More important than the findings of the Church Committee today are the procedures and techniques deployed to ensure a full airing of the facts without any compromise of legitimate secrecy claims.

b. Lessons from the Church Committee

The Church Committee's inquiry has numerous parallels with today's inquiries. It too took place again the backdrop of a global confrontation with a dangerous enemy. At that time, as now, we were embroiled in a difficult foreign war. Then as now, there was mounting evidence of the abuse of national security powers at home, often for partisan reasons.

In my view, the most relevant lessons are the following.

i. Oversight is not a partisan matter: The Church Committee demonstrates that congressional oversight is not a partisan matter. That body brought both Republicans and Democrats together and was able to pursue inquiries into Administrations of both stripes. Some of the most important findings of the Church

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[4] *See* Frank J. Smist, CONGRESS OVERSEES THE UNITED STATES INTELLIGENCE COMMUNITY, 1947-1989 (1990).

[5] The Church Committee's investigations revealed the following (among many other abuses of intelligence and law enforcement powers):

- Secret intelligence action was used to harass, disrupt, and even destroy law-abiding domestic groups and citizens.
- Too many people were spied on with excessively intrusive, and often knowingly illegal, techniques.
- Intelligence agencies conducted secret surveillance and infiltration of entirely lawful groups.
- Mail was illegally opened.
- Without their knowledge, Americans were given dangerous, even fatal, drugs to test techniques being developed to combat the Soviets.
- Congress was given incomplete or misleading intelligence on subjects of national concern, such as whether the civil rights movement or anti-Vietnam War protests were controlled from overseas.
- Presidents solicited intelligence agencies to spy on political opponents.
- Among other assassination plots, the CIA attempted for years to assassinate Fidel Castro, even enlisting the Mafia in its efforts.

For a complete account of these abuses, see Frederick A. O. Schwarz and Aziz Z. Huq, UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TERROR 21-49 (2007).

Committee concerned Democratic icons, such as Presidents Franklin Delano Roosevelt, John F. Kennedy and Lyndon B. Johnson.

Today's task is complicated by the fact that it is the actions of one Administration at issue. This means it is easier for an Administration to label any inquiry—no matter how legitimate—as partisan. President Bush has expressed concern about a "partisan fishing expedition."[6] This is at best premature. Congress has a constitutional obligation to conduct oversight. Congressional oversight amounts to public accounting. Having testimony open and on the record makes it *less* political: There is less danger that either one side or the other can misrepresent the facts. Oversight means that the public, both Republicans and Democrats, decide whether the actions taken were right or wrong.[7]

The Church Committee is not an outlier. Congress has undertaken meaningful investigations in the past, even against the backdrop of grave threats to the nation. During the American Civil War, congressional Republicans drove President Lincoln's first Secretary of War from office by their investigations. And just three decades before the Church Committee, then-Senator Harry Truman conducted a vast investigation that effectively exposed military waste and inefficiency during World War II, even while his own party held the White House.[8] Most recently, the National Commission on Terrorist Attacks Upon the United States ("the 9/11 Commission") strived to overcome party bias, even arranging its seating to break up clusters of Republicans and Democrats. It again proved that there is no Republican or Democratic way when it comes to proper use of our law enforcement and national security resources: Most often, sensible men and women will converge on sensible courses of action.[9]

Oversight, in sum, is not a Republican issue or a Democratic issue. "Fundamental issues concerning the conduct and character of the nation deserve nonpartisan treatment."[10] It is in the interest of all members of Congress, and of all members of the public, to know that law enforcement and national security powers are not being misused.

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[6] Richard B. Schmitt and Richard A. Serrano, *Bush Clashes With Congress Over Firings*, L.A. TIMES, March 21, 2007, at A1.

[7] In any case, the Framers relied on the adversarial matching of branch against branch to achieve good governance: "Ambition must be made to counteract ambition" in a "policy of supplying, by opposite and rival interests, the defect of better motives." THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter, ed., 1961). Aggressive congressional oversight driven by individual and institutional self-interest was hence anticipated and expected by the Framers.

[8] *See* David McCullough, TRUMAN 259-91(1992).

[9] According to the 9/11 Commission: "Of all our recommendations, strengthening congressional oversight may be among the most difficult and important. So long as oversight is governed by current congressional rules and resolutions, we believe the American people will not get the security they want and need. The United States needs a strong, stable and capable congressional committee structure to give America's national intelligence agencies oversight, support, and leadership." THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 419 (2004).

[10] Final Report of the Select Committee to Study Governmental Operations With Respect to Intelligence Activities, United States Senate, Book II: Intelligence Activities and the Rights of Americans, viii (1976). [hereafter *Bk. II*].

ii. In understanding the facts, contemporaneous documents and also live testimony are vital. Contemporaneous documents and the testimony of actual witnesses are necessary to master the intricacies of governmental institutions and to learn the truth about their conduct. Without such documents and testimony, one cannot cut though the fog of plausible deniability or conclusory statements to know how presidents and other senior officials have carried out their responsibilities. Without such documents and testimony, oversight will necessarily be empty, easily slipping into dueling slogans or platitudes. Moreover, characterizations or summaries supplied by a government agency or high government officials are generally insufficient or necessarily tainted by self-interest.

Handling facts about law enforcement (or intelligence) matters demands sensitivity to the proper line between necessary secrecy, and excessive classification. (To be sure, Congress has delegated by statute broad discretion to the President in setting classification rules.[11] But it is worth asking whether this discretion needs to be more tightly regulated.) Taken too far, however, this sensitivity allows the executive to gloss over hard questions and suppress misconduct. Certainly, executive branch labels for past conduct cannot be taken for granted, and must instead be carefully scrutinized.

An example of misleading terminology came to light during the Church Committee's investigation. Hints about COINTELPRO—the FBI's program to secretly harass and disrupt a wide-range of American dissidents—surfaced in the media in 1971. A few years later, a new Attorney General sought an internal report. Even though the FBI was part of the Justice Department, it successfully resisted the Department's request for actual COINTELPRO files, claiming that even release within the Department would jeopardize national security. The Bureau offered instead to summarize for the Attorney General facts about each action. Thus, as the Church Committee discovered, the FBI's summary of a letter sent to the Chicago Blackstone Rangers purportedly from the Chicago Black Panthers described the letter as an effort to "drive a wedge between" the two groups. The actual, contemporaneous FBI purpose of writing the letter, as revealed by contemporaneous FBI documents, however, was to provoke "reprisals" from a group prone to "violent type activity, shooting and the like"—the hope, in other words, was to incite a killing.[12]

Today, the debate over whether the eight United States Attorneys recently terminated were singled out due to their "performance" is an example of ambiguous terminology that can only be clarified by testimony.[13] The evidence thus far yielded by documentation of executive branch decision-making concerning the removal of the eight prosecutors is ample proof of this.

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[11] *See* 50 U.S.C § 435(a) (2007).

[12] *See Bk. II*, 271 & n20.

[13] *See, e.g.*, Gene Johnson, *Political Whodunnit: The curious downfall of John McKay*, SEATTLE TIMES, Mar. 26, 2007.

iii. Testimony needs to be transcribed. In my experience as chief counsel to the Church Committee, a "hearing" without a transcript is simply a waste of time. The purpose of congressional hearings is to establish the facts. That is not done in the course of a single hearing. Rather, it is through the careful comparison of hearing evidence with documentary evidence and other sources that meaningful conclusions can be reached. Without a transcript, a hearing yields little or nothing of value. Recollections are faulty. On complex factual and legal matters, disputes will necessarily arise around what was said.

The Church Committee demonstrated that it is possible to call senior officials and former officials, including directors of central intelligence (past and present), attorneys general and the White House's national security advisors, to testify on the record. In every case, there was a written record of the person's testimony. These records proved critical to our investigations.

It is hard to see a witness's interest in not being transcribed. If the witness's ground for resisting testimony is a privilege, the fact of transcription makes no difference as to whether the privilege is respected or not. Of course, the absence of a transcript allows witnesses to give evasive or ambiguous answers to hard questions, and to resist later being pinned down by contradictions with other evidence.

It is also hard to see why a witness would resist taking an oath. Lying to a government body is a serious matter,[14] even in the absence of an oath.

iv. The Church Committee used several methods to handle testimony where privileged or classified information may have been pertinent. Fair analysis of the government's law enforcement and security programs requires that members of Congress have access to secrets. It also requires that members of Congress assess the overuse of privilege claims and secrecy stamps, sometimes determining that the nation is best served by a secret's revelation. Nonetheless, there obviously are legitimate exercises of privilege and real secrets. Oversight heedless of this is doomed, as well as irresponsible.

The Committee used several methods to sift credible from flawed secrecy claims. Sometimes, oral testimony from government witnesses was first delivered in the Committee's executive session. This is a practice akin to a deposition in civil litigation. On the basis of the testimony to the executive sessions, the Committee would make a decision as to whether public testimony ought to follow. This sharpened the Committee's focus on the relevant issues and shortened the live testimony, as well as obviating needless conflicts over secrecy. The procedure prior to the public testimony had the further advantage of allowing distinctions to be drawn prior to public testimony between legitimate and illegitimate secrets.

[14] Federal criminal penalties have been held to apply to unsworn misrepresentation to congressional committees. *See United States. v. Poindexter*, 951 F.2d 369, 386-388 (D.C. Cir. 1991).

v. Legitimate secrets can be sifted from excessive and unwarranted use of secrecy stamps. The Church Committee's experience with intelligence and law enforcement agencies yields valuable lessons for distinguishing among secrets. To begin with, there is a salient difference between, on the one hand, a claim of secrecy for the very existence of a program or for the policies and legal justification underlying it, and—at the other extreme—"sources and methods" used by the intelligence agencies and the names of undercover agents. Acknowledging these differences, the Church Committee worked out reasonable arrangements with the intelligence and law enforcement agencies and the White House. When, for example, agencies produced documents, they could, in the first instance, redact informants' names. The Committee thus got information about the FBI infiltration of the NAACP or the "Women's Liberation Movement" by reviewing informants' reports without getting informants' names. If the Committee felt a name was important, it remained free to make a more specific request. Second, the Committee agreed that before issuing a report, relevant agencies would have an opportunity to *argue*—but not decide—that publishing certain details would cause harm and were unnecessary.

The Committee's reports were enormously detailed and left out none of the improprieties uncovered during the investigation. But the Committee placed sensible limits on what details were disclosed. In particular, it did not use the actual names of low-level undercover agents tasked with unseemly or illegal acts, but did disclose their bosses' names. These sensible agreements did not get in the way of the Committee's mission.

One kind of document that almost never merits classification is a legal opinion of the kind issued by the Office of Legal Counsel in the Department of Justice. These documents address abstract legal issues, and often contain final determinations of unsettled legal questions that are binding on the rest of the executive branch. Congress and the people have a powerful interest in knowing how the executive branch interprets and applies the law. And there is rarely (if ever) any justification for preserving these legal opinions from congressional or public scrutiny.

vi. Like other secrecy claims, executive privilege is one that should not be taken at face value. In this case, there is reason to believe that few, if any, of the communications in question are protected by executive privilege. The principal witnesses in the matter of the prosecutors' removal are officials from the White House and the Justice Department.[15] White House officials, as noted above, now play a far larger role in the White House than has historically been the case: They have tremendous policy-making and implementation resources at their disposal. If the *de facto* decision abut which prosecutors to remove (and why) was made by such an advisor, it makes no

[15] In particular, this subcommittee could investigate aggressively the question how the Justice Department could have inserted in the Patriot Act renewal a provision that allowed the President to circumvent the Senate in appointing new U.S. Attorneys. *See infra*. What did this provision have to do with national security? Why was it included in the March 2006 omnibus legislation? Who decided that it should be so included?

sense to circumscribe congressional inquiry to lower-level functionaries who were mere instruments of their higher-ups.

According to the Court of Appeals for the District of Columbia Circuit, the privilege encompasses "communications made by presidential advisors in the course of *preparing advice for the President* ... even when these communications are not made directly to the President."[16] Executive privilege is generally justified as a way of ensuring the confidentiality of advice given *to* the president. It simply cannot justify the withholding of information about how a policy was implemented, *i.e.*, how directions *from* the President were implemented. Indeed it would make no sense for Congress to be able to subpoena an officer in a department who carries out an order from a presidential advisor, but to be barred from inquiring as to why that order was given, or how it came about. Congress needs to know not only *how* orders within the executive branch were carried out, but also the *reasons* for such orders. This is especially true when, as now, a question of improper motive is paramount. Further, it is clear that decisions not at all involving the President do not give rise to executive privilege. The mere fact of working in proximity to the President is not sufficient ground to establish a legitimate claim of privilege.

If, as President Bush has stated in a press conference, he had a minimal role in the determination of which prosecutors were to be terminated, or the grounds on which prosecutors would be selected,[17] executive privilege should not bar testimony at all. Indeed, the details of President Bush's instructions to his subordinates concerning the removal of prosecutors is a matter of clear congressional interest. Even if executive privilege issues do arise, they should be handled through procedural devices—such as a hearing before an executive session, which is followed by carefully considered public testimony.

Moreover, there is reason to be skeptical about the strength of presidential advisors' interest in confidentiality. It is simply not the case that presidential advisors can ever be wholly and absolutely secure that their advice will remain confidential: There is always the possibility, however remote, that any given advice will be ventilated to public view in the course of a criminal proceeding.[18] This is true regardless of the advice and the context in which it has been given. The interest in confidentiality, in other words, is always and necessarily provisional. No one can, or should, rely on the perpetual nondisclosure of their work inside the executive branch. The Subcommittee should bear in mind this conditionality when faced with claims to confidentiality.

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[16] *In re Sealed Case*, 121 F.3d 729, 751-52 (D.C. Cir. 1997) (emphasis added).

[17] President Bush explained White House involvement in the following terms: "[T]he Justice Department made recommendations, *which the White House accepted*, that eight of the 93 would no longer serve." President Bush Addresses Resignations of U.S. Attorneys, available at http://www.whitehouse.gov/news/releases/2007/03/20070320-8.html (emphasis added).

[18] *Nixon v. United States*, 418 U.S. 683 (1974) (holding that President Nixon was obliged to submit to a subpoena duces tecum for tape recordings and documents in the context of a criminal proceeding).

c. The Damage From Lax Oversight

Oversight is necessary to ensure the efficacy of law enforcement and national security policy. One of the Church Committee's major findings, indeed, was that the wise restraints that the Framers imposed to make us free also keep us safe. Of particular interest today is the way in which lax oversight during the Cold War allowed partisan motives to seep into the FBI and other law enforcement agencies. Today's scandal about improper partisanship in the handling of U.S. Attorneys, in short, is nothing new.

During the closing days of the 1964 presidential election campaign, for example, the Johnson White House asked the FBI for information on all persons employed in Republican candidate Barry Goldwater's Senate office. It also sought information about Vice Presidential candidate Spiro Agnew's long distance telephone calls during the 1968 presidential campaign, and about seven Senators critical of bombing of North Vietnam. The White House also received FBI information on non-politicians, including people who signed letters to Senator Wayne Morse supporting his criticism of the Vietnam War, and many mainstream journalists, including NBC anchor David Brinkley, *Life Magazine's* Washington Bureau Chief Richard Stolley, and authors of books critical of the Warren Commission report.[19]

The nexus between intelligence collecting and White House political interests reached an acme during the 1964 Democratic Convention in Atlantic City, New Jersey. President Johnson directed the assignment of an FBI "special squad." Originally justified by vague reference to possible civil disorders, the squad's mandate expanded to cover surveillance of political activities. The special squad generated many memos for the White House on the political plans of Dr. Martin Luther King, Jr., and the Mississippi Freedom Democratic Party, a new black party challenging convention delegates from the old-line, segregationist Mississippi Democratic Party.[20]

Similar practices continued under the Nixon White House. Nixon officials solicited information from the FBI on, for example, CBS reporter Daniel Schorr and the Chairman of Americans for Democratic Action. Vice President Spiro Agnew sought information on Ralph Abernathy, Dr. King's successor as head of the Southern Christian Leadership Conference. An internal Bureau document reporting the request explained Agnew's purpose was "destroying Abernathy's credibility."[21]

At Henry Kissinger's request, the FBI used warrantless wiretaps on three newsmen and fourteen executive branch employees from 1969 to 1971. They were supposed to uncover the source of leaks to the media from the White House, but what came back was political gossip and valuable political information for the White House: a report on Senator Edward Kennedy's plan to give a speech on Vietnam; the planned

[19] *Bk. II*, 228-230.

[20] *Bk II*, 117-119, 234-35.

[21] *Bk. II*, 230-231. Agnew denied that he made such a request, but agreed he received the information (*Bk. II*, 231, citing staff summary of Agnew interview on October 15, 1975).

timing of Senator William Fulbright's hearings on Vietnam; Senator Mondale's "dilemma" about a trade bill; and what former President Johnson had said about Senator Edmund Muskie's campaign for the Democratic Party nomination for President. The taps continued on two targets even after they left the government to work on Senator Muskie's presidential campaign. Revealingly, the stream of resulting memos began to be sent to H.R. Haldeman, the President's political advisor, rather than Henry Kissinger, his national security advisor, even though it had been Kissinger who had demanded the warrantless wiretaps for "national security reasons."[22]

In sum, history demonstrates that the absence of oversight allows the awesome law enforcement and national security powers of the executive branch to be turned to harmful ends. This is simply human. As one longtime CIA general counsel explained at the time of the Church Committee, the absence of congressional oversight caused *problems* for that agency because "we became a little cocky about what we could do." The result is the abuse of American civil liberties and unwise actions.

V. The Committee's Oversight Agenda

Congressional oversight into the prosecutors' firings is wholly proper and necessary. However broad presidential discretion under Article II might be, it does not encompass power to turn the awesome power of federal prosecution against partisan foes. But investigating the prosecutors' firing is not enough. Needed urgently today is a broader investigation into the politicization and the credibility of the Justice Department as a whole.

A broader inquiry must be conducted in a scrupulous fair manner. Oversight powers can always be wielded recklessly. I urge that oversight of a broader gamut of Justice Department matters be conducted in a careful and probing fashion.

There is substantial evidence of improper actions and conduct harmful to the administration of justice by the Department of Justice. Most notoriously, the Office of Legal Counsel has played a pivotal role in authorizing torture, the "outsourcing" of torture, abandonment of the Geneva Conventions, and warrantless surveillance of Americans.[23] As I have explained in detail elsewhere,[24] the Office of Legal Counsel's memoranda on torture and other measures taken in the name of national security fell far short of professional standards. For example, lawyers failed to cite pivotal legal precedent and adopted strained and frankly absurd analogies in order to avoid criminal prohibitions. There was no attention to the views of military lawyers, and no regard for the consequences on America's reputation.

Bad lawyering alone, of course, is no justification for congressional inquiry. In this case, however, illegal measures were justified with this shoddy legal analysis. The

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[22] *Bk. II*, 235-36.

[23] This is detailed in Schwarz and Huq, *supra*, at 65-150.

[24] *Id.* at 187-99.

OLC's memo *de facto* abetted the introduction of measures in sharp contradiction with federal criminal law and our international treaty commitments. And they were enacted over the protests of career civilian *and military* lawyers.[25] But troubling reports about the Justice Department that merit careful analysis and oversight include the following:[26]

- One aspect of the question of U.S. Attorney removal that has not received sufficient attention is the question how the Administration came to have power to appoint new U.S. Attorneys without input from the Senate. A statutory provision to this effect was introduced in the March 2006 reauthorization of the Patriot Act.[27] According to news reports, this provision was added by a member of Senator Arlen Specter's staff without his affirmative consent—*at the request of the Justice Department*.[28] This raises the very troubling prospect that the Justice Department took advantage of the complexity and public pressure to enact the Patriot Act reauthorization to have enacted into law a provision that had nothing to do with national security, but that concentrated power in the White House to the detriment of Congress.

- FBI use of National Security Letters, a form of administrative subpoena authorized by the 2001 Patriot Act, has been rife with abuse, as Inspector General Fine has disclosed.[29]

- A leading Justice Department litigator alleges that she was directed to pull her punches in the context of litigation against tobacco companies, at substantial

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[25] *See, e.g.*, Dana Priest, *Covert CIA Program Withstands New Furor; Anti-Terror Effort Continues to Grow*, WASH. POST, Dec. 30, 2005, at A1 ("The administration's decisions to rely on a small circle of lawyers for legal interpretations that justify the CIA's covert programs and not to consult widely with Congress on them have also helped insulate the efforts from the growing furor," "The White House tightened the circle of participants involved in these most sensitive new areas. It initially cut out the State Department's general counsel, most of the judge advocates general of the military services and the Justice Department's criminal division, which traditionally dealt with international terrorism."); Mark Mazzetti and Neil A. Lewis, *Military Lawyers Caught in Middle on Tribunals*, N.Y. TIMES, Sep. 16, 2006, at A1 (Describing pressure put on military lawyers by Pentagon general counsel to sign letter supporting military commissions); Raymond Bonner, *Terror Case Prosecutor Assails Defense Lawyer*, N.Y. Times, March 4, 2007, at A10 (Describing pressure put on Major Michael Mori by chief US Prosecutor Colonel Morris Davis).

[26] *See generally* Tom Hamburger, *Justice Department tugged to the right*, L.A. TIMES, Mar. 25, 2007.

[27] USA Patriot Act Improvement and Reauthorization Act of 2005 § 502, Pub. L. No. 109-177, 120 Stat. 192 (2006) (codified at 28 U.S.C. § 546 (2006)). A bill to remove this provision has been passed by the Senate 94-2. *See* A Bill to Amend Chapter 35 of Title 28, United States Code, To Preserve the Independence of United States Attorneys, S. 214, 110th Cong. (2007).

[28] See Paul Krugman, *Surging and Purging*, N.Y. TIMES, Jan. 19, 2007, at A23; *see also* Paul Kiel, *I Do Not Slip Things In*, TPM MUCKRAKER, Feb. 6, 2007, http://www.tpmmuckraker.com/archives/002487.php.

[29] U.S. Department of Justice, Office of the Inspector General, A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION'S USE OF NATIONAL SECURITY LETTERS (2007); *see also* R. Jeffrey Smith, *FBI Violations May Number 3,000, Official Says*, WASH. POST, Mar. 21, 2007, at A7.

detriment to the federal fisc and considerable benefit to the defendant tobacco companies.[30]

- The Civil Rights Division of the Department of Justice has been subject to personnel changes that have substantially reduced the number of career lawyers in that office.[31] Decisions about state electoral laws, including some with substantial disenfranchising consequences, at least appear to have been influenced by improper partisan motives.[32] Whatever the motive of these actions, this Subcommittee should look careful at how the Civil Rights Division's mission is, or is not, being achieved.

- Long prior to the December 2006 removals of prosecutors engaged in corruption investigations, there is evidence suggesting that other prosecutors had been removed because their investigations raised narrowly partisan concerns for some in the executive branch.[33]

These incidents are the reasons that oversight of the Justice Department by this Committee and by Congress in general cannot cease with the matter of the U.S. Attorneys' removal. I strongly recommend that this Committee and Congress examine the Justice Department's operation in the past six years.

VI. Conclusion

Congress has the tools and it has the constitutional obligation to conduct vigorous oversight of the executive branch's law enforcement and national security actions. To pursue vigorously such oversight is not to condone partisanship. It is to do what is necessary and expected from our elected leaders.

Today, this Committee in particular must address the gamut of problems that have arisen around the conduct of the Justice Department. There is a need for thoroughgoing inquiry, of the kind conducted by the Church Committee thirty years ago, into all of the troublesome, harmful, arguably unethical, and perhaps illegal, conduct that has been reported within the Justice Department. Such an investigation is a prerequisite to a restoration of the Checks and Balances that the Framers envisaged would keep us safe and free.

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[30] Carol D. Leonnig, *Tobacco Witnesses Were Told To Ease Up: Justice Dept. Sought Softened Sanctions*, WASH. POST, June 9, 2005, at A4.

[31] Charlie Savage, *Civil Rights Hiring Shifted in Bush Era: Conservative Leanings Stressed*, BOSTON GLOBE, July 23, 2006, at A1.

[32] Dan Eggen, *Politics Alleged in Voting Cases; Justice Officials are Accused of Influence*, WASH. POST, Jan. 1, 2006, at A1.

[33] Walter F. Roche Jr., *Inquiry Into Lobbyist Sputters After Demotion; The Unusual Financial Deal Between Jack Abramoff and Officials in Guam Drew Scrutiny*, L.A. TIMES, August 7, 2005, at A31.

Ms. SÁNCHEZ. Thank you for your testimony. And you did, in fact, make it in under the 5-minute rule.

We have been called for a series of votes, unfortunately. There is going to be a series of three 15-minute votes, which means potentially we will be on the floor for 45 minutes, a little bit less if we can get people back here.

I would ask—and I know it is asking a lot because you have been extremely patient—I would ask the witnesses, if they could stick around, that they do so, so we could do questioning. I think this is a nice, natural break for the Members to get to the floor to vote.

So if, because of time constraints, you cannot stay for questioning, we certainly understand, but we will be submitting questions to you to have you respond in writing.

So, again, we really appreciate your time and your testimony.

And the Committee will stand in recess.

[Recess.]

Ms. SÁNCHEZ. Okay. The Committee will reconvene.

I want to thank our witnesses for sticking around. We will be joined shortly by some of our colleagues, but I wanted to go ahead and recognize myself for the first round of questions.

Mr. Podesta, I read your written testimony and was very interested in getting your views on the potential reasons for dismissal of U.S. attorneys and whether politics or performance is involved, and how that relates to executive privilege.

Mr. PODESTA. Thank you, Madam Chair.

I think that Mr. Sampson in his testimony this morning, over on the Senate side, he said there is not a difference between performance and political considerations. I guess I beg to disagree.

I think that where politics becomes partisanship is when you are trying to actually influence the outcome of the cases for partisan gain or for personal gain. Then it seems to me that is beyond the realm of the normal course of politics with respect to the duties of a U.S. attorney.

I think really at the bottom line, that is really what the case is here. If this was simply trying to dismiss people who weren't doing a very good job in their offices, that would be one thing, but that does not appear to be from what we know today, what was at issue.

I think that if you go back, and Fritz is the expert on the Nixon administration, but I think if you go back and look at what President Nixon did in the ITT investigation, where he ordered then-Deputy Attorney General Kleindienst to not appeal the ITT case to the Supreme Court, that that was really what was at the heart of the issue.

Of course, President Nixon argued it was just a policy matter, that he was just exercising his responsibility as the President to do it. But when he called Mr. Kleindienst and said, "Mr. Kleindienst, you son of a bitch, don't you understand the English language? Don't appeal this case," he was of course going way beyond the normal exercise of policy in that matter.

We don't know what the circumstances are here. That is why it is important that the Justice Department come forward with its testimony and the White House give you an explanation of what they are up to.

Ms. SÁNCHEZ. I appreciate the answer.

I just want to note that, Mr. Francisco, in your testimony you said that the White House had provided information, and that we needed to look at executive privilege in the context the White House has provided, or the offers that they have made to provide.

I just wanted to note that so far to date, we have received nothing from the White House—no documents, no witnesses to come and testify. We have received redacted documents from the Department of Justice. But just so you know, so far we have received nothing from the White House.

I wanted to ask the whole panel this question, because I find it very interesting and relevant. Recently, the National Journal reported that a former White House official familiar with Karl Rove's work habits indicated that Mr. Rove does about 95 percent of his e-mailing using his RNC-based account, not his official account.

In your experience with the contours of executive privilege, can the White House make a valid claim of executive privilege as to any communications originating outside of the White House? I would be interested in getting all of the panel's views on that, beginning with Mr. Podesta.

Mr. PODESTA. I think that under the precedents certainly in this circuit, you would be very hard-pressed to claim privilege once you have moved out beyond the senior level people inside the White House.

If that is true, and of course we don't know that that is true, but if that is true, the Presidential Records Act seems to be violated also, because again post-Watergate and post-the claim that those were personal records of President Nixon, the Congress passed the Presidential Records Act that dealt really with these circumstances and dealt specifically with material that involved political activity, but that intersected with official governmental activity.

I can't believe that Mr. Rove is spending 95 percent of his time only engaged in partisan political activity and only 5 percent of his time on—he is the deputy chief of staff in the White House—on the affairs of the Government.

Ms. NOLAN. I do think it is very important that this law we have, the Presidential Records Act, is intended to preserve communications on official White House business. They are supposed to be made public after a certain period under the law.

So if in fact Mr. Rove or others are trying to conduct official White House business outside the official channels of communication, then I think that really is very serious and problematic, and would certainly raise questions about how you can both treat this as something outside the White House, and yet claim a privilege on it.

Mr. FRANCISCO. I would like to be clear, since I don't really know exactly what is going on with Mr. Rove's e-mails, I can't comment on that specifically. But in terms of the general question, the core of executive privilege is obviously intra-White House communications that take place among the White House staff.

But second only to that in terms of how strong the privilege applies are communications to the White House. So in theory, a communication that originates outside of the White House, but goes into the White House is still protected by the executive privilege, provided that it is something that relates to official White House

business. So in theory, the executive privilege still would apply even if the communication did originate outside of the White House and was made to the White House.

Ms. SÁNCHEZ. So would it be fair to say or believe that there is a blanket privilege for all outside communications originating into the White House, intra-White House communications would all be covered by the privilege, and under no circumstances would there be exceptions?

Mr. FRANCISCO. Well, to be clear, at least in the cases that have been decided, none of which have involved congressional subpoenas for information, with the exception of one old case, in the cases that have been decided in other areas, courts have adopted a balancing test. So to say at least in those cases there is an absolute privilege, I probably wouldn't agree with that.

With respect to core internal intra-White House communications, I do believe that would be very difficult for the Congress ever to overcome the presumption of a privilege that applies to those core communications. Communications that originate outside the White House probably are less protected because they are not as much at the core of the privilege.

Mr. SCHWARZ. I would say first the fact that someone is located in the White House cannot be the answer to the question. The question is whether they are functioning as a governmental official when they are in the White House.

For example, if I visited the White House one day and I was there for a chat about something relating to the Government, and while I was in the White House, I communicated to the Attorney General and said, "Here is what you should do," you couldn't possibly say that is privileged because I was in the White House.

Now, as I understand the facts, and here I don't understand the facts, but what I have heard about the facts really only this afternoon I think in your opening comments, was that Mr. Rove when he was physically in the White House was using a computer system that wasn't a White House computer system. If that is true, he is not functioning as a governmental official, and so clearly it is not privileged. It is not covered by the executive privilege.

If you think about the attorney-client privilege, that protects communications from an attorney to the client when the attorney is functioning as an attorney. As we all know, there are many lawyers who sometimes have the lawyer's degree and call themselves a lawyer, but they are actually working as business people. If they give business advice to their client, the fact that they are labeled as a lawyer doesn't make it privileged.

So if someone is physically in the White House and they are sending e-mails that are not on a White House governmental system, but are on some private system, there is no possibility that that is privileged under an executive privilege, in my judgment, hearing the facts for the first time today and reacting to your question today.

Ms. SÁNCHEZ. Thank you, Mr. Schwarz.

I now would like to recognize our Ranking Member, Mr. Cannon.

Mr. CANNON. Let's follow up on the same line of questioning. Let me just ask Mr. Podesta, and then we will go down the panel.

If someone, before we had VoIP, so you are talking about an old telephone system, lifted up the phone and made a phone call from the White House, the Old Executive Office Building, and that went through a switch downtown, there would be no question that that you would not lose executive privilege based upon going through a switch downtown. Right?

Mr. PODESTA. I don't think the technology would matter in that context. The question is whether it falls within the privilege itself.

Mr. CANNON. Right. But nobody is going to disagree with that conclusion, right?

Now, I think the question that we are going to have here is Karl Rove used something, not an old telephone system, it is a new e-mail system, so Karl Rove uses an e-mail system to communicate from himself to someone else in the White House. Now, there are all kinds of reasons for doing that, but it won't be that the system is based outside the White House that diminishes the privilege, whatever that might be otherwise.

Mr. PODESTA. Well, I think quite frankly, Mr. Cannon, I raise the Presidential Records Act. I think the Presidential Records Act requires—and I was involved in litigation on this that began in the Reagan administration——

Mr. CANNON. We can come back to this. But it will not be the fact that you got a service-provider outside the White House that diminishes the——

Mr. PODESTA. It may not be the question of whether it was hosted outside the White House, but Mr. Rove if he was conducting official governmental business was required to use the assets of the Government in order to capture and retain those governmental communications.

Look, we are speculating here completely because we don't know in fact what he did and whether it was engaged or involved. We know to some extent that his deputy was using these accounts for official business, but we don't know what Mr. Rove did. But if he was using those separate e-mail accounts that were essentially off the books of the White House, why was he doing that?

Mr. CANNON. There may be many reasons why, but it would certainly not mean that those records were not part and don't come under the purview of the Presidential Records Act. Right?

Mr. PODESTA. Again, we, as a result of litigation that began at the end of the Reagan administration as a result of Iran-Contra, they were trying to clean the e-mail records of the NSC and Ollie North's records. Litigation was brought. That litigation lasted for 6 years.

We implemented a system to retain and capture official governmental records. That system still exists, I believe, inside the White House, to capture e-mail records of the Administration. That was approved by the National Archives and we ultimately settled the case as a result of implementing that system.

If he was conducting official business on the separate political accounts, then it seems to me that was an avoidance of his obligation under the Presidential Records Act. So if he felt that that was an official action, then it wouldn't be privileged. If he thought it was, he was violating the Presidential Records Act. But I think it is one or the other.

Mr. CANNON. Depending upon how he did it, and granted there are many questions that are out there, you would certainly not say that these don't become presidential records because of some cloak of using an alternative system. Whatever the Presidential Records Act covers, those will be included in it, whether they were used in the inner-system or not.

Mr. PODESTA. Well, I think if he was conducting official business, he was creating presidential records and he should have been doing that——

Mr. CANNON. If he was creating presidential records, then he is going to have a presidential privilege regardless of what the external system that it goes through uses.

Mr. PODESTA. Well, as I said, I think that as a result of litigation that the White House settled, the obligation of White House employees with formal guidance was that you could not participate in a way of conducting official business in the manner that you are describing.

Mr. CANNON. We understand that. We are not litigating this case right here. We are just saying it is not the fact that it sits on or went through an external system that makes it not a privileged communication.

Mr. PODESTA. Well, it would be my view that it would certainly diminish or eliminate the presumption that that document was privileged.

Mr. CANNON. I am sorry. You are suggesting that if it goes through—there are many unknowns here, and that was a pretty blanket statement. It is not the fact that it goes through an external system that eliminates the presumption. If he is trying to avoid the Presidential Records Act, that might eliminate the presumption, but it is not the system that it goes through that represents the elimination of the presumption.

Mr. PODESTA. I am saying that the system inside the White House was set up to capture those records as a result of the obligations of the White House to retain records under the Presidential Records Act.

Mr. CANNON. I see that my time has expired.

Ms. SÁNCHEZ. The time of the gentleman has expired.

We will have a second round of questioning.

Mr. CANNON. I would just make a point, hopefully it won't do that, at least I don't want to be here for the second round. Let me just make the point——

Ms. SÁNCHEZ. You are not required to be here for the second round. [Laughter.]

Mr. CANNON. It is not a presumption. It is a privilege. And the privilege is undefined to some degree.

Thank you. I appreciate that.

Ms. SÁNCHEZ. Thank you, Mr. Cannon.

Mr. Johnson?

Mr. JOHNSON. Thank you.

Mr. Francisco, you indicated or you stated in your opening that if there is a principle in our Constitution more sacred than any other, it is that which separates the legislative, executive and judicial powers. I am sure that all of us will agree that that setup has indeed worked well in our governance.

Do you respect the notion that these three branches are co-equal?

Mr. FRANCISCO. Yes, Congressman, I do.

Mr. JOHNSON. And you do you know of any legal precedent that suggests that Congress does not have jurisdiction to oversee the office of the President?

Mr. FRANCISCO. I do know it is the longstanding position of the executive branch, articulated both in Republican and Democratic Administrations that White House staff-members are subject to an executive privilege that shields them from being called upon to testify before Congress absent the President's agreement for them to appear to testify.

Mr. JOHNSON. Well, it is not an absolute privilege, though, is it?

Mr. FRANCISCO. I think that, in my view, with respect to White House staff-members being required to testify under compulsion before the Congress, I do believe that it is the longstanding position——

Mr. JOHNSON. But is it absolute privilege?

Mr. FRANCISCO. In terms of the positions that Democrat and Republican Presidents have taken, yes.

Mr. JOHNSON. What about that third branch of Government, the courts? How have they interpreted this question of unqualified immunity, if you will?

Mr. FRANCISCO. There is only one decision that has ever addressed Congress's subpoena of the President, in the face of an assertion of executive privilege. And in that one case, the court said that Congress was not entitled to enforce the subpoena. That was the Senate Committee case. It is a relatively old case, but it is the only one that there is on this issue.

Mr. JOHNSON. What about that case involving the firing, or the issuance of subpoenas by Congress for the White House tapes?

Mr. FRANCISCO. I believe that you are referring to the Nixon case.

Mr. JOHNSON. Yes, the Nixon case.

Mr. FRANCISCO. My understanding, and I can be corrected, is that that was the subpoena issued by a special prosecutor, rather than the Congress.

Mr. JOHNSON. Well, I guess that the bottom line would be that the executive privilege is not absolute. It is qualified and can be subject to other concerns such as Congress's ability to oversee the office of the President.

What factors must be assessed in balancing executive privilege against congressional oversight functions, Ms. Nolan?

Ms. NOLAN. First of all, I would like to say that no court has ever addressed this claim that former Presidents have made, and this President seems to be making, that White House advisors are immune from being called to testify. There is no judicial decision on that. The judicial decisions we do have say that executive privilege involves balancing, and that is the question you have: What factors would be balanced?

I think what you are looking for is what are the legitimate and important constitutional interests and prerogatives of each branch. We have seen that courts may look, for instance, in a case such as this where I think there is no question that Congress has oversight authority with respect to these matters, then is Congress able to

obtain the information in another way. That would be one question that you might look to.

Mr. JOHNSON. Well, according to Mr. Francisco's view, conversations intra-White House, intra-White House communications, would be immune, and also communications from outside of the White House flowing into the White House would be immune. So that would severely limit the available material for the Congress to be able to exercise legislative authority or oversight authority.

Ms. NOLAN. Well, I think it is correct that the presidential communications privilege, those communications between advisers who are advising the President directly, do have the strongest claim to privilege.

Now, I think Mr. Schwarz made a very good point that we don't know here that what we are talking about were advisers advising the President. It seems like they were directing the Justice Department instead. So we don't even know that that would be the claim.

But even if it is a stronger claim, it doesn't mean that Congress's interest won't overcome that claim. What is important here is that while we have a very limited number of judicial decisions or law on the question, we have decades and decades of practice.

And executive privilege is really nine parts practice and one part law. It is what the branches have agreed to and accommodated. I would say here there is plenty of precedent for the idea that those internal White House communications can be provided.

Mr. JOHNSON. You yourself have provided testimony.

Ms. NOLAN. I have, and we did it again and again.

Ms. SÁNCHEZ. The time of the gentleman has expired.

Mr. JOHNSON. All right. Thank you.

Ms. SÁNCHEZ. Mr. Delahunt?

Mr. DELAHUNT. Somewhere in the U.S. criminal code is there a criminal sanction imposed for testimony that is misleading to the Congress? Anybody?

Mr. FRANCISCO. I believe it is——

Mr. PODESTA. Yes, it is 18 U.S.C. 1001.

Mr. DELAHUNT. Okay.

Mr. PODESTA. "Misleading," I think, threw us. You can't lie to Congress.

Mr. DELAHUNT. That is the point.

You know, I understand the distinction we are making here, I think, Mr. Francisco is in terms of the rationale for the dismissal, if you will, of the U.S. attorneys. But what I would suggest is that there is uncertainty now in terms of whether there has been a violation of the United States criminal code.

We have heard significant and germane variations on statements by the Attorney General of the United States. Would you agree, Mr. Francisco, that there is a rationale and a basis for the issuance of a subpoena, given the predicate of the potential violation of the U.S. criminal code?

Mr. FRANCISCO. My understanding is that the Administration has agreed to make the Attorney General and other Department of Justice officials available for testimony to the Congress. I may be wrong on that, but that is at least my understanding.

Ms. SÁNCHEZ. In a limited scope.

Mr. FRANCISCO. And if that is the case, then the people who you believe may or may not have provided false testimony to the Congress are accessible to the Congress.

Mr. DELAHUNT. I understand. Even if that is the case, however, the conduct of a criminal investigation implicates far more than just the testimony of an individual that may or may not invoke the fifth amendment.

Mr. FRANCISCO. In the context of a criminal investigation, that is where the courts have said that where a prosecutor is investigating a case and trying to uncover evidence of a crime, that is where the interest is the strongest in terms of overcoming executive privilege. But they have not said the same thing in the context of a congressional investigation.

Mr. DELAHUNT. So then what the Congress ought to do if it feels appropriate or it feels that there is a quantum of evidence that there may have been a potential violation of the United States criminal code, is to request the appointment of a special prosecutor.

Mr. FRANCISCO. I think it would be appropriate for Congress to make that request.

Mr. DELAHUNT. Mr. Podesta?

Mr. PODESTA. Well, my experience with the independent counsel leads me to think that that is an extraordinary remedy. And so I would urge you to try to work to get the——

Mr. DELAHUNT. I am not suggesting. We let the independent counsel statute die.

Mr. PODESTA. There are special counsel provisions that Mr. Fitzgerald was appointed by.

But just to clarify one thing, Mr. Delahunt, I think that it is still okay to lie to the press, which I think, if I understood Mr. Sampson's testimony this morning when he suggested that the Attorney General's statements weren't accurate, that those were press statements, rather than statements before Congress. Now, Mr. McNulty and others I think did testify before Congress.

Mr. DELAHUNT. Well, then I guess I would suggest that there is the predicate for a conspiracy. In other words, we are focused on the dismissal at this point in time, as opposed to a rationale which would implicate the U.S. criminal code.

I am not suggesting that the Attorney General has misled to lied to Congress, but what I am saying is exactly because we don't know, should mandate or should I think diminish the rationale for the invocation of executive privilege.

We just saw a case here in Washington, the Libby case. It had nothing to do with leaking to the press. It had to do with testimony before the grand jury. What I am suggesting is if the White House reflects on this particular issue and there is an examination of testimony before Congress by individuals who may or may not have been informed by superiors in the Department of Justice, as well as the White House, that misled Congress, there is, one can theorize, a case, that there has been a violation of our criminal statutes.

That, in and of itself, should, in my judgment, be sufficient for the White House to recognize that this is more than just simply dismissal of eight U.S. attorneys.

Ms. SÁNCHEZ. The time of the gentleman has expired.

Mr. Jordan?

Mr. JORDAN. I thank the Chair and the panel for being here today.

I am going to yield the balance of my time to the Ranking Member.

Mr. CANNON. Thank you, Mr. Jordan.

What has gone on with the U.S. attorneys has gone on. It is going to take a little bit of time to sort out. Let me just reassert the importance of the prerogatives of Congress.

I think there is actually an interesting point that the gentleman from Massachusetts is making, if someone gave incorrect information knowing that it was going to come to Congress, there is a problem there somewhere and we need to pursue that.

Now, Ms. Nolan, in your written testimony, you stated that some in the present Administration appear to believe that presidential advisers are immune from giving testimony on the theory that Congress does not have jurisdiction to oversee the office of the President. No precedent in our country's history has attempted to make such an extraordinary claim and no precedent provides a legal justification to support that perspective.

Would you be surprised to learn that Robert Lipschutz, the former White House counsel in the Carter administration, wrote a memo on February 8, 1979 to White House staff stating—and by the way, Madam Chair, I would like to insert this letter from Mr. Lipschutz to the White House staff into the record.

Ms. SÁNCHEZ. Without objection.

[The letter follows:]

THE WHITE HOUSE

WASHINGTON

February 8, 1979

MEMORANDUM FOR THE WHITE HOUSE STAFF

FROM: ROBERT LIPSHUTZ

SUBJECT: Congressional Testimony by Members of the White House Staff

The role of a White House aide is that of an adviser to the President. Frank and candid discussions between the President and his personal staff are essential to the effective discharge of the President's Executive responsibilities. Discussions of this type take place only if their contents are kept confidential.

A personal aide to the President does not have independent authority or responsibility. He or she generally acts as an agent of the President in implementing a Presidential instruction.

While the investigative power of Congressional committees is extremely broad, the personal staff of the President is immune from testimonial compulsion by Congress. This immunity is grounded in the Constitutional doctrine of separation of powers.

The concept of immunity does not apply to all Presidential advisers. Those advisers who are vested with statutory obligations (such as Dr. Frank Press) must be available to testify. Presidential advisers who hold dual roles, one of which is defined by a statute, are available to Congressional committees, but only to testify relative to their responsibilities under the statute and not with respect to any matter arising in the course of their official position of advising or formulating advice for the President.

The Constitution and court decisions make it clear that the President may properly regard his personal staff immune from an obligation to testify before a Congressional committee.

If you have any questions regarding this, contact Margaret McKenna on extension 6611.

Ms. NOLAN. Mr. Cannon, you are saying that is from my testimony?

Mr. CANNON. Oh, well, pardon me here. This is Mr. Podesta's testimony.

The problem is no reasonable man would mind being at crosswords with you, but your rapier-like mind is beyond the competence of most of us, so let's get away from you and to someone who—— [Laughter.]

Mr. Podesta, I think you said that.

Let me just read a little portion of the letter: "While the investigative power of congressional Committees is extremely broad, the personal staff of the President is immune from testimonial compulsion by Congress. This immunity is grounded in the constitutional doctrine of separation of powers."

Mr. PODESTA. Mr. Cannon, the statement I was referring to goes to the back-end of that sentence, that Congress does not have jurisdiction to oversee the office of the President. That has been repeated from the White House podium on several occasions, including last Monday by Ms. Perino. And that is just not true.

Mr. CANNON. What did she have to say? Do you recall her actual words?

Mr. PODESTA. I probably have it here, and I will find it for you.

But on several occasions, I think that the White House has made the claim that the Congress has no authority over the White House, that they have no oversight authority over the White House, and that is just patently not true.

Mr. CANNON. Well, they are separate branches, but they don't mean that Congress can't investigate the President. That can't possibly be what——

Mr. PODESTA. I would provide for the record the statements that have been made by the White House over the course of the last week. I think they would support the testimony that I gave here.

Mr. CANNON. Well, they are a public record. If you could find them, that would be nice. We have an obligation here to also look for them.

Let me just say, I think that we have come to a point where there is not a lot of disagreement here about what is privileged and what it not privileged. This case, as I think Mr. Schwarz pointed out earlier, raises some very interesting particular questions that may be new. We will sort through those.

The scope of this is, and what I think we have agreed to, is that there is no absolute privilege. There is a right based upon a separation of powers. That right has come down to internal discussions versus external discussions.

I think the President's offer, by the way, has been remarkably open in that regard. They have made everything available that has been into the White House, even discussions which I think Mr. Francisco would say may have been privileged, that is, ideas that have come from outside of the White House, inside the White House.

If what we are doing is trying here in Congress to get to the truth, to find out how significant the problem is, then we could do so by pursuing the offer the President has made and seeing where that leads us. It may lead to a more significant revelation or not.

Personally, I don't think the revelations that have come out so far as substantial. Certainly, there has been nothing significant of the testimony of the U.S. attorneys themselves is definitive that there is no attempt to avoid corruption charges or investigations, or that any investigations were not interrupted by the firings and would not be harmed by the firings.

So what we are dealing with here may be angels on the head of a pin, but your contribution today has been very helpful in clarifying that. It seems to me that we have come down to a pretty clear sense of the scope of Congress's ability, and that is something that we will pursue aggressively on both sides of the aisle.

Ms. SÁNCHEZ. The time of the gentleman has expired.

I have one last question, and we will see if there are other questions. I want to pick up on the point that Mr. Delahunt was trying to make, and Mr. Cannon tried to flesh out a little bit.

Regarding the potential of the invocation of presidential communications privilege as it pertains to matters surrounding the current case of the dismissals of the United States attorneys, is it necessary for Congress to establish a likelihood of criminal wrongdoing in order to overcome the presumption of privilege? Or would an indication of inefficiency or maladministration be sufficient?

Mr. Podesta?

Mr. PODESTA. I think there is no definitive answer to that. I think clearly the Congress has jurisdiction and the Supreme Court has recognized that they have the authority to investigate for purposes of uncovering maladministration or other kinds of oversight issues. I think that there is a whole line of Supreme Court cases that uphold that right.

The real question is, when you are faced with an executive privilege, have you overcome that right just because you are essentially operating in that zone? The one case that I am familiar with again goes back to Watergate, where the select Committee, the Watergate Committee, tried to get a set of tapes from the Nixon White House, and the court of appeals here concluded that they had not overcome the privilege because they had not demonstrated the need.

The reason for that was that this Committee, the House Judiciary Committee, which was engaged in the impeachment process, had already received that same set of tapes, and the Watergate Committee in the Senate no longer needed them because the process had moved along. So I think that is a question that would be a first impression if it actually got to a court.

Ms. SÁNCHEZ. Ms. Nolan, any thoughts?

Ms. NOLAN. Yes. I agree with Mr. Podesta that we don't have a definitive answer, but I don't understand there to be any law that would suggest that an actual determination of criminal wrongdoing is necessary to overcome the privilege. The cases have largely been in the criminal area, and so that is what the cases address. We don't have the same kind of explanation from the courts with respect to Congress.

Ms. SÁNCHEZ. If we had to just assume a hypothetical that there was an intention in the firing of U.S. attorneys to disrupt certain investigations that were taking place, would the suggestion of that be enough to overcome the assertion of privileged communications?

Ms. NOLAN. I certainly think yes. If you have something that looks like obstruction of justice, an attempt to interfere with individual cases for reasons that really should be outside the authority of officials to do, then I think that is exactly the kind of thing.

You are talking then about issues, whether they are criminal obstruction of justice or whether it is simply questions about the administration of justice, impartial execution of prosecutorial discretion, questions that really go to the heart of the rule of law and our criminal justice system, then I would say not only does Congress have the right to receive information relevant to that, but it has a responsibility. That is what the American people look to Congress to do.

So without judging particular facts, in your hypothetical, yes.

Ms. SÁNCHEZ. That would be a situation that would warrant it.

Ms. NOLAN. Absolutely.

Ms. SÁNCHEZ. I am curious to know, must a claim of privilege be asserted by the President personally?

Ms. NOLAN. Yes. In the accommodation process, it is not always escalated to that point. That is, Congress and the executive reach an agreement before there is a personal assertion, a direct assertion by the President. But if the Administration is seeking to assert a privilege in a formal way, the accommodation process has failed. Then it is the President and the President only.

Ms. SÁNCHEZ. Must that be in writing, that invocation?

Ms. NOLAN. I don't know the answer to that.

Ms. SÁNCHEZ. Does anybody know the answer to that on the panel?

Mr. FRANCISCO. I think the practice has varied from President to President, which would suggest that it doesn't have to be in writing. But again, I would agree that I am not sure there is a definitive answer to that question.

Ms. SÁNCHEZ. Okay. Thank you.

Mr. Cannon, do you have any more questions, a second round of questions? Anybody else have questions?

Mr. Johnson?

Mr. Cannon passes.

Mr. Johnson, you are recognized.

Mr. JOHNSON. All right. Thank you.

I will ask this of Mr. Schwarz.

I want you to assume that there is a White House political director who decides that he wants to replace one U.S. attorney with another U.S. attorney for the reason that he wants the new U.S. attorney to institute a vindictive prosecution against a candidate for President from a different party in an upcoming election. And he wants that new U.S. attorney to institute criminal proceedings, or at least an investigation, against this presidential candidate, who may have some connections to that particular venue where the U.S. attorney is being replaced.

Would that be a legitimate area of congressional inquiry?

Mr. SCHWARZ. Well, sure, it is an area of congressional inquiry. It seems to me it gets back to the dialogue that the Chairwoman started and the Ranking Member continued about this discussion that somebody in the White House was using a political account to send their e-mails. It seems to me what that shows is that persons

wasn't functioning as a Government official so the privilege wouldn't arise in the first instance.

On your hypothetical, you have described an instance where someone was a political official and not a governmental official, and if they are a political official, and they are working in the White House——

Mr. JOHNSON. Well, I want you to assume that the political official is actually a White House official, working in the White House, with the title of White House political director.

Mr. SCHWARZ. To me, the question is whether the person is in fact a governmental official, or is a political person.

Mr. JOHNSON. Let's assume that they are a governmental official as well as a political official.

Mr. SCHWARZ. It is like my hypothetical of the attorney-client privilege. If someone who is a lawyer and a businessman communicates to a client, and what they are communicating is business advice, not legal advice, then it is not privileged, even though they were a lawyer in a law firm.

By the analogy, I would think if someone in the White House was in part a governmental official and in part a political official, to the extent they are a political official, I don't see why the presumption in favor of there being some sort of privilege should apply at all.

I think your question is getting at it, and frankly I have never thought about this subject until it came up today, so perfectly, possibly I am giving you off-the-cuff reactions which wouldn't be supported after I had a chance to think about it further.

But in starting to think about it, I think if there is a person physically in the White House who is in part a governmental official and in part a political official, when they are being a political official they are not protected by any privilege associated with the executive privilege, and shouldn't be.

And that is, by the way, not a partisan issue, because it would be something that would bite on any future or past President and any future or past White House.

Mr. JOHNSON. Mr. Podesta, let me ask you this question. The power to remove a United States attorney certainly vests in the President, and no one is disputing that.

Do you think that the fact that the President has the unfettered discretion to appoint and to—well, I won't say to "appoint," but he certainly has unfettered discretion to dismiss.

The fact that he has that unfettered discretion, does that insulate the reason for the dismissal from congressional inquiry and oversight?

Mr. PODESTA. No, Mr. Johnson. I think that U.S. attorneys serve at the pleasure of the President. So he could dismiss them on a whim, but he can't dismiss them for improper purpose.

I think, again, if the purpose was to interfere with specific cases—I am not alleging that in this case. We don't know the facts. But if those were the facts, then I think that is inappropriate and improper. You could posit circumstances under which that would violate the criminal law.

Ms. SÁNCHEZ. The time of the gentleman has expired.

Mr. Delahunt?

Mr. DELAHUNT. I will try to be brief. I will go back to what I was speaking to earlier.

The Chair set a standard of likelihood. I would suggest that is too high. But in terms of obviating the ability for the White House to claim privilege, the appointment of a special prosecutor based on a quantum of evidence that would trigger the need for a special prosecutor would accomplish that. The question is, what is that quantum of evidence?

If, for example, there was a decision made in the White House to stonewall, to resist explanation for the rationale for the dismissals, and a variety of explanations were explored, which had the consequence of misleading Congress in testimony, then I would suggest that, again, based on an analysis, there could be a sufficient quantum of evidence to trigger a request by this Committee in a bipartisan way to seek a special prosecutor.

If I am correct in my analysis of executive privilege and the precedents, that would end the issue surrounding executive privilege.

Comments? Mr. Francisco?

Mr. FRANCISCO. Sure. I think I said it would be appropriate for you to request a special prosecutor, but I tend to agree with Mr. Podesta that I don't think it would be appropriate for the Department of Justice to appoint one. I think the best way for that case to be handled——

Mr. DELAHUNT. Why?

Mr. FRANCISCO. Well, I think for many of the same reasons you all decided not to reauthorize the independent counsel statute.

Mr. DELAHUNT. We decided not to reauthorize the independent counsel statute, but left available, given potential conflicts, the ability to appoint, by the Attorney General, a special prosecutor.

Mr. FRANCISCO. That is absolutely true. My own personal belief is that when you hand these issues off to the career prosecutors in the public integrity sections in the U.S. attorneys' offices in the Department of Justice, those attorneys are generally better able to assess whether a case should be pursued.

Mr. DELAHUNT. Well, I would be happy to have Mr. Fitzpatrick come back and assume that responsibility.

Mr. FRANCISCO. Sure. My concern——

Mr. DELAHUNT. It is not a question of "who." It is a question of if there is a trigger, whether it is a special prosecutor or whether it is assigned to an individual who is given independence within the Department of Justice, to investigate. That does obviate the invocation of the privilege.

Mr. FRANCISCO. Well, it doesn't obviate the invocation of the privilege. What the courts have said is that in the context of a criminal investigation, if there is a sufficient showing of need, it can obviate the privilege. We would be into the balancing world that Ms. Nolan was discussing and that the Supreme Court employed in the Nixon case.

Mr. DELAHUNT. Thank you.

Ms. Nolan?

Mr. Podesta?

Ms. NOLAN. Mr. Delahunt, I would, like both of the people on either side of me, I am not a big fan of the special counsel, inde-

pendent counsel, special prosecutor, whatever you want to call it. But I can't think of a situation that cries out it more than this one. There is no possibility that the Attorney General or the deputy Attorney General could be expected to oversee an investigation and prosecution of this.

Mr. DELAHUNT. Absolutely.

Thank you. With that, I am going to yield back my time.

But before I do, I am going to request the Chair consult with the Ranking Member and the Chair of the full Committee and the Ranking Member of the full Committee to explore the possibility of a request from the Judiciary Committee to the Attorney General for the appointment of a special prosecutor.

Ms. SÁNCHEZ. The Chair will take that suggestion under advisement.

Mr. CANNON. If the gentleman would yield, I think that is a very appropriate thing to do. I think that what we have heard from the panel is that we need to find something substantial before we take that leap.

If the gentleman would continue to yield, I would just like to submit for the record the case of *Judicial Watch v. Justice Department,* wherein the Appellate Circuit for the District of Columbia has said, "However, the issue of whether a President must personally invoke the privilege remains an open question." So I am not sure that is definitive and will submit that for the record.

[The information referred to follows:]

Westlaw.
365 F.3d 1108
365 F.3d 1108, 361 U.S.App.D.C. 183, 64 Fed. R. Evid. Serv. 141
(Cite as: 365 F.3d 1108)

Judicial Watch, Inc. v. Dept. of Justice
C.A.D.C.,2004.

United States Court of Appeals,District of Columbia Circuit.
JUDICIAL WATCH, INC., Appellant,
v.
DEPARTMENT OF JUSTICE, Appellee.
Nos. 03-5093 and 03-5094.

Argued Jan. 22, 2004.
Decided May 7, 2004.

Background: Public interest organization brought Freedom of Information Act (FOIA) suit against Department of Justice (DOJ), seeking to compel additional disclosure of documents relating to outgoing president's exercise of pardon power. The United States District Court for the District of Columbia, 259 F.Supp.2d 86,Kessler, J., granted summary judgment for government, and appeal was taken.

Holdings: The Court of Appeals, Rogers, Circuit Judge, held that:

(1) presidential communications privilege applied only to pardon documents solicited and received by President or his immediate advisers;

(2) documents whose disclosure would constitute unwarranted invasion of privacy were properly withheld; and

(3) organization was not entitled to blanket waiver of processing fees.

Affirmed in part, reversed in part, and remanded.

Randolph, Circuit Judge, dissented and filed opinion.

West Headnotes

[1] Records 326 54

326 Records
326II Public Access
326II(B) General Statutory Disclosure Requirements
326k53 Matters Subject to Disclosure; Exemptions
326k54 k. In General. Most Cited Cases
Freedom of Information Act's (FOIA's) exemptions are to be narrowly construed. 5 U.S.C.A. § 552(b).

[2] Witnesses 410 216(1)

410 Witnesses
410II Competency
410II(D) Confidential Relations and Privileged Communications
410k216 Communications to or Information Acquired by Public Officers
410k216(1) k. In General; Official or Governmental Privilege. Most Cited Cases
Unlike deliberative process privilege, which is general discovery privilege that applies to all executive branch officials, "presidential communications privilege" is specific to President, applies to documents in their entirety, and covers final and post-decisional materials as well as pre-deliberative ones.

[3] Witnesses 410 216(1)

410 Witnesses
410II Competency
410II(D) Confidential Relations and Privileged Communications
410k216 Communications to or Information Acquired by Public Officers
410k216(1) k. In General; Official or Governmental Privilege. Most Cited Cases
Both deliberative process privilege and presidential communications privilege are qualified discovery privileges that can be overcome by sufficient showing of need.

[4] Witnesses 410 216(1)

410 Witnesses
410II Competency
410II(D) Confidential Relations and Privileged Communications
410k216 Communications to or Information Acquired by Public Officers
410k216(1) k. In General; Official or Governmental Privilege. Most Cited Cases

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"Presidential communications privilege" applies only to documents solicited and received by President or his immediate White House advisers.

[5] **Records 326 ⚿57**

326 Records
326II Public Access
326II(B) General Statutory Disclosure Requirements
326k53 Matters Subject to Disclosure; Exemptions
326k57 k. Internal Memoranda or Letters; Executive Privilege. Most Cited Cases
Presidential communications privilege did not preclude disclosure, under Freedom of Information Act (FOIA), of internal pardon documents in Justice Department's Office of the Pardon Attorney and Office of the Deputy Attorney General that were not solicited and received by President or Office of the President; rather, such internal documents were protected from disclosure, if at all, by deliberative process privilege. 5 U.S.C.A. § 552(b)(5).

[6] **Records 326 ⚿58**

326 Records
326II Public Access
326II(B) General Statutory Disclosure Requirements
326k53 Matters Subject to Disclosure; Exemptions
326k58 k. Personal Privacy Considerations in General; Personnel Matters. Most Cited Cases
Department of Justice, responding to Freedom of Information Act (FOIA) request for information regarding issuance of president pardons, could properly withhold documents whose disclosure would constitute invasion of privacy rights of pardon applicants, despite claim that persons involved were convicted felons entitled to reduced level of privacy. 5 U.S.C.A. § 552(b)(6).

[7] **Records 326 ⚿52**

326 Records
326II Public Access
326II(B) General Statutory Disclosure Requirements
326k52 k. Persons Entitled to Disclosure; Interest or Purpose. Most Cited Cases

Records 326 ⚿58

326 Records
326II Public Access
326II(B) General Statutory Disclosure Requirements
326k53 Matters Subject to Disclosure; Exemptions
326k58 k. Personal Privacy Considerations in General; Personnel Matters. Most Cited Cases
Operative inquiry in determining whether disclosure of document implicating privacy issues is warranted, under Freedom of Information Act (FOIA), is nature of requested document itself, not purpose for which document is being requested. 5 U.S.C.A. § 552(b)(6).

[8] **Records 326 ⚿65**

326 Records
326II Public Access
326II(B) General Statutory Disclosure Requirements
326k61 Proceedings for Disclosure
326k65 k. Evidence and Burden of Proof. Most Cited Cases
Although Freedom of Information Act (FOIA) requestor bears burden of satisfying public interest standard for obtaining waiver of processing fees, proof of ability to disseminate released information to broad cross-section of public is not required. 5 U.S.C.A. § 552(a)(4)(A)(iii).

[9] **Records 326 ⚿68**

326 Records
326II Public Access
326II(B) General Statutory Disclosure Requirements
326k61 Proceedings for Disclosure
326k68 k. Costs and Fees. Most Cited Cases
Public interest organization, seeking disclosure, under Freedom of Information Act (FOIA), of documents relating to president's exercise of pardon power, was not entitled to blanket waiver of processing fees absent showing that nonexempt documents were not generally already publicly available; organization was entitled only to waiver of fees for production of particular documents which were not already publicly available. 5 U.S.C.A. § 552(a)(4)(A)(iii).

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****184** Appeals from the United States District Court for the District of Columbia (No. 01cv00639) (No. 01cv00720).

Paul J. Orfanedes argued the cause and filed the briefs for appellant.
Michael E. Tankersley was on the brief for amicus curiae George Lardner in support of appellant.
Mark B. Stern, Attorney, U.S. Department of Justice, argued the cause for appellee. With him on the brief were Peter D. Keisler, Assistant Attorney General, Roscoe C. Howard, Jr., U.S. Attorney, Gregory G. Katsas, Deputy Assistant Attorney General, and Michael S. Raab, Attorney.

Before: HENDERSON, RANDOLPH and ROGERS, Circuit Judges.

Dissenting opinion filed by Circuit Judge RANDOLPH.ROGERS, Circuit Judge:
In *In re Sealed Case*, 121 F.3d 729 (D.C.Cir.1997), the court, in considering a grand jury subpoena for White House documents relating to an investigation of the former Secretary of Agriculture, reviewed the history of the executive privilege doctrine, and the nature and principles underlying two privileges falling within that doctrine. We apply that analysis in deciding whether, under Exemption 5 of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(5), the presidential communications privilege extends into the Justice Department to internal pardon documents in the Office of the Pardon Attorney and the Office of the Deputy Attorney General that were not "solicited and received." *id.* at 752, by the President or the Office of the President. [FN1] In refusing to release certain ***1110 **185** documents in response to Judicial Watch's FOIA requests, the Deputy Attorney General, to whom the Attorney General has delegated his pardon duties, invoked the deliberative process privilege. However, in moving for summary judgment, the Department also relied on the presidential communications privilege. On appeal, Judicial Watch contends that the district court erred in extending the presidential communications privilege to these internal Department documents. We agree, and accordingly we reverse, in part, the grant of summary judgment to the Department and remand the case for the district court to determine whether the Department's internal documents not "solicited and received" by the President or the Office of the President are protected from disclosure under the deliberative process privilege. We affirm the grant of summary judgment to the Department on the documents withheld under FOIA Exemption 6, and on Judicial Watch's request for a blanket waiver of FOIA processing fees.

FN1. The Office of the President, as relevant to the issues in this appeal, is distinct from the Executive Office of the President and is a smaller unit comprised of such immediate advisers as the Chief of Staff and the White House Counsel. *See* Congressional Quarterly, Federal Staff Directory vii (44th ed.2004); Nat'l Archives & Records Admin., Office of the Fed. Register, The United States Gov't Manual 88-89 (2003). Although the Executive Office of the President is an agency subject to the FOIA, *see* 5 U.S.C. § 552(f)(1), the Office of the President is not. *See Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156, 100 S.Ct. 960, 971, 63 L.Ed.2d 267 (1980) (quoting H.R. Conf. Rep. No. 93-1380, p. 15 (1974)). In referring to the President's immediate or key advisers in the Office of the President, we embrace the definitional analysis set forth in *In re Sealed Case*, 121 F.3d at 749-50, 752.

I.

In January and February 2001, Judicial Watch filed two FOIA requests for documents from the Justice Department. One request was to the Office of the Pardon Attorney, and the other was to the Office of the Deputy Attorney General. In each FOIA request, Judicial Watch sought release of "[a]ny and/or all [p]ardon [g]rants" by former President Clinton in January 2001, and "[a]ny and/or all pardon applications considered" by former President Clinton. [FN2] Judicial Watch's request for expedited processing under 28 C.F.R. § 16.5(d)(1)(iv), was denied, and the Department began releasing documents in February 2001, including some without prepayment of the FOIA processing fee. *See* 28 C.F.R. § 16.11(i)(2). Although it released thousands of pages of documents, the Department withheld 4,341 pages pursuant to FOIA Exemption 5, *see* 5 U.S.C. § 552(b)(5), and, to the extent these pages contained personal information about living individuals, pursuant to FOIA Exemption 6, *Id.* § 552(b)(6). The Department separately withheld another 524 pages under Exemption 6.

FN2. Specifically, Judicial Watch requested, "all correspondence, memoranda,

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> documents, reports, records, statements, audits, lists of names, applications, diskettes, letters, expense logs and receipts, calendar or diary logs, facsimile logs, telephone records, call sheets, tape recordings, video recordings, notes, examinations, opinions, folders, files, books, manuals, pamphlets, forms, drawings, charts, photographs, electronic mail, and other documents and things, that refer or relate to the following in any way" to pardon grants and applications considered by former President Clinton.

The withheld documents are described by the Department in a *Vaughn* Index [FN3], which organizes the records into 34 categories and specifies the particular privileges invoked for each document, with the presidential communications privilege and deliberative process privileges invoked either in full or in part. The 4,341 documents withheld under both the presidential communications***1111 **186** and deliberative process privileges, either in full or in part, can be grouped into several broad categories. For instance, a number of withheld documents consist of letters and reports from the Deputy Attorney General to the President, advising the President on individual pardon petitions. *See Vaughn* Index 5, 19, 32. A second group of withheld documents consist of communications between the Department and the White House Counsel's Office concerning pending pardon applications, and communications between the White House Counsel and the President discussing the Department's recommendations. *See id.* 3, 16, 18, 26. A third broad category of documents are proposed recommendations for the Deputy Attorney General's consideration, which were authored by the Deputy Attorney General's staff or the Pardon Attorney. *See id.* 1, 10, 11, 13, 14, 27, 28. A fourth category consists of internal communications and working documents among and between the Deputy's Office and the Pardon Attorney, such as memoranda from the Deputy's staff to the Pardon Attorney inquiring about specific pardon applications and requesting that certain pardon recommendations be modified or resubmitted to the Deputy. *See id.* 2, 4, 7, 20, 21, 22, 25, 29, 30. A fifth category consists of communications with and documents received from other agencies and departments in the course of preparing the Deputy's pardon recommendations for the President, such as FBI memoranda on background investigations. *See id.* 17, 23, 33. Other documents are either miscellaneous lists or drafts or are difficult to categorize because they appear to be internal departmental memoranda but actually incorporate specific recommendations the Deputy had submitted for the President. *See id.* 6, 8, 9, 12, 15, 19, 24, 31. With the exception of category 34 - involving 524 documents, which the Department withheld under Exemption 6, consisting of pardon petitions and letters to or from pardon applicants and their counsel and supporters - the Department posits that all of these documents fall under the purview of the presidential communications privilege.

> FN3. *See Vaughn v. Rosen*, 484 F.2d 820, 826-28 (D.C.Cir.1973). The *Vaughn* index is appended to this opinion.

In March and April 2001, Judicial Watch sued the Department to enforce the FOIA requests and to challenge the denial of a blanket waiver of FOIA processing fees. The district court consolidated the cases, and the Department moved for summary judgment. The district court agreed with the Department that all 4,341 pages were properly withheld under the presidential communications privilege pursuant to Exemption 5. Rejecting Judicial Watch's position that the privilege does not apply to documents not involving White House staff, the district court concluded that because the materials had been produced for the "sole" function of advising the President on a "quintessential and nondelegable Presidential power," the extension of the presidential communications privilege to internal Justice Department documents was justified. The district court also agreed that the Department had properly withheld 524 pages of documents, consisting primarily of individual petitions for pardons, under Exemption 6. Upon reconsideration, the court also granted the Department's motion for summary judgment on the fee waiver request, finding that Judicial Watch had failed to show that the FOIA requests were likely to contribute significantly to the public interest.

On appeal, Judicial Watch challenges the district court's rulings under Exemptions 5 and 6 and the denial of the blanket waiver of FOIA fees. Our review of the grant of summary judgment is *de novo*. *See Assassination Archives & Research Ctr. v. Cent. Intelligence Agency*, 334 F.3d 55, 57 (D.C.Cir.2003); *Johnson v. Executive Office for U.S. Attorneys*, 310 F.3d 771, 774 (D.C.Cir.2002); ***1112**187***Nation Magazine v. United States Customs Serv.*, 71 F.3d 885, 889 (D.C.Cir.1995). We address Exemption 5 in Part II, Exemption 6 in Part III, and the fee waiver in Part IV.

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II.

This FOIA case calls upon the court to strike a balance between the twin values of transparency and accountability of the executive branch on the one hand, and on the other hand, protection of the confidentiality of Presidential decision-making and the President's ability to obtain candid, informed advice. In striking this balance, the court must determine the contours of the presidential communications privilege with respect to the President's pardon power under Article II, Section 2, of the Constitution in light of the organization of the executive branch with regard to pardon applications, investigations, and recommendations. One view, advocated by the Department, is that protection of the institution of the Presidency requires that the presidential communications privilege apply to all documents authored by any executive branch agency employee that are generated in the course of preparing pardon recommendations for the President. The district court adopted this functional approach, finding that the presidential communications privilege applied to the requested documents because the Pardon Attorney's "sole" responsibility was to advise the President on pardon applications. Under this approach, the Pardon Attorney is, in effect, a White House adviser, rendering the presidential communications privilege applicable to all pardon-related documents notwithstanding the location and staff function of the Pardon Attorney in the Justice Department.

Another view, espoused by Judicial Watch, is that, in harmony with the FOIA's purpose, the principles underlying the presidential communications privilege limit its reach to documents and other communications "solicited and received" by the Office of the President, and thus do not extend to agency documents that are not submitted for Presidential consideration. Under this view, which we endorse, internal agency documents that are not "solicited and received" by the President or his Office are instead protected against disclosure, if at all, by the deliberative process privilege. We begin our analysis with the FOIA statute and then turn to the presidential communications privilege and the organization of the pardon process in the executive branch.

[1] The FOIA directs that "each agency, upon any request for records .... shall make the records promptly available to any person" for "public inspection and copying," unless the records fall within one of the exclusive statutory exemptions. *See* 5 U.S.C. § § 552(a)(2) & (a)(3)(A). There is, however, a built-in presidential communications privilege for records in the possession of, or created by, immediate White House advisers, who are not considered an agency for the purposes of FOIA. *See supra* note 1. The FOIA amended the public disclosure section of the Administrative Procedure Act, 5 U.S.C. § 1002, which had been viewed, for a variety of reasons, as "falling short" of the disclosure goals of the statute. *EPA v. Mink*, 410 U.S. 73, 79, 93 S.Ct. 827, 831, 35 L.Ed.2d 119 (1973). The Supreme Court has long recognized that Congress' intent in enacting FOIA was to implement "a general philosophy of full agency disclosure." *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 754, 109 S.Ct. 1468, 1471, 103 L.Ed.2d 774 (1989)(quoting *Dep't of the Air Force v. Rose*, 425 U.S. 352, 360-61, 96 S.Ct. 1592, 1598, 48 L.Ed.2d 11 (1976)). The Supreme Court has explained that,

> Without question, the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily***1113 **188** from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands.

Mink, 410 U.S. at 80, 93 S.Ct. at 832. In weighing opposing interests, Congress has instructed that "[s]uccess lies in providing a workable formula that encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure." S.Rep. No. 813, p. 3, *quoted in Mink*, 410 U.S. at 80, 93 S.Ct. at 832. Accordingly, FOIA's exemptions are to be narrowly construed. *See United States Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 151, 109 S.Ct. 2841, 2851, 106 L.Ed.2d 112 (1989); *Rose*, 425 U.S. at 361, 96 S.Ct. at 1599. *See also* 5 U.S.C. § 552(d); *Bristol-Myers Co. v. FTC*, 424 F.2d 935, 938 (D.C.Cir.1970), *cert. denied*, 400 U.S. 824, 91 S.Ct. 46, 27 L.Ed.2d 52 (1970).

FOIA Exemption 5 allows the government to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party ... in litigation with the agency." 5 U.S.C. § 552(b)(5). This language has been interpreted as protecting against disclosure those documents normally privileged in the civil discovery context. *See Mink*, 410 U.S. at 91, 93 S.Ct. at 837. This includes documents protected under the executive privilege doctrine. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 n. 16 &

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150, 95 S.Ct. 1504, 1515 n. 16, 1516, 44 L.Ed.2d 29 (1975). As described in *In re Sealed Case*, 121 F.3d at 737, the deliberative process privilege under Exemption 5 protects "confidential intra-agency advisory opinions" and "materials reflecting deliberative or policy-making processes." *Mink*, 410 U.S. at 86, 89, 93 S.Ct. at 835, 836 (citations omitted). It rests on the policy of protecting the "decision making processes of government agencies," *Sears Roebuck*, 421 U.S. at 150, 95 S.Ct. at 1516 (citations omitted), with the "ultimate purpose [being] to prevent injury to the quality of agency decisions." *Id.* at 151, 95 S.Ct. at 1516. Materials that are "predecisional" and "deliberative" are protected, while those that "simply state or explain a decision the government has already made or protect material that is purely factual" are not. *In re Sealed Case*, 121 F.3d at 737. The deliberative process privilege, however, is qualified and can be overcome by a sufficient showing of need. *See id.*

[2][3] Exemption 5 also has been construed to incorporate the presidential communications privilege. *See Sears Roebuck*, 421 U.S. at 149 n. 16 & 150, 95 S.Ct. at 1515 n. 16, 1516. In *United States v. Nixon*, 418 U.S. 683, 708, 94 S.Ct. 3090, 3107, 41 L.Ed.2d 1039 (1974) ("*Nixon I*"), which involved a grand jury subpoena for tape recordings of President Nixon's conversations in the Oval Office, the Supreme Court instructed that there is "a presumptive privilege for Presidential communications," which is "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." Later, in *Nixon v. Administrator of General Services*, 433 U.S. 425, 449, 97 S.Ct. 2777, 2793, 53 L.Ed.2d 867 (1977) ("*Nixon II*"), in addressing the President's challenge to a statute providing for screening by government archivists of his papers and recorded conversations, the Supreme Court emphasized *Nixon I*'s holding 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.' " (citations omitted). As analyzed by this court in *In re Sealed Case*, 121 F.3d at 744, "[t]he President can invoke the privilege when asked to produce documents or other materials that reflect presidential decision-making and deliberations and that the President believes should remain confidential." Unlike the ***1114 **189** deliberative process privilege, which is a general privilege that applies to all executive branch officials, the presidential communications privilege is specific to the President and "applies to documents in their entirety, and covers final and post-decisional materials as well as pre-deliberative ones." *Id.* at 745. The presidential communications privilege thus is a broader privilege that provides greater protection against disclosure, although it too can be overcome by a sufficient showing of need. *See id.* at 746.

Although Judicial Watch contends that the presidential communications privilege was not properly invoked, *see In re Sealed Case*, 121 F.3d at 744-45 n. 16; *Center on Corp. Responsibility, Inc. v. Shultz*, 368 F.Supp. 863, 872-73 (D.D.C.1973); *United States v. Burr*, 25 F. Cas. 187, 192 (C.C.Va. 1807)(No. 14,694), the court need not address the issue because Judicial Watch has waived this challenge by failing to raise it in the district court. *See Singleton v. Wulff*, 428 U.S. 106, 120, 96 S.Ct. 2868, 2876, 49 L.Ed.2d 826 (1976); *Amax Land Co. v. Quarterman*, 181 F.3d 1356, 1369 (D.C.Cir.1999). *See also Soucie v. David*, 448 F.2d 1067, 1071 (D.C.Cir.1971). Unlike in *In re Sealed Case*, 121 F.3d at 744-45 n. 16, where the affidavit of the White House Counsel stated that he was specifically authorized by the President to invoke the presidential communications privilege, the White House Counsel's declaration here includes no such statement and there is no other indication that the President has invoked the privilege. However, the issue of whether a President must personally invoke the privilege remains an open question, *see In re Sealed Case*, 121 F.3d at 744-45 n. 16, and the court need not decide it now. *Cf. United States v. Reynolds*, 345 U.S. 1, 7-8, 73 S.Ct. 528, 531, 97 L.Ed. 727 (1953).

[4] When the Supreme Court first acknowledged a separate privilege for presidential communications in *Nixon I*, 418 U.S. at 705, 94 S.Ct. at 3106, it was in the context of President Nixon's invocation of the privilege to protect his personal conversations with his chief White House advisers in the Oval Office. Although the Court in *Nixon I* and *II* outlined the nature of the privilege in terms of its "constitutional underpinnings," *see Nixon I*, 418 U.S. at 705-06, 94 S.Ct. at 3106, twenty years passed before, in *In re Sealed Case*, a court attempted to define the scope of the privilege more precisely. In *In re Sealed Case*, 121 F.3d at 746-47, the court was called upon to extend the privilege beyond communications directly involving and documents actually viewed by the President, to the communications and documents of the President's immediate White House advisers and their staffs. In the instant case, the Department seeks a further extension of the presidential communications privilege to officials within the Justice Department whose sole function, according to

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the Department, is to advise and assist the President in the performance of his non-delegable pardoning duty. We decline to sanction such an extension of the presidential communications privilege to all agency documents prepared in the course of developing the Deputy Attorney General's pardon recommendations for the President. Instead, consistent with the teachings of *Nixon I* and *II* and *In re Sealed Case*, we hold that the presidential communications privilege applies only to those pardon documents "solicited and received" by the President or his immediate White House advisers who have "broad and significant responsibility for investigating and formulating the advice to be given the President." *Id.* at 752.

This limitation, conveniently summarized by *In re Sealed Case*'s phrase "solicited and received," is necessitated by the principles underlying the presidential communications privilege, and a recognition of ***1115 **190** the dangers of expanding it too far. At core, the presidential communications privilege is rooted in the President's "need for confidentiality in the communications of his office," *Nixon I*, 418 U.S. at 712-13, 94 S.Ct. at 3109, in order to effectively and faithfully carry out his Article II duties and "to protect 'the effectiveness of the executive decision-making process.' " *In re Sealed Case*, 121 F.3d at 742 (quoting *Nixon v. Sirica*, 487 F.2d 700, 717 (D.C.Cir.1973)). The privilege extends to the President's immediate advisers because of the need to protect "candid, objective, and even blunt or harsh opinions," for, as the Supreme Court has recognized, "[a] President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." *Nixon I*, 418 U.S. at 708, 94 S.Ct. at 3107. However, in *In re Sealed Case*, the court recognized that, in determining whether "restricting the presidential communications privilege to communications that directly involve the President will 'impede the President's ability to perform his constitutional duty,' " 121 F.3d at 751 (quoting *Morrison v. Olson*, 487 U.S. 654, 691, 108 S.Ct. 2597, 2619, 101 L.Ed.2d 569 (1988)), there is, in effect, a hierarchy of presidential advisers such that the demands of the privilege become more attenuated the further away the advisers are from the President operationally. *See id.* at 752. Thus, as we demonstrate below, because pardon documents obtained from other agencies by Justice Department staff undergo various stages of intermediate review before pardon recommendations are submitted for consideration by the President and his immediate White House advisers, with some documents never making their way to the Office of the President, the same confidentiality and candor concerns calling for application of the presidential communications privilege in *Nixon I* and *II* and *In re Sealed Case* do not apply as forcefully here.

Although *In re Sealed Case* was not a FOIA case, it too involved a non-delegable duty of the President under Article II, Section 2 of the Constitution: the appointment and removal power for heads of Executive Departments and members of his Cabinet. The White House Counsel had conducted an investigation of alleged conflicts of interest of the Secretary of Agriculture and, on the basis of that investigation, had released a report to the public. A grand jury issued a subpoena *duces tecum* seeking all documents on the former Secretary possessed by the White House and any other documents "relating in any way to" the White House Counsel's report. *Id.* at 734-35. When the White House withheld many of the documents under the deliberative process and presidential communications privileges, the Office of Independent Counsel moved to compel production. The district court, upon conducting *in camera* review of the documents, ruled that the White House had properly invoked the presidential communications and deliberative process privileges. *Id.* at 735-36. On appeal, this court held that although all the documents sought were protected by the presidential communications privilege, the Independent Counsel had demonstrated a sufficient showing of need to obtain some of the information in the documents, and remanded the case to the district court to determine what information should be released. *Id.* at 757.

Consistent with the principles underlying the presidential communications privilege, the court in *In re Sealed Case* espoused a "limited extension" of the privilege "down the chain of command" beyond the President to his immediate White House advisers only, holding that "communications made by [such] presidential advisers in the course of preparing***1116 **191** advice for the President come under the presidential communications privilege, even when these communications are not made directly to the President." *Id.* at 749-50, 752. Emphasizing "the need for confidentiality to ensure that presidential decision-making is of the highest caliber, informed by honest advice and full knowledge," *id.* at 750, the court also held that "the privilege must apply both to communications which these advisers *solicited and received* from others as well as those they authored themselves." *Id.* at 752 (emphasis added).

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However, the court emphasized the limited nature of its holding, cautioning against the dangers 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." *Id.* The court instructed that "[n]ot 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." *Id.*

While the Department attempts to discount the court's instruction as mere dictum, it is unavoidably relevant for the purposes of defining the contours of the presidential communications privilege. In undertaking the task of conducting a more comprehensive analysis of the presidential communications privilege than had been done by the Supreme Court in *Nixon I* and *II* or any other court since then, the *In re Sealed Case* court's statement limiting the scope of the privilege to key White House advisers in the Office of the President and their staff cannot easily be divorced from the issues and concerns underlying its holding. Those issues and concerns are equally applicable here. The court in *In re Sealed Case* recognized the need to ensure that the President would receive full and frank advice with regard to his non-delegable appointment and removal power, but was also wary of undermining countervailing considerations such as openness in government. *See id.* at 749. Hence, the court determined that while "communications authored or solicited and received" by immediate White House advisers in the Office of the President and their staff could qualify under the privilege, communications of staff outside the White House in executive branch agencies that were not solicited and received by such White House advisers could not. *See id.* at 752. The court explained that only communications at the level of the immediate White House adviser's staff "are close enough to the President to be revelatory of his deliberations or to pose a risk to the candor of his advisers." *Id.* There is no indication in *Nixon I* or *II* or other Supreme Court jurisprudence that the boundaries set by *In re Sealed Case* were inappropriate. Rather, until *In re Sealed Case*, the privilege had been tied specifically to direct communications of the President with his immediate White House advisers. *See* Nixon I, 418 U.S. at 708, 94 S.Ct. at 3107; *Nixon II*, 433 U.S. at 448-49, 97 S.Ct. at 2792-93. The reluctance of the *In re Sealed Case* court to extend the presidential communications privilege beyond the limits of its requirements applies no less here.

Consequently, we proceed on the basis that "the presidential communications privilege should be construed as narrowly as is consistent with ensuring that the confidentiality of the President's decision-making process is adequately protected." *In re Sealed Case*, 121 F.3d at 752. Further extension of the privilege to internal Justice Department documents that never make their way to the Office of the President on the basis that the documents were created for the sole purpose of advising the President on a non-delegable duty is ***1117 **192** unprecedented and unwarranted. The only documents at issue in *In re Sealed Case* were documents created within the White House or received by key White House advisers or their staff. The majority of the withheld documents were authored by two associate White House Counsel, the White House Counsel and Deputy Counsel, and the President's Chief of Staff or Press Secretary. *See id.* at 757. Because these advisers were immediate White House staff in the Office of the President with significant responsibility for advising the President, the court held that these documents were protected by the privilege. *See id.* at 758. The few documents authored by a legal extern in the White House Counsel's Office and the few that had no author were also held by the court to be protected by the privilege because they "were clearly created at the request of the two associate White House Counsel with broad and significant responsibility" for the White House Counsel's investigation of the Secretary of Agriculture, and because the documents were received by these advisers. *Id.*

The Department now would have the court extend the presidential communications privilege to communications of persons in the Justice Department who are at least twice removed from the President, among and between the Offices of the Pardon Attorney and the Deputy Attorney General, as well as other agencies, that were never received by immediate White House advisers in the Office of the President. Undoubtedly a bright-line rule mandating application of the privilege to all departmental or agency communications related to the preparation of the Deputy Attorney General's pardon recommendations for the President would be easier to apply than a rule under which pardon communications not "solicited and received" by the Office of the President must be individually examined under the deliberative process privilege. But such a bright-line rule is inconsistent with the nature and principles of the presidential communications privilege, as well as the goal of best

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serving the public interest. *See In re Sealed Case*, 121 F.3d at 751-52. Communications never received by the President or his Office are unlikely to "be revelatory of his deliberations." *Id.* at 752. Nor is there reason to fear that the Deputy Attorney General's candor or the quality of the Deputy's pardon recommendations would be sacrificed if the presidential communications privilege did not apply to internal agency documents. *See id.* Any pardon documents, reports, or recommendations that the Deputy Attorney General submits to the Office of the President, and any direct communications the Deputy or the Pardon Attorney may have with the White House Counsel or other immediate presidential advisers will remain protected. The *In re Sealed Case* court's concern for providing "sufficient elbow room for [presidential] advisers to obtain information from all knowledgeable sources," *id.*, will also not be undermined. It is only those documents and recommendations of Department staff that are not submitted by the Deputy Attorney General for the President and are not otherwise received by the Office of the President, that do not fall under the presidential communications privilege. Although the potential for chilling the candor of the staffs of the Pardon Attorney or the Deputy Attorney General is greater than if everything produced in relation to pardon recommendations were covered under the privilege, because the deliberations of these staff are not close enough to the President to be revelatory of his deliberations and will in any event remain protected pursuant to the deliberative process privilege, the justification for expanding the presidential privilege that far disappears. *See id.*

Moreover, the President's discretion and autonomy in granting pardons, *see* ***1118**193***United States v. Klein*, 80 U.S. (13 Wall.) 128, 147, 20 L.Ed. 519 (1871), which may be based on the Deputy Attorney General's recommendations, the advice of his key White House advisers, or such other sources as he may seek out, counsel against further expansion of the privilege. It would be implausible, however, to conclude that documents that neither the President nor his key advisers receive from the Deputy Attorney General are part of the President's personal decision-making process such that their exclusion from the scope of the privilege would impair the quality of his deliberations. For instance, the court can hardly conclude that examining documents such as an "[e]-mail within the Department of Justice, among officials in [the Office of the Deputy Attorney General] and [the Office of the Pardon Attorney] transmitting information on particular pardons, and requesting information, such as warrants and background investigations," *see Vaughn* Index category No. 7, under the deliberative process privilege rather than the presidential communications privilege, would jeopardize the President's confidentiality and decision-making process. Extending the presidential communications privilege to cover such internal Department documents would be both contrary to executive privilege precedent and considerably undermine the purposes of FOIA to foster openness and accountability in government. Indeed, a bright-line rule expanding the privilege could have the effect of inviting use of the presidential privilege to shield communications on which the President has no intention of relying in exercising his pardon duties, for the sole purpose of raising the burden for those who seek their disclosure. Such an approach would distort the rationale adopted by the Supreme Court in *Nixon I* and *II* and the principled analysis of this court in *In re Sealed Case*.

However, the Department contends that the Pardon Attorney is, in effect, a "member[ ] of an immediate White House adviser's staff who ha[s] broad and significant responsibility for investigating and formulating the advice to be given the President." *In re Sealed Case*, 121 F.3d at 752. Under this view, because the Pardon Attorney's sole purpose is to advise the Deputy Attorney General, and ultimately, the President on pardon applications, and the Pardon Attorney either authored or compiled the documents sought, the documents are protected by the presidential communications privilege. But the Department's view ignores the separate responsibilities of the Deputy Attorney General and the Pardon Attorney as well as the Pardon Attorney's history of invoking the deliberative process privilege to protect the confidentiality of the Department's internal pardon process.

The court has long recognized that the organization of governmental functions is of significance for the purposes of FOIA. In *Ryan v. Dep't of Justice*, 617 F.2d 781, 789 (D.C.Cir.1980), the court observed that,

> In many different areas the President has a choice between using his staff to perform a function and using an agency to perform it. While not always substantively significant, these choices are often unavoidably significant for FOIA purposes, because the Act defines agencies as subject to disclosure and presidential staff as exempt.

The court considered the President's decisions about the location of advisers as reflective of his

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understanding of the access that the public could potentially have to government documents under FOIA. *See id.* at 789. Although the issue in *Ryan* involved the meaning of "agency records" under FOIA, namely, whether questionnaire responses of United States Senators sent to the Attorney General regarding their procedures for selecting and recommending***1119 **194** potential judicial nominees were "agency records," the court's analysis is nonetheless instructive. Just as the power to grant pardons is a quintessential and non-delegable Presidential duty, so too is the Article II, Section 2 power to select and appoint federal judges. There, as here, the President had delegated to the Attorney General the responsibility of evaluating potential nominees, receiving recommendations, and recommending candidates to the President. In performing this duty, the Attorney General solicited questionnaire responses from Senators on their procedures for recommending potential nominees, *id.* at 784, much as the Deputy Attorney General, through the Pardon Attorney, solicits responses from agencies on pardon applicants. While an inquiry into whether documents are " agency records" under FOIA is different from an inquiry into whether documents come within a FOIA exemption, each inquiry ultimately involves shielding government documents from public scrutiny - in these cases, on the basis that the documents were produced for the purpose of advising the President on a nondelegable Presidential duty.

The court in *Ryan* rejected a functional approach. It reasoned that although the documents were received for the purpose of advising the President on a nominating role that was exclusively his, *id.* at 786, adopting a functional approach to "defin[e] 'agency records' by the purpose for which they exist, would cut back severely on the FOIA's reach as interpreted by courts since its inception." *Id.* at 788. The court observed that judicial nominations were "by no means unique as an instance where normal agency functions involve some element of giving advice to the President." *Id.* at 787. For instance, the Office of Legal Counsel in the Justice Department exists to assist the Attorney General in advising the President on major legal issues, a large portion of the Secretary of State's functions is to advise the President in the conduct of foreign affairs, *id.* at 787-88, and the Central Intelligence Agency and the National Security Agency produce documents for the function of advising the President in his "solely presidential role of Commander-in-Chief." *Id.* at 788. That reasoning is equally applicable here. Extension of the presidential communications privilege beyond the limits of *In re Sealed Case* to all documents prepared or received by the Pardon Attorney or his Office simply because they are produced for the sole function of assisting the Deputy Attorney General in presenting pardon recommendations for the President would have far-reaching implications for the entire executive branch that would seriously impede the operation and scope of FOIA.

However, rather than focusing on whether the internal Department documents are "agency records," as in *Ryan*, we proceed on the basis that the Office of the Pardon Attorney, as an office within the Justice Department, is an agency subject to FOIA. *See Crooker v. Office of Pardon Attorney*, 614 F.2d 825, 827 (2d Cir.1980). It is the respective roles of the Deputy Attorney General and the Pardon Attorney in making pardon recommendations for the President that are significant for our analysis. The Department's assertion that the Pardon Attorney and his staff can be likened to "immediate White House adviser's staff," *In re Sealed Case*, 121 F.3d at 752, or as an extended arm of the White House Counsel's Office, such that all documents authored or solicited and received by the Pardon Attorney fall under the protection of the presidential communications privilege, is untenable in light of the review and intermediate decision-making by the Deputy Attorney General. The declarations and attachments filed by the Department in the district court reveal that the Attorney General has delegated his advisory duties on pardons ***1120 **195** to the Deputy Attorney General, and within the Department, the Pardon Attorney assists the Deputy Attorney General in performing this duty, as well as "such other duties as may be assigned," *see* 28 C.F.R. § 0.35(b), by the Attorney General or the Deputy Attorney General.[FN4] Thus, the Pardon Attorney receives, on behalf of the President, applications for pardons for federal criminal offenses, and in accordance with instructions from the Deputy Attorney General's Office, conducts an investigation, calling upon other agencies such as the Internal Revenue Service, the Federal Bureau of Investigation, the U.S. Probation Office and U.S. Attorney in the District where the applicant was convicted. *See* 28 C.F.R. § 1.6(a). Staff in the Office of the Deputy review the Pardon Attorney's proposed recommendations and investigatory report, and upon any necessary further investigation, prepare a report for the Deputy Attorney General. Ultimately, the Deputy Attorney General submits, on behalf of the Attorney General, his recommendations for the President on the pardon applications that the Deputy has determined should be considered by the President. *See id.* § 1.6(c).

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> FN4. Although the current rules refer to the "Associate Attorney General," *see* 28 C.F.R. § § 0.35(b), 0.36 (2003), the declarations, which were filed in 2002, refer to the delegation of the Attorney General's pardon duties to the Deputy Attorney General.

The Pardon Attorney, therefore, does not, as a matter of his working relationships, directly advise the President on pardon recommendations or serve as immediate staff to the White House Counsel or other key White House advisers in the Office of the President. In practice, the Deputy Attorney General acts as an intermediate controlling official who exercises independent judgment on which pardon applications and what recommendations to submit for the President's consideration. *Cf. Ryan,* 617 F.2d at 786. These internal working relationships are part of the "*regular* business" of the Department. *See id.* at 787. The fact that the Deputy Attorney General's recommendations for the President are transmitted to the Office of the White House Counsel through the Pardon Attorney does not minimize the significance for FOIA purposes of the Department's intermediary role in preparing pardon recommendations for the President. This role contrasts with that of the key White House advisers in the Office of the President who directly advise the President as was discussed in *In re Sealed Case,* 121 F.3d at 752. The White House Counsel, in the Office of the President, who enjoys close proximity to the President, is one such key adviser; the Pardon Attorney, in the Justice Department, who is at least twice removed from the President, is not.

Nor can the Deputy Attorney General or Attorney General be equated with the close presidential advisers discussed in *In re Sealed Case.* Since the creation of the Department in 1870, the Attorney General has not only served as an adviser to the President, but also as the administrator of the Department. *See Ryan,* 617 F.2d at 787. Recognizing the problem of "dual-hat" advisers who perform other functions in addition to advising the President, *see Armstrong v. Executive Office of the President,* 90 F.3d 553, 558 (D.C.Cir.1996), the court in *Ryan* noted that the Attorney General, as head of the Justice Department, could not be treated as a non-agency exempt from the FOIA when he was engaged in his presidential advisory functions. *Ryan,* 617 F.2d at 788. In *In re Sealed Case,* the court's reference to " 'dual hat' presidential advisers," was limited to those "immediate White House adviser's staff" who "exercise substantial independent authority or perform other ***1121 **196** functions in addition to advising the President," 121 F.3d at 752, and for these individuals, the presidential communications privilege could apply if the government bore its burden of proving that their communications occurred in the course of advising the President. *See id.* But, the court in *Ryan* rejected the notion that the Attorney General should be treated as "the President's immediate personal staff," or as a unit within the Executive Office of the President "whose sole function is to advise the President." *Id.* at 788. *Cf. Soucie,* 448 F.2d at 1075. Extension of the presidential communications privilege to the Attorney General's delegatee, the Deputy Attorney General, and his staff, on down to the Pardon Attorney and his staff, with the attendant implication for expansion to other Cabinet officers and their staffs, would, as the court pointed out in *In re Sealed Case,* "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." *Id.*

Instead, consistent with the Department's historical position and the underlying public interest, its internal documents that are not "solicited and received" by the President or the Office of the President should be evaluated under the deliberative process privilege. Heretofore, in complying with FOIA requests, the Pardon Attorney has withheld documents that he or she considered privileged under the deliberative process privilege, not the presidential communications privilege. For instance, in *Binion v. United States Dep't of Justice,* 695 F.2d 1189, 1191 (9th Cir.1983), when an applicant for a Presidential pardon sought disclosure under FOIA of all records dealing with his prior pardon applications, the Pardon Attorney relied only on Exemption 5's deliberative process privilege. Exemption 7's privilege for law enforcement records, and the Privacy Act's "general exemption" for rap sheets and other criminal reports, to justify withholding the documents. *See also Crooker,* 614 F.2d at 828. Indeed, the declaration of Deputy Attorney General Larry D. Thompson states that "the documents withheld in this litigation ... are properly subject to the deliberative process privilege," evidencing an expectation that working documents, produced in the course of developing the Deputy Attorney General's recommendations for the President, would be evaluated only under the deliberative process privilege, not the presidential communications privilege. The ultimate goal of protecting the confidentiality of the President's decision-making and his access to candid advice is

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achieved under the deliberative process privilege for those working documents that never make their way to the Office of the President. Inasmuch as disclosure of factual information may reveal the nature and substance of the issues before the President, factual information is protected against disclosure under the deliberative process privilege "if it is inextricably intertwined with policy-making processes." *Soucie*, 448 F.2d at 1077-78.

Consequently, to define the scope of the presidential communications privilege functionally by focusing on the "sole" responsibility of the Pardon Attorney to advise the President on his pardon duty, ignores the internal working relationships of the Pardon Attorney within the Justice Department and the fact that it is the Deputy Attorney General who makes the final decision on the pardon recommendations to be submitted for the President's consideration. While a functional approach has the virtue of simplicity, it comes at too high a price: Any document that in any way pertains to pardons would be covered by the presidential communications privilege regardless of whether it is submitted with the Deputy Attorney General's pardon recommendations for the ***1122 **197** President. To hold that all work performed in connection with a standing request by the President for the Attorney General's pardon recommendations falls under the presidential communications privilege entails fundamental conceptual difficulties. First, such an interpretation would sweep within the reach of the presidential privilege much of the functions of the executive branch, namely, to advise the President in the performance of his Article II duties. Courts have long been hesitant to extend the presidential communications privilege so far, for ours is a democratic form of government where the public's right to know how its government is conducting its business has long been an enduring and cherished value. *See In re Sealed Case*, 121 F.3d at 749 (quoting Letter from James Madison to W.T. Barry (Aug. 4, 1822), *in* 9 Writings of James Madison 103 (Gaillard Hunt, ed.1910)). *See also Mink*, 410 U.S. at 105, 93 S.Ct. at 844 (Douglas, J., dissenting) (quoting Henry Steels Commager, *The New York Review of Books*, Oct. 5, 1972, p. 7). As we cautioned in *In re Sealed Case*, the courts must be "ever mindful of the dangers |of| cloaking governmental operations in secrecy." 121 F.3d at 762. Second, extending the presidential communications privilege to working documents produced in the course of advising the President on his pardon power would be inconsistent with the Department's historical approach of invoking the deliberative process privilege rather than the presidential communications privilege to protect its internal documents and deliberations from public disclosure. The Department has not argued, much less proffered any evidence, that the President's decision-making process on pardons has been compromised in any manner as a result of the Department's prior reliance on the deliberative process privilege.

Our dissenting colleague reaches a different conclusion, namely, that any and all documents originated for the sole purpose of advising the President on a "quintessential and nondelegable" power must be protected by the presidential communications privilege, irrespective of whether they are received by the President or any of his close White House advisers. Dissenting Op. at 1137. The dissent points to the *In re Sealed Case* court's statement that the privilege protects "pre-decisional" documents produced in the course of advising the President, not just those documents that physically enter the Oval Office. 121 F.3d at 750. *See* Dissenting Op. at 1137-38. However, application of this statement to the pardon documents at issue is problematic for several reasons. The *In re Sealed Case* court extended the presidential communications privilege beyond communications actually seen by the President to the working papers of the President's immediate White House advisers in the Office of the President, not simply because the documents were "originated for the sole purpose of advising the President," Dissenting Op. at 1137, but because there was reason to believe, given the decision-making process at issue, that the President's confidentiality and access to candid advice might otherwise suffer. That concern is far more attenuated for working documents of an agency that were never submitted to the Office of the President. The dissent's point seems to be that with regard to nondelegable presidential duties, no matter how many steps a communication is removed from the President, if it is protected only by the deliberative process privilege and not by the presidential communications privilege, it risks exposing the "issues before the President," thus compromising his interest in confidentiality. Dissenting Op. at 1139. But this approach fails to acknowledge both "the general rule, underscored by the Supreme Court in *Nixon II*, that privileges should be narrowly construed," ***1123**198***In re Sealed Case*, 121 F.3d at 749, and the significance of the hierarchy of presidential advisers underlying the analysis in *In re Sealed Case*, 121 F.3d at 752. Whereas the *in rE sealeD case* court recognized that the need for the presidential communications privilege becomes more attenuated the further away

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the advisers are from the President, the dissent fails to acknowledge that the " organizational chart" affects the extent to which the contents of the President's communications can be inferred from predecisional communications.

The reality is that working papers of an immediate White House adviser in the Office of the President will be far more revelatory of advice given to the President than internal Department documents such as emails within the Department "transmitting information on particular pardons, and requesting information, such as warrants and background investigations." *See Vaughn* Index category No. 7. The less one can learn from these twice- and thrice-removed communications about "the evolution of advisers' positions and as to the different policy options considered along the way," Dissenting Op. at 1137, the less need is there to protect them under the presidential communications privilege. Although the court acknowledged in *In re Sealed Case* that the deliberative process privilege would be inadequate to protect the President's confidentiality and the candor of his immediate White House advisers, 121 F.3d at 750, the court nevertheless concluded that the presidential communications privilege should not extend outside of the White House into executive branch agencies. *See id.* at 752. For, to the extent those concerns remain with regard to internal agency communications, the deliberative process privilege protects confidential intra- and inter-agency communications consisting of recommendations or opinions that are advisory or deliberative in nature as well as communications revelatory of the President's decision-making process. *See Soucie*, 448 F.2d at 1077-78. *See also Mink*, 410 U.S. at 86, 89, 93 S.Ct. at 835, 836. The dissent's further argument that the President could have organized the pardon process to bring more pre-decisional communications within the scope of the presidential communications privilege, *see* Dissenting Op. at 1138; *cf. Ass'n. of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 910 (D.C.Cir.1993), is irrelevant. The President has not done so, and the organizational structure of presidential decision-making matters in determining the scope of the presidential communications privilege because it speaks to the strength of the President's confidentiality interests in a particular communication. In the FOIA context, moreover, the court has long recognized that the way in which the President organizes and delegates his official duties is significant. *See Ryan*, 617 F.2d at 789. Finally, the dissent's qualification that the protection of the presidential communications privilege would attach only if the advice is on a "quintessential and nondelegable Presidential power," Dissenting Op. at 1137, draws an arbitrary line, for it provides no reason to conclude that presidential decisions that could have been delegated, but were not, are entitled to less candid or confidential advice than those that could not have been delegated at all.

[15] Accordingly, we hold that the presidential communications privilege applies to pardon documents "solicited and received" by the President or his immediate advisers in the Office of the President, and that the deliberative process privilege applies to internal agency documents that never make their way to the Office of the President. This approach heeds the teachings of *Nixon I* and *II* and *In re Sealed Case*, and strikes an appropriate balance between the President's need for confidentiality and frank advice and the obligations of open ***1124 **199** government. As is demonstrated by the Department's historical reliance on the deliberative process privilege, the public interest in protecting the President's decision-making process is preserved without extending the presidential communications privilege to internal Department documents that do not accompany the Deputy Attorney General's pardon recommendations for the President and are not otherwise solicited and received by the Office of the President. Although the Supreme Court has pointed out that the "expectation of the confidentiality of executive communications [ ] has always been limited and subject to erosion over time after an administration leaves office," *Nixon II*, 433 U.S. at 451, 97 S.Ct. at 2793, the Department does not suggest that a lesser interest in confidentiality is called for because the requested documents are those of a former Administration.

As noted, the *Vaughn* index indicates that certain documents requested by Judicial Watch are not covered by the presidential communications privilege. Internal documents between the Office of the Pardon Attorney and the Deputy Attorney General's staff or communications within the Deputy Attorney General's office, that were not sent to the Office of the President, appear to be more appropriately examined under the deliberative process privilege. *See, e.g., Vaughn* Index category Nos. 1, 2, 4, 10, 11, 13, 14, 19, 20, 21, 22, 25, 27-30. We therefore reverse that part of the grant of summary judgment extending the presidential communications privilege to the Department's internal documents. With regard to other categories of documents, however, it is difficult to determine whether or not all or some of the documents were

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forwarded to the Office of the President. *See, e.g., Vaughn* index Category 12 (letters among the Office of the Pardon Attorney, United States Attorney's Offices, and the White House). On remand, the district court should review those documents and determine whether they fall within the presidential communications privilege. For those documents not protected by the presidential communications privilege, the district court should determine whether they were properly withheld under FOIA Exemption 5's deliberative process privilege or under FOIA Exemption 6, giving due consideration to Judicial Watch's claim that the balance of interests weighs in favor of releasing the records and to the agency's obligation, pursuant to 5 U.S.C. § 552(b), to disclose all reasonably segregable, nonexempt portions of the documents.

III.

FOIA Exemption 6 allows the government to withhold documents about individuals in "personnel and medical and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Its primary purpose is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *United States Dep't of State v. Washington Post Co.*, 456 U.S. 595, 599, 102 S.Ct. 1957, 1960, 72 L.Ed.2d 358 (1982). The reference to "similar files" has been interpreted broadly to include those "detailed Government records on an individual which can be identified as applying to that individual." *Id.* at 602, 102 S.Ct. at 1962 (quoting H.R.Rep. No. 1497, U.S.Code Cong. & Admin.News 1966, p. 2428). The Supreme Court has long rejected a "cramped notion of personal privacy." *United States Dep't of Justice v. Reporters Comm. For Freedom of the Press*, 489 U.S. 749, 763, 109 S.Ct. 1468, 1476, 103 L.Ed.2d 774 (1989).

[6] The district court ruled that the release of non-public, personal information regarding the pardon applicants, their families, and the crimes they committed, ***1125 **200** could reasonably be interpreted as invasions of personal privacy, and that there was no indication that the disclosure of such information would contribute significantly to the public's understanding of the government's activities. *See Judicial Watch, Inc. v. United States Dep't of Justice*, 259 F.Supp.2d 86, 91-92 (D.D.C.2003). On appeal, Judicial Watch contends that Exemption 6 is inapplicable, first, because pardon applications do not concern personal information about prisoners but rather, the basis upon which their clemency was granted, and second, because convicted felons are not entitled to the same privacy rights as other citizens. These contentions are without merit.

In *Reporters Comm.*, the Supreme Court held that the disclosure of contents of FBI rap sheets constituted an unwarranted invasion of personal privacy, and thus were exempt from disclosure. Although the case involved FOIA Exemption 7(c) rather than Exemption 6, the Court's reasoning is instructive. This court has deemed the privacy inquiry of Exemptions 6 and 7(c) to be essentially the same, *see Reed v. NLRB*, 927 F.2d 1249, 1251 (D.C.Cir.1991); *Nat'l Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 874 (D.C.Cir.1989), although the Supreme Court has recently construed Exemption 7(c) to be broader. *See Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, at ----, 124 S.Ct. 1570, at 1577, 158 L.Ed.2d 319 (2004). In *Reporters Comm.*, the Supreme Court described privacy as an "individual interest in avoiding disclosure of personal matters.... [encompassing] the individual's control of information concerning his or her person." 489 U.S. at 762-63, 109 S.Ct. at 1476. The Court stated that although much of the content of FBI rap sheets were a matter of public record, *id.* at 753, 109 S.Ct. at 1471, the limited availability of an actual rap sheet to the public reflected a recognition of the privacy interests of criminals, for there was a distinction, in the court's view, of "scattered disclosure of the bits of information contained in a rap sheet and revelation of the rap sheet as a whole." *Id.* at 764, 109 S.Ct. at 1476. Thus, the Court not only recognized that criminals have privacy interests, but also that the availability of the public information contained in rap sheets, when compiled as one document, implicated privacy interests.

The documents withheld by the Department under Exemption 6 consist primarily of individual petitions for pardons, including non-public personal information about the applicants and their lives before and after their convictions and personal information about third parties. The pardon application calls for a broad range of detailed and highly personal information about a pardon applicant. In addition to the usual identifying information such as name, home address, social security number, citizenship, and physical characteristics, the form asks the applicant to provide a detailed account of his or her criminal history, substance abuse, occupational licensing history, and such personal biographical matters as family history, marital status, and the names, birth dates, custody, and location of the

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applicant's children. Information must also be provided on residences, employment history, military record, financial status, and medical history. Applicants generally also include a description of their lives since conviction, their mental and physical well-being, and emotional pleas for pardons, including letters from friends, family members, employers, and attorneys.

[7] These documents easily fall under the purview of an individual's "interest in avoiding disclosure of personal matters," and controlling "information concerning his or her person." *Reporters Comm.*, 489 U.S. at 762-63, 109 S.Ct. at 1476. The ***1126 **201** disclosure of the documents Judicial Watch requests would implicate far more serious privacy interests than those at stake in *Reporters Comm.* Even though some of this information has previously been disclosed to the public, under the reasoning of *Reporters Comm.*, the information is nevertheless entitled to protection. *See id.* at 764, 109 S.Ct. at 1476. Judicial Watch's reliance on such cases as *United States v. Amen*, 831 F.2d 373 (2nd Cir.1987), for the proposition that pardon applicants do not have the same privacy interests as law-abiding citizens, is misplaced. *Amen* involved a Fourth Amendment claim where the Second Circuit held that prison inmates have no reasonable expectation of privacy - i.e., they are subject to strip searches, random cell searches, and monitoring of their telephone conversations. 831 F.2d at 379-80 (citations omitted). It does not follow that pardon applicants, who are not necessarily still in custody, do not have a privacy interest in documents containing sensitive personal information. *See also Smith v. Fairman*, 678 F.2d 52, 54 (7th Cir.1982). Furthermore, these types of personal records are unlikely to shed light on the Department's conduct in the pardoning process. *See Reporters' Comm.*, 489 U.S. at 773, 109 S.Ct. at 1481. The operative inquiry in determining whether disclosure of a document implicating privacy issues is warranted is the nature of the requested document itself, not the purpose for which the document is being requested. *See id.* at 772, 109 S.Ct. at 1480. Accordingly, we affirm the grant of summary judgment for documents withheld pursuant to Exemption 6, for the district court correctly ruled that their disclosure would constitute "a clearly unwarranted invasion of personal privacy," 5 U.S.C. § 552(b)(6), that outweighs any public interest that Judicial Watch may claim in their disclosure.

IV.

[8] Under FOIA, the Department is permitted to charge a reasonable fee for searching, copying, and reviewing its files. *See* 5 U.S.C. § 552(a)(4)(A)(ii). Fees are to be reduced or waived if disclosure of the requested information is "in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of government and is not primarily in the commercial interest of the requester." *Id.* § 552(a)(4)(A)(iii). For a request to be in the "public interest," four criteria must be satisfied: (1) the request must concern the operations or activities of government; (2) the disclosure must be "likely to contribute" to an understanding of government operations or activities; (3) disclosure must contribute to an understanding of the subject by the public at large; and (4) disclosure must be likely to contribute significantly to such public understanding. *See* 28 C.F.R. § 16.11(k)(2). The Department's regulations also provide that, "The disclosure of information that already is in the public domain, in either a duplicative or a substantially identical form, would not be as likely to contribute to such [public] understanding where nothing new would be added to the public's understanding." *Id.* § 16.11(k)(2)(ii). The burden of satisfying the public interest standard is on the requestor. *See Larson v. CIA*, 843 F.2d 1481, 1483 (D.C.Cir.1988). However, proof of the ability to disseminate the released information to a broad cross-section of the public is not required. *See Carney v. United States Dep't of Justice*, 19 F.3d 807, 814 (2d Cir.1994).

In response to Judicial Watch's requests for a blanket waiver of FOIA processing fees under 5 U.S.C. § 552(a)(4)(A)(iii), the Department, in moving for summary judgment, argued that Judicial Watch was seeking information that was already in the public domain and thus not likely to ***1127 **202** contribute significantly to the public's understanding of the pardon process. After initially denying the Department's motion on the ground that Judicial Watch did not have access to any of the documents and could not determine whether they were publicly available, the court, upon reconsideration, granted summary judgment to the Department based upon its subsequent release of more than 15 percent of the total pages of the non-exempt documents and a supplemental Department affidavit averring that additional non-exempt pardon documents were also in the public domain. On appeal, Judicial Watch contends that it has met all four of the Department's criteria for qualifying for a fee waiver, *see* 28 C.F.R. § 16.11(k)(2)(i-iv), but has been placed in a "catch-22" situation by being asked to identify the documents that would most likely contribute to the

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public's understanding of the pardon process before it has access to any of the documents.

[9] Despite receipt of thousands of pages of requested documents, Judicial Watch has made no showing that these documents were not publicly available. Absent some indication of why it was not reasonable for the district court to have relied on the documents already released by the Department and its supplemental declaration as to the remaining non-exempt documents, there is no basis to conclude that Judicial Watch is entitled to a blanket waiver of FOIA processing fees. *See Larson,* 843 F.2d at 1483. Under Department regulations, when the costs of an anticipated duplication is determined to be in excess of $250, the Department may "require the requester to make an advance payment of an amount up to the amount of the entire anticipated fee" prior to producing any of the documents to the requester. *See* 28 C.F.R. § 16.11(i)(2). Further, if advance payment or a good faith commitment to pay the anticipated duplication fees is not provided, the regulations provide that "the request shall not be considered received and further work will not be done on it until the required payment is received." *Id.* § 16.11(i)(4). Hence, the Department properly refused to process further documents without payment of the required fees.

At the same time, Judicial Watch cannot be expected to show that the unreleased documents are not, in fact, publicly available. The Department acknowledges as much on appeal. While continuing to maintain that Judicial Watch is not entitled to a blanket fee waiver, the Department states in its brief that some documents sought by Judicial Watch may qualify for a waiver of fees, and that the Pardon Attorney will grant fee waivers for those particular documents. *See* Appellee's Brief at 43. In light of this acknowledgment, Judicial Watch has obtained the only relief to which it is entitled under the regulations. *See* 5 U.S.C. § 552(a)(4)(A)(iii); 28 C.F.R. § 16.11(k)(2)(i-iv).

Accordingly, we reverse, in part, the grant of summary judgment to the Department based on application of the presidential communications privilege to the internal documents of the Department withheld pursuant to Exemption 5, and otherwise affirm the grant of summary judgment to the Department on documents withheld pursuant to Exemption 6 and Judicial Watch's request for a blanket waiver of the FOIA processing fees.

***1128 **203** APPENDIX

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APPENDIX

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Judicial Watch, Inc. v. U.S. Department of Justice
CV 01-0639
U.S. District Court
District of Colombia

Vaughn Index

Description of the Office of the Deputy Attorney General pardon records protected by FOIA Exemptions 5 and 6. The 4825 pages withheld in full and 40 pages withheld in part are grouped into thirty-four categories and described below.

Number	Category	Exemptions	Pages
1	Correspondence control sheets forwarding proposed recommendations on pardon applications from the Office of the Pardon Attorney (OPA) and from Ms. Deborah Smolover, Counsel to the Deputy Attorney General (DAG), to the Deputy Attorney General.	Presidential Communications Privilege Deliberative in Part Privacy	13
2	Two memoranda from the Pardon Attorney when he worked for the Office of the Deputy Attorney General (ODAG), to Marshall Jarrett, an official in the ODAG, providing his proposed recommendations on certain pardon applications.	Presidential Communications Privilege Deliberative in part Privacy	4
3	Typed notes and memoranda from the Pardon Attorney to Ms. Meredith Cabe of the White House Counsel's Office (WHCO) providing responses to inquiries from Ms. Cabe regarding particular pardon applicants.	Presidential Communications Privilege Deliberative in part Privacy	32

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4	Electronic mail (e-mail) and memoranda from Ms. Smolover to the Pardon Attorney asking questions about pardon applicants and requesting that certain draft pardon recommendations be modified and submitted again to the DAG.	Presidential Communications Privilege Deliberative in part Privacy	8
5	Signed letters of advice from the DAG, Acting DAG, or the Pardon Attorney to the President of the United States.	Presidential Communications Privilege Deliberative in full Privacy	1084
6	Memorandum from the Pardon Attorney to the DAG advising of the pardons granted by the President on a particular day. The memorandum discusses what the DAG had recommended to the President and includes an attachment with the name of the pardon applicant, their offense and some of the reasons for the pardon grant.	Presidential Communications Privilege Deliberative in part Privacy	6
7	E-mail within the Department of Justice, among officials in ODAG and OPA transmitting information on particular pardons, and requesting information, such as warrants and background investigations. There is also discussion on language for letters of advice.	Presidential Communications Privilege Deliberative in part Privacy in part because some people are deceased	64
8	Typed summaries of selected pending clemency cases containing views of various components or officials regarding each applicant and with occasional handwritten notes describing the DAG's view on a particular pardon, with a comparison of cases in which pardons were granted by the President.	Presidential Communications Privilege Deliberative in full Privacy	9

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9	Computer print-outs from the OPA's computerized tracking system reflecting the status of pending clemency requests and the DAG's recommendations on those requests and also including, for some, e.g., whether victim consultation had been done, what was requested by the White House, the views of the OPA, and the Department's recommendation.	Presidential Communications Privilege Deliberative in full Privacy	24
10	Memoranda from Ms. Smolover to the Attorney General (including draft versions) providing the status of three pending pardon applications, including the background of an applicant, the Department's investigations, and the proposed recommendations of the Pardon Attorney and other officials.	Presidential Communications Privilege Drafts are deliberative in full, final versions are deliberative in part Privacy	26
11	Memoranda from the Pardon Attorney to the Attorney General providing the status of, and background information on, particular pardon applicants, and memoranda forwarding draft letters for the Attorney General's signature in response to a letter in support of a particular pardon applicant.	Presidential Communications Privilege Deliberative in part Privacy	34

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12	Letters and memoranda between the Office of the Pardon Attorney, the White House and various United States Attorney's Offices (USAO's) in which the Pardon Attorney seeks the views of USAO's on particular pardons and the USAO's provide those views in letters to the Pardon Attorney or directly to the White House. This category also includes one memorandum from the Pardon Attorney to the Immigration and Naturalization Service seeking the immigration status of a particular applicant.	Presidential Communications Privilege Deliberative in part Privacy	51
13	Handwritten notes to and from the DAG, Ms. Smolover and Mr. Kevin Ohlson, Chief of Staff to the DAG, regarding recommendations on granting and denying pardons.	Presidential Communications Privilege Deliberative in full Privacy	105
14	One memorandum from Ms. Smolover to the DAG and one memorandum from Mr. Brian Jackson, ODAG, to Mr. Gary Grindler, Principal Associate DAG, providing the status of various pardon applications including their recommendations.	Presidential Communications Privilege Deliberative in part Privacy	5
15	Various lists of pending pardon cases and comparison lists showing selected cases either granted or denied. These lists include a brief summary of each case along with the recommendations of various parties such as the relevant sentencing judge and United States Attorney.	Presidential Communications Privilege Deliberative in full Privacy	46

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16	Typed talking points for telephone conversations between the DAG and officials of the WHCO regarding clemency matters in general and some specific pardon applicants.	Presidential Communications Privilege Deliberative in full Privacy	12
17	Memoranda between the Pardon Attorney and the Federal Bureau of Investigation (FBI) regarding the background investigations of certain pardon applicants.	Presidential Communications Privilege Deliberative in part Privacy	6
18	One memorandum from the WHCO to the President discussing the Justice Department's recommendations on particular pardon applications and advising the President whether or not they concur with the Department's recommendations.	Presidential Communications Privilege Deliberative in part Privacy	10
19	Unsigned draft letters of advice from the DAG to the President.	Presidential Communications Privilege Deliberative in full Privacy	1209
20	E-mail messages between Ms. Smolover and various Department officials regarding clemency matters in general and certain pardon applications in particular.	Presidential Communications Privilege Deliberative in part Privacy	44
21	One e-mail and two memoranda from the OPA to the ODAG providing responses to inquires from the ODAG on particular pardon cases.	Presidential Communications Privilege Deliberative in part Privacy	6
22	Typed chronology from the OPA regarding a particularly complex pardon application.	Presidential Communications Privilege Deliberative in full Privacy	12

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23	Draft memoranda from the Attorney General or the DAG to the FBI or Interpol seeking records checks on a pardon applicant.	Presidential Communications Privilege Deliberative in full Privacy	6
24	Draft versions of "Executive Grants of Clemency" with varying language prepared for the President's signature.	Presidential Communications Privilege Deliberative in full Privacy	11
25	Department of Justice memorandum from personnel in the ODAG discussing and analyzing the merits of numerous pardon applications.	Presidential Communications Privilege Deliberative in part Privacy	20
26	Memoranda from the Pardon Attorney or the DAG to the WHCO forwarding letters of advice to the President or proposed recommendations for denials of pardons.	Presidential Communications Privilege Deliberative in part Privacy	398
27	Memoranda from the Pardon Attorney to the DAG providing proposed recommendations for or against granting particular pardon applications.	Presidential Communications Privilege Deliberative in part Privacy	339
28	Memoranda (including drafts) from Ms. Smolover to the DAG forwarding the OPA's proposed recommendations on particular pardons and providing her recommendations.	Presidential Communications Privilege Deliberative in part, drafts are deliberative in full Privacy	388
29	Memoranda from employees in the ODAG to Ms. Smolover providing background information and proposed recommendations on particular pardon applicants.	Presidential Communications Privilege Deliberative in part Privacy	19

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30	Memoranda and e-mail from the Pardon Attorney to Ms. Smolover providing updated information and proposed recommendations on particular pardon applicants, including comparison lists of previous pardon grants for particular categories of cases.	Presidential Communications Privilege Deliberative in part Privacy	119
31	Memoranda from the Pardon Attorney to the ODAG, two memoranda from Ms. Smolover to Mr. Ohlson, and a draft memorandum from the DAG to the Counsel to the President, forwarding charts reflecting the status of pending pardon cases including whether the OPA is awaiting a background investigation or recommendations from the USAO's, whether a favorable recommendation is being prepared by the Pardon Attorney, etc.	Charts: Presidential Communications Privilege Deliberative in full Privacy Cover memos - Presidential Communications Privilege Deliberative in part, except for one draft memo which is deliberative in full	148
32	Memoranda from Ms. Smolover to the Pardon Attorney forwarding the DAG's recommendations for or against particular pardon applications and asking that they be forwarded to the White House Counsel's Office.	Presidential Communications Privilege Deliberative in part Privacy	81
33	Two letters solicited by the OPA from a federal judge containing the judge's views on an applicant.	Presidential Communications Privilege Deliberative in full	2

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34	A. Pardon petitions with attachments and exhibits, two groups of exhibits (without petitions attached), and three letters. B. Letters to or from pardon applicants or their counsel, letters from a Senator and a supporter, and responses from the OPA, administrative notes, and letters from the White House to the DAG notifying him of the President's decisions on certain clemency requests.	A. Privacy: 484 pages withheld in full (Two letters, totaling four pages, are drafts and are also protected as deliberative.) B. Privacy: 40 pages withheld in part	524

Legend:
OPA - Office of the Pardon Attorney
DAG - Deputy Attorney General
ODAG - Office of the Deputy Attorney General
WHCO - White House Counsel's Office
USAO - United States Attorney's Office
FBI - Federal Bureau of Investigation

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**211 RANDOLPH, Circuit Judge, dissenting:

In my view, documents originated for the sole purpose of advising the President on his pardon power are protected by the presidential communications privilege. The President alone has the "Power to grant Reprieves and Pardons for Offenses against the United States." U.S. Const. *1137 **212 art. II, § 2, cl. 1; he cannot delegate this authority. *See* The Federalist No. 74 (Alexander Hamilton). In exercising his nondelegable power to pardon, the President has historically requested and received recommendations from the Office of Pardon Attorney, as reviewed by the Deputy Attorney General. The Pardon Attorney produces documents and other information in determining what advice to give to the President. As in *In re Sealed Case*, this information is "generated in the course of advising the President in the exercise of ... a quintessential and

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nondelegable Presidential power." 121 F.3d 729, 752 (D.C.Cir.1997). It follows that the information and documents, as well as the final recommendation, are privileged. "A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." *United States v. Nixon*, 418 U.S. 683, 708, 94 S.Ct. 3090, 3107, 41 L.Ed.2d 1039 (1974); *see Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 447 n. 10, 97 S.Ct. 2777, 2792, 53 L.Ed.2d 867 (1977).

The majority agrees that the presidential communications privilege protects the Pardon Attorney's final recommendations sent to the President. But it holds the privilege inapplicable to the drafts of those recommendations, or to any other documents the Pardon Attorney or his supervisor, the Deputy Attorney General, produce in formulating advice to the President on "Reprieves and Pardons." U.S. Const. art. II, § 2, cl. 1. *In re Sealed Case* gave good reasons for holding the opposite: "In the vast majority of cases, few if any of the documents advisers generate in the course of their own preparation for rendering advice to the President, other than documents embodying their final recommendations, will ever enter the Oval Office. Yet these pre-decisional documents are usually highly revealing as to the evolution of advisers' positions and as to the different policy options considered along the way. If these materials are not protected by the presidential privilege, the President's access to candid and informed advice could well be significantly circumscribed." 121 F.3d at 750.

The majority has two grounds, repeated in many different ways, for departing from this precedent. The first relies on an organizational chart, the second on a slippery slope.

The Office of Pardon Attorney is in the Department of Justice rather than at 1600 Pennsylvania Avenue. Hence the Pardon Attorney is not in "close proximity" to the Oval Office (maj. op. at 1120); he is "not close enough to the President" (*id.* at 1117); he is "at least twice removed from the President" because his recommendations are reviewed by the Deputy Attorney General (*id.* at 1120); he is too far away from the President (*id.* at 1114-15). I think none of this matters. The talk - actually dicta - in *In re Sealed Case* about operational proximity to the President, 121 F.3d at 752, was directed at ensuring that documents were generated for the purpose of advising the President.[FN1] There is no need to worry about that here. Despite hints to the contrary in the majority opinion, the uncontested fact in this case is that all of the Pardon Attorney's duties and responsibilities are aimed at formulating***1138 **213** advice for the President about pardons. As to documents involving the Deputy Attorney General, there is no contention that he was doing anything else than participating in the Pardon Attorney's preparation of recommendations to the President. In these circumstances, "there is assurance that even if the President were not a party to the communications over which the government is asserting presidential privilege, these communications nonetheless are intimately connected to his presidential decision-making." *In re Sealed Case*, 121 F.3d at 753.[FN2]

FN1. The majority opinion also relies on *Ryan v. Dep't of Justice*, 617 F.2d 781 (D.C.Cir.1980). *Ryan* has nothing to do with the issue in this case. The issue in *Ryan* was whether a particular entity was an "agency" within the meaning of the Freedom of Information Act. Everyone agrees the Office of Pardon Attorney is an agency. The question here is whether the presidential communications privilege protects the materials the Office of Pardon Attorney and the Deputy Attorney General generate for the purpose of advising the President, a question on which *Ryan* had nothing to say.

FN2. The full quotation is:
In this case the documents in question were generated in the course of advising the President in the exercise of his appointment and removal power, a quintessential and nondelegable Presidential power. In many instances, presidential powers and responsibilities, for example the duty to take care that the laws are faithfully executed, can be exercised or performed without the President's direct involvement, pursuant to a presidential delegation of power or statutory framework. But the President himself must directly exercise the presidential power of appointment or removal. As a result, in this case there is assurance that even if the President were not a party to the communications over which the government is asserting presidential privilege, these communications nonetheless are intimately connected to his presidential decision-making.

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> *In re Sealed Case*, 121 F.3d at 752-53 (citation and parenthetical omitted).

Nonetheless the majority treats as decisive the dicta in *In re Sealed Case* stating that the privilege applies only to information "solicited and received" [FN3] by the President or his close advisers and their staff, 121 F.3d at 752. It is bad enough "to dissect the sentences of the United States Reports as though they were the United States Code." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515, 113 S.Ct. 2742, 2751, 125 L.Ed.2d 407 (1993); *see Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1291 (D.C.Cir.1998) (en banc). It is far worse to treat dicta in one of our opinions as if it were some sort of statute. Besides, the extraneous statement in *In re Sealed Case* itself rested on the following dicta in *Association of American Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 910 (D.C.Cir.1993) (*AAPS*): "We believe it is the Task Force's operational *proximity* to the President, and not its exact function at any given moment, that implicates executive powers.... The President's confidentiality interest is strong regardless of the particular role the Task Force is playing on any given day." The court in *AAPS* was not referring to members of the immediate White House staff. The "Task Force" was established by the President to advise him on health care legislation. 997 F.2d at 901. The majority opinion comes up with nothing to distinguish such a group, drawn from throughout the Executive Branch, from the Office of the Pardon Attorney. If the President set up an executive branch task force each time he received a pardon application and asked the members to advise him whether to grant or deny the pardon, there is no doubt that the work of each such task force would be covered by the privilege. It can make no difference that the President, instead, relies on a permanent office to perform the same function.

> FN3. There is no dispute that the White House "solicits" advice from the Pardon Attorney and Deputy Attorney General. Pardon requests are addressed directly to the President, who then submits the applications to the Pardon Attorney.

The majority's other reason for not holding the privilege applicable to the Pardon Attorney is of the slippery slope variety: if the privilege applied this "would have far-reaching implications for the entire executive branch that would seriously impede the operation and scope of FOIA" (maj. op. at 1119); it "would sweep within the reach of the presidential privilege much of the ***1139 **214** functions of the executive branch" (*id.* at 1122); it would result in " 'expanding to a large swath of the executive branch a privilege that is bottomed on a recognition of the unique role of the President.' " *Id.* at 1121, *quoting In re Sealed Case*, 121 F.3d at 752.

The slope is slippery, the majority argues, because there is no non-arbitrary line between this case and other FOIA cases throughout the Executive Branch. The argument is invalid. The dividing line is clear, it is unmistakable and it is principled. It is a line *In re Sealed Case* itself recognized in distinguishing advice about "a quintessential and nondelegable Presidential power," which is subject to the privilege, from "information regarding governmental operations that do not call ultimately for direct decision-making by the President," which is not. 121 F.3d at 752. The vast majority of executive branch documents - those relating either to delegated responsibilities or having purposes other than advising the President on a nondelegable duty - would therefore not be swept in if the privilege were applied here.

In response to this dissent, the majority opinion tells us: "The reality is that working papers of an immediate White House adviser in the Office of the President will be far more revelatory of advice given to the President than internal Department [of Justice] documents...." Maj. op. at 1123. I do not know where the majority gets this idea. The record does not support it. It is impossible for me to understand how one can say that the Pardon Attorney's drafts of his final recommendation to the President will reveal less about advice to the President than the internal musings of those in the President's immediate vicinity. In short, the Pardon Attorney's proximity to the President is not the key. It is the function the Pardon Attorney performs that should have controlled.

The majority takes comfort in the fact that some of the Pardon Attorney's documents it has artificially excluded from the presidential privilege "will in any event remain protected pursuant to the deliberative process privilege," thus making the "justification" for applying the presidential communications privilege "disappear[ ]." Maj. op. at 1117-18. This too is an unwarranted departure from the essential reasoning of *In re Sealed Case*. "The protection offered by the more general deliberative process privilege will often be inadequate to ensure that presidential advisers provide knowledgeable and candid advice, primarily because the deliberative process privilege does not

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extend to purely factual material." 121 F.3d at 750. More than that, "[e]xposure of the factual portions of presidential advisers' communications also represents a substantial threat to the confidentiality of the President's own deliberations. Knowledge of factual information gathered by presidential advisers can quickly reveal the nature and substance of the issues before the President...." *Id.* In response the majority has nothing to say.

I therefore dissent.

C.A.D.C.,2004.
Judicial Watch, Inc. v. Dept. of Justice
365 F.3d 1108, 361 U.S.App.D.C. 183, 64 Fed. R. Evid. Serv. 141

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Ms. SÁNCHEZ. Okay. The time of the gentleman has expired.

I want to once again thank all of the witnesses for your testimony today.

Without objections, Members will have 5 legislative days to submit any additional written questions, which we will forward to the witnesses, and ask that you answer as promptly as you can, so that they can be made part of the record.

Without objection, the record will remain open for 5 legislative days for the submission of any additional materials.

Again, thank you for your time and your patience. You have been very generous.

The hearing of the Subcommittee on Commercial and Administrative Law is adjourned.

[Whereupon, at 3:46 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

RESPONSE TO POST-HEARING QUESTIONS FROM JOHN D. PODESTA, FORMER WHITE HOUSE CHIEF OF STAFF TO PRESIDENT CLINTON, PRESIDENT AND CEO, CENTER FOR AMERICAN PROGRESS

Question from Chairwoman Sánchez

In a letter dated April 12, 2007, Chairman Conyers and I requested that the Republican National Committee (RNC) produce all communications by current or former government employees stored on RNC servers related to the Judiciary Committee's investigation concerning the recent firings of eight United States Attorneys and related matters. In response, the White House indicated that it will review these communications for claims of executive privilege before they are disclosed to the Judiciary Committee. Is an executive privilege claim by the White House appropriate? Please explain.

Response of Mr. Podesta

It is unlikely that a claim of privilege would be sustained in this instance even if the presidential communications in question had been conducted through official channels. This is because the presidential communications privilege is not unqualified, and the presumption of privilege can be rebutted by a strong showing that the subpoenaed evidence is critical to the responsible fulfillment of the Committee's functions. See *Senate Select Committee on Presidential Campaign Activities v. Nixon,* 498 F.2d 725 (D.C.Cir. 1974). This is a burden which I believe the Committee would meet.

The fact that the communications in question were transmitted via unofficial, non-White House email accounts does not necessarily extinguish a claim of privilege, but under such circumstances, the presumption, at a minimum, should be reversed. The emails still might be privileged if they were "authored or solicited and received by those members of an immediate White House adviser's staff who have broad and significant responsibility for investigating and formulating the advice to be given the President on the particular matter to which the communications relate." *In re Sealed Case (Espy),* 121 F.3d 729, 752 (D.C. Cir. 1997). But given the use of RNC email accounts, the burden is on the White House to show that the communications should be treated as presidential communications.

I would therefore urge the Committee to insist that the White House: (a) turn over all records that do not meet the *Espy* test; and (b) produce a privilege log with respect to any records with respect to which it wishes to assert a claim of privilege, identifying the date, author, and recipient of each document withheld as well as a general statement of the nature of each document and the basis for the privilege on which the document was withheld. See *Espy* at 735. Only then will the Committee be in a position to assess the validity of any claims of privilege with respect to these documents.

It is fair to conclude that the authors of the subpoenaed communications transmitted them outside of official channels for one of two reasons: either they did not believe they were presidential communications, or they were seeking to evade the requirements of the Presidential Records Act. In either case, their behavior was inconsistent with a claim of privilege.

Given the use of RNC email accounts, the burden necessarily belongs with the White House to show that the communications should be treated as presidential communications.

RESPONSE TO POST HEARING QUESTIONS FROM NOEL J. FRANCISCO, FORMER ASSOCIATE COUNSEL TO PRESIDENT GEORGE W. BUSH, PARTNER, JONES DAY

Question from Chairwoman Sánchez

In a letter dated April 12, 2007, Chairman Conyers and I requested that the Republican National Committee (RNC) produce all communications by current or former government employees stored on RNC servers related to the Judiciary Committee's investigation concerning the recent firings of eight United States Attorneys and related matters. In response, the White House indicated that it will review these communications for claims of executive privilege before they are disclosed to the Judiciary Committee. Is an executive privilege claim by the White House appropriate? Please explain.

Answer

The reported case law in this area is somewhat murky. In my view, however, executive privilege is broad enough to cover communications to White House officials, including those received by such officials on non-White House e-mail accounts. For example, if a White House official were working from home and received work-related messages on his or her home e-mail account, then I believe such e-mail messages would fall within the scope of Executive Privilege. The same principle would, in my view, apply to messages received on other e-mail accounts. Therefore, depending upon the nature of the communications, I believe that the invocation of Executive Privilege by the White House would be appropriate.

RESPONSE TO POST-HEARING QUESTIONS FROM FREDERICK A.O. SCHWARZ, JR., SENIOR COUNSEL, BRENNAN CENTER FOR JUSTICE, NYU SCHOOL OF LAW

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June 13, 2007

The Honorable John Conyers, Jr.
Chairman, House Judiciary Committee
2426 Rayburn Building
Washington, DC 20515

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Michael Waldman

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Cristina Rodríguez
Stephen Schulhofer
John Sexton
Rev. Walter J. Smith, S.J.
Sung-Hee Suh
Clyde A. Szuch
Adam Winkler

You have asked whether a claim of "executive privilege" could extend to "communications by current or former government employees stored on RNC servers related to the Judiciary Committee's investigation concerning the recent firings of eight United States Attorneys and related matters." I write now to supplement my written and oral testimony of March 29, 2007, to clarify and confirm that in light of the publicly available information, "executive privilege" does not extend to these communications because they were knowingly prepared and sent outside the purview of the relevant officials' *governmental* responsibilities.

At the threshold, it is important to understand the facts concerning the emails in question.[1] Three facts emerge from the public record that are particularly important for the "executive privilege" analysis. First, the executive branch officials in all the relevant cases maintained governmental emails that could be used to conduct governmental business, but chose to use a non-governmental channel instead.[2] As a consequence, they exercised a conscious

[1] *See, e.g.*, Sheryl Gay Stolberg et al., *Missing E-Mail May Be Related to Prosecutors*, N.Y. TIMES, April 13, 2007, at A1; Sheryl Gay Stolberg et al., *Missing E-Mail May Be Related to Prosecutors*, N.Y. TIMES, April 13, 2007, at A1.

[2] The Presidential Records Act of 1978, 44 U.S.C. §§ 2201 *et seq.* regulates the retention of official records and documents of a president, his immediate staff and certain parts of the Executive Office of the President. In light of the legal duties that attach to the production and retention of documents generated by presidential staff, it should be presumed that presidential staff understand that the choice to use a non-governmental e-mail account implicates legal consequences concerning the status of such communications.

choice to act wearing a non-governmental hat. Second, none of the e-mails in question involve the provision of legal advice, a matter that would raise separate privilege questions.[3] Finally, it is my understanding that the e-mails in question do not involve communications directly with the President or the Vice President, which receive greater constitutional protection.

Under the aforementioned circumstances, a claim of executive privilege for the e-mail correspondence in question ought to be rejected. The "presidential communications privilege" encompasses communications only either by the President directly or, in a limited set of circumstances, by "his immediate advisors in the Office of the President"[4] The presidential communications privilege is not a free-floating shield of any and all communications from within the White House. Rather, it is limited by the constitutional function that it serves. As the Supreme Court explained in its landmark cases, *Nixon v. United States*[5] and *Nixon v. Administrator of General Services*,[6] the presidential communications privilege stems from both functional need and from constitutional form – from the need for candor in executive decision-making and "from the supremacy of each branch within its own assigned area of constitutional duties."[7] Hence, while other members of the executive branch may benefit from executive privilege, the application of that privilege hinges on the relation between the communication and the constitutionally-protected act of advising the President.

In consequence, not every communication to or from a presidential advisor is protected by the privilege. In particular, two limitations on the privilege are relevant here.

First, the Court of Appeals for the District of Columbia Circuit has held that communications by advisors when they act in *non-advisory* capacity are unprotected.[8] Many of the individuals whose communications are at issue

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Additionally, it is worth underscoring that the Supreme Court also strongly suggested the presidential communications privilege must yield whenever a coordinate branch's constitutional role is at stake. *Nixon I* concluded that President Nixon had to yield to a subpoena to preserve "the function of the courts under Article III,"[10] and *Nixon II* held that Congress could roll back a former president's privilege in light of "the scope of Congress' broad investigative power."[11] Thus, Congress ought to be able to overcome the presidential communications privilege generally when it exercises its constitutional powers to legislate and conduct oversight.

In conclusion, my view remains the same as it was on March 29: "[I]f someone is physically in the White House and they are sending e-mails that are not on a White House governmental system, but are on some private system, there is no possibility that that is privileged under an executive privilege."

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Please do not hesitate to contact me should you have further questions.

Sincerely

Frederick A.O. Schwarz, Jr.
Senior Counsel

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June 13, 2007

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Chairwoman, House Subcommittee on Commerical and Administrative Law
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Sincerely

Frederick A.O. Schwarz, Jr.
Senior Counsel

LETTER FROM FRED F. FIELDING, COUNSEL TO THE PRESIDENT, TO THE CHAIRMAN LEAHY, CHAIRMAN CONYERS, RANKING MEMBER SPECTER, RANKING MEMBER SMITH, AND CONGRESSWOMAN SÁNCHEZ

THE WHITE HOUSE
WASHINGTON

March 20, 2007

Dear Chairman Leahy, Chairman Conyers, Ranking Member Specter, Ranking Member Smith, and Congresswoman Sánchez:

I write in response to the letter of Chairman Leahy and Senator Specter dated March 13, 2007, and Chairman Conyers' and Congresswoman Sánchez's letter of March 9, 2007, regarding the Department of Justice's decision to request the resignations of United States Attorneys in December 2006. As you know, I have been working over the last week with your Committees to accommodate your interests, while at the same time respecting the constitutional prerogatives of the Presidency. I very much appreciate the time and consideration that you and other Members of Congress have provided me in the course of these discussions.

In keeping with the President's commitment to ensure that Congress and the American people understand the resignations of the U.S. Attorneys, the Department of Justice has produced more than 3,000 pages of documents relating to this matter. These documents do not reflect that any U.S. Attorney was replaced to interfere with a pending or future criminal investigation or for any other improper reason. These documents, together with the interviews to be provided by Department officials, will provide extensive background on the decisions in question, including an account of communications between the Department and senior White House officials. Congress, in short, is receiving a virtually unprecedented window into personnel decision-making within the Executive Branch.

In the midst of this current debate, the President must remain faithful to the fundamental interests of the Presidency and the requirements of the constitutional separation of powers. We wish to reach a reasonable accommodation so as to provide your Committees the information they are seeking in a way that will allow this President, and future Presidents, to continue to discharge their constitutional responsibilities effectively.

In response to the invitations for interviews extended by the Committees, I am prepared to agree to make available for interviews the President's former Counsel; current Deputy Chief of Staff and Senior Advisor; Deputy Counsel; and a Special Assistant in the Office of Political Affairs. We are prepared to agree to the following terms, which, considering applicable constitutional principles relating to the Presidency and your Committees' interests, we believe are fair, reasonable, and respectful. We believe that such interviews should be a last resort, and should be conducted, if needed, only after Congress has heard from Department of Justice officials about the decision to request the resignations of the U.S. Attorneys.

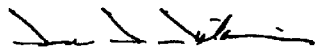
Such interviews may cover, and would be limited to, the subject of (a) communications between the White House and persons outside the White House concerning the request for resignations of

the U.S. Attorneys in question; and (b) communications between the White House and Members of Congress concerning those requests. Those interviews should be conducted by both Committees jointly. Questioning of White House officials would be conducted by a Member or limited number of Members, who would be accompanied by committee staff. Such interviews would be private and conducted without the need for an oath, transcript, subsequent testimony, or the subsequent issuance of subpoenas. A representative of the Office of the Counsel to the President would attend these interviews and personal counsel to the invited officials may be present at their election.

As an additional accommodation, and as a part of this proposal, we are prepared to provide to your Committees copies of two categories of documents: (a) communications between the White House and the Department of Justice concerning the request for resignations of the U.S. Attorneys in question; and (b) communications on the same subject between White House staff and third parties, including Members of Congress or their staffs on the subject.

We trust and believe that the accommodation we offer here, in addition to what the Department of Justice has provided, should satisfy the Committees' interests.

Sincerely,



Fred F. Fielding
Counsel to the President

The Honorable Patrick Leahy
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The Honorable Arlen Specter
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The Honorable Lamar Smith
United States House of Representatives
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The Honorable Linda Sánchez
United States House of Representatives
1007 Longworth House Office Building
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CONGRESSIONAL RESEARCH SERVICE MEMORANDUM ON OVERSIGHT AND EXECUTIVE PRIVILEGE ISSUES PERTAINING TO THE MARCH 29, 2007 HEARING ON "ENSURING EXECUTIVE BRANCH ACCOUNTABILITY"

Memorandum April 19, 2007

TO: House Committee on the Judiciary, Subcommittee on Commercial and Administrative Law
Attention: Hon. Linda Sánchez

FROM: T.J. Halstead
Legislative Attorney
American Law Division

SUBJECT: Oversight and Executive Privilege Issues Pertaining to the March 29, 2007 Hearing on "Ensuring Executive Branch Accountability"

Pursuant to your request, this memorandum provides an overview of issues pertaining to the Subcommittee's hearing on "Ensuring Executive Branch Accountability," held on March 29, 2007. In particular, this memorandum will discuss principles of congressional oversight, precedent for the receipt of testimony from close advisers to the President by Congress and issues of executive privilege, with a focus on their applicability to the Subcommittee's ongoing inquiry into the dismissal of United States Attorneys by the Department of Justice.

Congressional Oversight.

While there is no definitive constitutional or statutory provision imbuing Congress with oversight authority, a long line of Supreme Court precedent establishes Congress' power to engage in oversight and investigation of any matter related to its legislative function.[1] Unless there is a countervailing constitutional privilege or a self-imposed statutory restriction upon its authority, Congress and its committees possess the essentially unfettered power to compel necessary information from executive agencies, private persons and organizations. Indeed, even though the Constitution does not contain any express provision authorizing Congress to conduct investigations and take testimony in support of its legislative functions, the Supreme Court has held conclusively that congressional investigatory power is so essential that it is implicit in the general vesting of legislative power in the Congress.[2]

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[1] For a thorough analysis of legal principles governing congressional oversight, *See* Kaiser, *et al., Congressional Oversight Manual*, CRS Rep. No. RL30240 (2007).

[2] *E.g., McGrain v. Daugherty*, 272 U.S. 135 (1927); *Watkins v. United States*, 354 U.S. 178 (1957); *Barenblatt v. United States*, 360 U.S. 109 (1959); *Eastland v. United States Servicemen's Fund*, 421 (continued...)

In *Eastland v. United States Serviceman's Fund*, for instance, the Court stated that the "scope of its power of inquiry...is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."[3] Also, in *Watkins v. United States,* the Court emphasized that the "power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes."[4] The Court further stressed that Congress' power to investigate is at its peak when focusing on alleged waste, fraud, abuse, or maladministration within a government department. Specifically, the Court explained that the investigative power "comprehends probes into departments of the federal government to expose corruption, inefficiency, or waste."[5] The Court went on to note that the first Congresses held "inquiries dealing with suspected corruption or mismanagement of government officials."[6] Given these factors, the Court recognized "the power of the Congress to inquire into and publicize corruption, maladministration, or inefficiencies in the agencies of Government."[7]

Accordingly, the rules of the House[8] and the Senate,[9] which confer both legislative and oversight authority, establish that committees may issue subpoenas in furtherance of an investigation within their subject matter jurisdiction, and subpoenas may be issued on the basis of either source of authority. It is important to note that an individual seeking to challenge the validity or sufficiency of a subpoena may only raise such objections in a limited fashion. The Supreme Court has held that courts may not enjoin the issuance of a congressional subpoena, declaring that the Speech or Debate Clause of the Constitution[10] provides "an absolute bar to judicial interference" with such compulsory process.[11] Consequently, the sole option in this context generally requires an individual to refuse to comply, risk being cited for contempt, and then raise objections as a defense in a contempt prosecution.

These constitutional maxims are fully applicable to the Subcommittee's ongoing efforts to oversee the management of the Department of Justice (DOJ), particularly with regard to the deliberations, decisions and actions that led to recent dismissal of eight U.S. Attorneys. Indeed, the Subcommittee's oversight prerogatives are arguably at their peak in a context such as this, as the current inquiry would seem to be clearly related to determining whether these dismissals stemmed from waste, fraud, abuse, or maladministration within the

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[2] (...continued)
U.S. 491 (1975); *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977); *See also, United States v. A.T.T.,* 551 F.2d 384 (D.C. Cir. 1976) and 567 F.2d 1212 (D.C. Cir. 1977).

[3] 421 U.S. at 504, n. 15 (quoting *Barenblatt, supra,* 360 U.S. at 111).

[4] 354 U.S. at 187.

[5] *Id.*

[6] *Id.* at 182.

[7] *Id.* at 200, n. 33.

[8] House Rule X, cl. 2.

[9] Senate Rule XXVI, cl. 8.

[10] U.S. Const., Art. I, sec. 6, cl. 1.

[11] *Eastland*, 421 U.S. at 503-507.

Department. Furthermore, it is important to note that this constitutional power adheres irrespective of whether there is any evidence of criminal wrongdoing. As noted above, it is well established that the oversight prerogatives of Congress encompass any investigation involving a valid legislative purpose, including issues of governmental administration of the type present here.

Furthermore, Congress has often investigated matters involving the DOJ, including inquiries into issues implicating open criminal investigations. Research conducted by CRS has revealed numerous examples of such investigations, ranging from the Palmer raids of the early 1920's to the House Government Reform Committee's 2004 investigation into the sheltering of members of organized crime syndicates by special agents at the Federal Bureau of Investigation's Boston Field Office. In the vast majority of these investigations, the relevant oversight committee received the information it required, including the testimony of front line attorneys as well as senior departmental officials. Based on these factors, it appears that the Committee's current oversight inquiry is grounded on well established constitutional and historical precedent.

Testimony of Presidential Advisers.

It should also be noted that Congress' authority in the oversight context extends to the receipt of testimony from senior presidential advisers. While the Administration has made DOJ officials available to testify regarding the current controversy, it has thus far rejected requests that senior presidential advisers appear before the Subcommittee to address the extent of their involvement in the formulation and execution of the plan to dismiss certain U.S. Attorneys. In particular, the Administration has indicated that it believes the separation of powers doctrine prevents Congress from receiving such testimony. However, as with investigations into the operations of the DOJ that have resulted in extensive cooperation with oversight committees, ample historical precedent belies the assertion that the constitutional separation of powers serves as a structural impediment to the appearance of presidential advisers before congressional oversight committees.

Research conducted by CRS has identified numerous instances since the closing years of World War II where presidential advisers have testified before a congressional committee or subcommittee, including several instances where Thomas J. Ridge appeared before various committees of Congress while serving as Assistant to the President for Homeland Security.[12] While these precedents establish that such advisers may appear before Congress, it remains a relatively rare event, ostensibly due to a tradition of comity between Congress and the White House, with presidential advisers primarily testifying in instances where the political climate renders it preferable to the President that such aides testify in order to diffuse congressional and public pressure.[13] While historical precedent appears to dispense with the argument that formal separation of powers principles prevent such testimony, executive privilege has also been invoked in the past as presenting a bar to the testimony of presidential advisers. While the Administration has not made a formal claim of privilege, it has intimated its view that the doctrine of executive privilege would further prohibit the testimony of presidential advisors with regard to the current controversy. While it is of course conceivable that issues of executive privilege might be implicated in the current

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[12] *See* Harold C. Relyea, Jay R. Shampansky, *Presidential Advisers' Testimony Before Congressional Committees: An Overview*, CRS Rep. No. RL31351 (2004).

[13] *Id.* at 22-23.

controversy, a brief overview of the privilege appears to indicate that it may not be successfully invoked as a complete shield to congressional demands for information relating to the dismissals of U.S. Attorneys.

Executive Privilege.

Just as the Constitution contains no provisions authorizing the investigatory and oversight functions of Congress, there is likewise no express grant of executive privilege. However, beginning with President Washington, the Executive Branch has claimed that the separation of powers doctrine implies that the President possesses the power to withhold confidential information in the face of legislative and judicial demands.[14]

Politically speaking, it is rare for interbranch disputes over contested information to reach the courts for a judicial determination on the merits. Consequently, the existence of a presidential confidentiality privilege was not judicially established until the Watergate era, when the courts recognized the presidential confidentiality privilege as an inherent aspect of presidential power.[15] In *United States v. Nixon*, the Supreme Court addressed a claim of executive privilege in response to a subpoena issued during a criminal trial to the President at the request of the Watergate Special Prosecutor. The Supreme Court found a constitutional basis for the doctrine of executive privilege, noting that "[w]hatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Article II powers, the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties."[16] The Court went on to explain that while it considered presidential communications to be "presumptively privileged," there was no support for the contention that the privilege was absolute, precluding judicial review whenever asserted, as such a conclusion "would upset the constitutional balance of a 'workable government.'"[17] In particular, the Court explained that "when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises. Absent 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 needed to enforce criminal statutes.[18]

Upon determining that a claim of privilege is not absolute, the Court weighed the President's interest in confidentiality against the judiciary's need for the materials in a criminal proceeding, stating that it was "necessary to resolve those competing interests in a manner that preserves the essential functions of each branch." Concluding this calculus, the Court held that the judicial need for the tapes, as established by a "demonstrated, specific need for evidence in a pending criminal trial," was of greater significance than the President's

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[14] *See* Morton Rosenberg, *Presidential Claims of Executive Privilege: History, Law, Practice and Recent Developments*, Congressional Research Service, Rep. No. RL30319 (1999).

[15] *United States v. Nixon*, 418 U.S. 683 (1974); *See also*, *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir.1973); *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974); *Nixon v. Administrator of Gen. Services.*, 433 U.S. 425 (1977).

[16] *United States v. Nixon*, 418 U.S. at 705.

[17] *Id.* at 707.

[18] *Id.* at 706.

"generalized interest in confidentiality...."[19] It should be noted that the Court specifically limited the scope of its decision, stating that it was not concerned with "the balance between the President's generalized interest in confidentiality...and congressional demands for information."[20]

Coupled with related and subsequent decisions, the Court's decision in *Nixon* established the "contours of the presidential communications privilege."[21] Pursuant to the standards developed in these cases, the President may invoke the privilege "when asked to produce documents or other materials that reflect presidential decisionmaking and deliberations and that the President believes should remain confidential."[22] As noted above, such an invocation renders the requested materials presumptively privileged, requiring an adequate showing of need to overcome the claim. This standard was further clarified in *In re Sealed Case* (hereinafter referred to as "*Espy*"), where the Court of Appeals for the District of Columbia Circuit addressed issues regarding the scope of the privilege, whether and to what extent the privilege extends to presidential advisers, whether the President must have seen or had knowledge of the material at issue, and the standard of need necessary to overcome a claim of privilege.[23]

Espy arose from an Office of Independent Counsel (OIC) investigation regarding allegations of impropriety by former Secretary of Agriculture Mike Espy. As part of the investigation, a grand jury issued a subpoena for all documents relating to a report prepared for the President by the White House Counsel's Office regarding the allegations. Regardless of the fact that the President had not viewed any of the documents underlying the report, he withheld 84 documents on the basis of "executive/deliberative privilege." The OIC moved to compel production of the withheld documents. Subsequent to *in camera* review, the district court upheld the claims of privilege forwarded by the President. In its decision, the Court of Appeals agreed generally with the district court's determination that the documents in question were subject to the presidential communications privilege.[24] However, the court vacated and remanded in order to provide the OIC an opportunity to provide a sufficient justification for its need for certain items of evidence.[25]

At the outset of its opinion, the court distinguished between the presidential communications privilege and the deliberative process privilege, noting that while the former has a constitutional basis in the separation of powers doctrine, the latter is a common law privilege applicable to the decisionmaking of executive officials generally.[26] The court went on to explain that while both privileges are qualified, the deliberative process privilege "disappears altogether when there is any reason to believe government misconduct occurred," whereas "the presidential communications privilege is more difficult to

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[19] *Id.* at 685, 713.

[20] *Id.* at 712, n. 19.

[21] *In re Sealed Case (Espy)*, 121 F.3d 729, 744 (D.C. Cir. 1997).

[22] *Id.*

[23] *Id.*

[24] *Id.* at 758.

[25] *Id.* at 761-762.

[26] *Id.* at 745-746.

surmount," requiring a "focused demonstration of need, even when there are allegations of misconduct by high level officials."[27]

Turning to the question of whether the subpoenaed documents could be claimed to be privileged even though the President had never viewed them, the court stated that "the public interest is best served by holding that communications made by presidential advisers in the course of preparing advice for the President come under the presidential communications privilege, even when these communications are not made directly to the President."[28] The court based this conclusion on what it characterized as "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," as well as "the need to provide sufficient elbow room for advisers to obtain information from all knowledgeable sources."[29] Further illuminating the scope of the privilege, the court stated that it "must apply both to communications which these advisers solicited and received from others as well as those they authored themselves. The privilege must also extend to communications authored or received in response to a solicitation by members of a presidential adviser's staff, since in many instances advisers must rely on their staff to investigate an issue and formulate the advice to be given to the President."[30]

Recognizing that a decision extending the presidential communications privilege to presidential advisers "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," the court limited the privilege to White House advisers and staff that are in "operational proximity" to presidential decisionmaking. Specifically, the court stated that "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 adviser's staff who have broad and significant responsibility for investigating and formulating the advice to be given to 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."[31] The court went on to stress that the privilege was not applicable to information that does not "call ultimately for direct decisionmaking by the President."[32] Applying these factors to the case before it, the *Espy* court held that the

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[27] *Id.* at 746. The deliberative process privilege allows the government to withhold information that would reveal recommendations and deliberations pertaining to the formulation of governmental decisions and policies, and does not apply to documents that merely state or explain a decision made by the government, or material that is purely factual. *Id.* at 737.

[28] *Id.* at 752.

[29] *Id.* at 751-752.

[30] *Id.* at 752. Regarding the standard of need necessary to overcome a claim of privilege, the court determined that a party must demonstrate that the requested documents are relevant to the proceeding and cannot be obtained elsewhere with due diligence. *Id.* at 754-755.

[31] *Id.* at 752. "[I]t is 'operational proximity' to the President that matters in determining whether the '[t]he President's confidentiality interest' is implicated (quoting *American Ass'n of Physicians and Surgeons, Inc. v. Clinton*, 997 F.2d 898, 910 (D.C. Cir. 1993) (emphasis omitted)).

[32] *Id.* at 752.

independent counsel had "demonstrated sufficient need in order to overcome the presidential communications privilege," and ordered the disclosure of the disputed documents.[33]

The Court of Appeals for the District of Columbia Circuit in 2004 reiterated the principles delineated in *Espy* in *Judicial Watch, Inc. v. Department of Justice*[34] In *Judicial Watch* the court was called upon to resolve a dispute between the DOJ and Judicial Watch, Inc. with regard to the latter's request for documents concerning pardon applications and pardon grants reviewed by the Office of the Pardon Attorney at DOJ as well as by the Deputy Attorney General for consideration by President Clinton.[35] The DOJ withheld roughly 4300 documents on the grounds that they were protected by the presidential communications and deliberative process privileges. The district court had ruled that because the materials sought had been produced for the "'sole' function of advising the President on a 'quintessential and non-delegable Presidential power,' the extension of the presidential communications privilege to internal Justice Department documents was justified."[36] The D.C. Circuit reversed, noting that the documents at issue had not been solicited and received by the President or the Office of the President, thus necessitating the conclusion that "internal agency documents that are not solicited and received by the President or his Office are instead protected against disclosure, if at all, by the deliberative process privilege."[37]

Tracking the analysis employed in *Espy*, the court emphasized that the "solicited and received" limitation "is necessitated by the principles underlying the presidential communications privilege, and a recognition of the dangers of expanding it too far."[38] The court went on to state that, under *Espy,* the privilege may be invoked only when presidential advisers in close proximity to the President, who have significant responsibility for advising him on non-delegable matters requiring direct presidential decisionmaking have solicited and received such documents or communications, or the President has received them himself. In rejecting the Government's argument that the privilege should be applicable to all departmental and agency communications related to the Deputy Attorney General's pardon recommendations for the President, the panel majority held that:

> [S]uch a bright-line rule is inconsistent with the nature and principles of the presidential communications privilege, as well as the goal of serving the public interest. Communications never received by the President or his Office are unlikely to 'be revelatory of his deliberations.' Nor is there any reason to fear that the Deputy Attorney General's candor or the quality of the Deputy's pardon recommendations would be sacrificed if the presidential communications privilege did not apply to internal documents. Any pardon documents, reports or recommendations that the Deputy Attorney General submits to the Office of the President, and any direct communications the Deputy or the Pardon Attorney may have with the White House Counsel or other immediate Presidential advisers will

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[33] *Id.* at 762.

[34] 365 F.3d 1108 (D.C. Cir. 2004)

[35] The President has delegated the formal process of review and recommendation of his pardon authority to the Attorney General who in turn has delegated it to the Deputy Attorney General. The Deputy Attorney General oversees the work of the Office of the Pardon Attorney.

[36] 365 F.3d at 1111.

[37] *Id.* at 1112.

[38] *Id.* at 1114-15.

> remain protected....It is only those documents and recommendations of Department staff that are not submitted by the Deputy Attorney General for the President and are not otherwise received by the Office of the President, that do not fall under the presidential communications privilege.[39]

Indeed, the *Judicial Watch* panel makes it clear that the *Espy* rationale would preclude cabinet department heads from being treated as being part of the President's immediate personal staff or as some unit of the Office of the President:

> Extension of the presidential communications privilege to the Attorney General's delegatee, the Deputy Attorney General, and his staff, on down to the Pardon Attorney and his staff, with the attendant implication for expansion to other Cabinet officers and their staffs, would, as the court pointed out in *In re Sealed Case*, "pose a significant risk of expanding to a large swatch of the executive branch a privilege that is bottomed on a recognition of the unique role of the President."[40]

The court also elaborated upon how the decision in *Espy* and the case before it differed from the Nixon and post-Watergate cases. According to the court, "[u]ntil *In re Sealed Case*, the privilege had been tied specifically to direct communications of the President with his immediate White House advisors."[41] The *Espy* court, it explained, was for the first time confronted with the question whether communications that the President's closest advisors make in the course of preparing advice for the President and which the President never saw should also be covered by the presidential privilege. As such, and as noted by the court in *Judicial Watch*, the decision in *Espy* "espoused a 'limited extension' of the privilege 'down the chain of command' beyond the President to his immediate White House advisors only,"[42] "recogniz[ing] the need to ensure that the President would receive full and frank advice with regard to his non-delegable appointment and removal powers," while remaining "wary of undermining countervailing considerations such as openness in government."[43] The court then noted that the decision in *Espy* thus established that "while 'communications authored or solicited and received' by immediate White House advisors in the Office of the President could qualify under the privilege, communications of staff outside the White House in executive branch agencies that were not solicited and received by such White House advisors could not."[44]

The decision in *Judicial Watch* tested and affirmed the principles laid out in *Espy*. While the presidential decision involved was certainly a non-delegable, core presidential function, the operating officials involved (the Deputy Attorney General and the Pardon Attorney) were deemed to be too remote from the President and his senior White House advisors to be protected. The court conceded that functionally those officials were performing a task directly related to the pardon decision, but concluded that an organizational test was more appropriate for confining the potentially broad sweep that would result from a functional test; under the latter test, there would be no limit to the coverage of the

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[39] *Id.* at 1117.

[40] *Id.* at 1121.

[41] *Id.* at 1116.

[42] *Id.* at 1115.

[43] *Id.* at 1116.

[44] *Id.* at 1116.

presidential communications privilege. In such circumstances, the majority concluded, the lesser protections of the deliberative process privilege would have to suffice.[45] Accordingly, the appeals court reversed the district court's holding that the material in question was subject to the presidential communications privilege and remanded the case for its determination as to whether the DOJ's internal documents "not 'solicited and received' by the President or the Office of the President" were instead protected under the deliberative process privilege.[46]

It should be noted that the decisions in *Espy* and *Judicial Watch* stressed that the holdings therein were limited to the facts presented and were rendered in the context of judicial demands for information. Accordingly, these decisions do not necessarily extend to executive privilege issues that may arise during the course of a congressional investigation. However, the principles laid out in *Espy* and confirmed in *Judicial Watch* represent the most comprehensive consideration of the contours of executive privilege by the judicial branch, and it is not clear on what basis a reviewing court might apply a different analytical rubric in the congressional context. Thus, while there may indeed be documents or discussions covered by the presidential communications privilege involved in the current controversy, it would not appear that the privilege may be invoked as a comprehensive structural bar to inquiries by the Subcommittee regarding the role of senior presidential advisors in the formulation and execution of a decision to dismiss United States Attorneys.

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[45] *Id.* at 1118-24.

[46] *Id.* at 1110.

PREPARED STATEMENT OF BRUCE FEIN, ON BEHALF OF THE AMERICAN FREEDOM AGENDA

WRITTEN STATEMENT OF BRUCE FEIN ON BEHALF OF THE AMERICAN FREEDOM AGENDA

REGARDING EXECUTIVE PRIVILEGE

BEFORE THE COMMITTEE ON THE JUDICIARY SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

UNITED STATES HOUSE OF REPRESENTATIVES

MARCH 29, 2007

Dear Mr. Chairman and Members of the Subcommittee:

I am pleased to share views on executive privilege on behalf of the American Freedom Agenda, an organization formed earlier this month by myself, David Keene, President, American Conservative Union, Richard Viguery, and former Congressman Bob Barr.

The President regularly asserts executive privilege to thwart congressional oversight to expose maladministration, waste, fraud, or other illegalities. For example, the Attorney General and the Director of the NSA have refused to disclose to Congress the legal rationale for the NSA's warrantless surveillance program in violation of FISA. They have declined to share the number of Americans who have been targeted for spying, the fruits of their illegal handiwork, what is done with the conversations intercepted, and whether there are other secret spying programs underway that have not yet leaked to the media. At present, these invocations of executive privilege have been unrebuked by Congress. That complacency should cease. Congress should enact a law creating five-member House and Senate legislative-executive committees featuring legislative majorities to arbitrate executive privilege claims based on state secrets with conclusive effect within 48 hours and with no judicial review. Executive privilege based on a generalized need for the confidentiality of presidential communications should be categorically rejected by statute. That statute should also stipulate that the President may not delegate to any subordinate the authority to invoke the privilege.

The informing function of Congress is even more important than its enactment of laws. The indiscriminate use of executive privilege must be defeated if congressional oversight is to be more than ceremonial.

The 110th Congress must enact new legislation to challenge executive privilege. The legislation should establish House and Senate legislative-executive committees featuring legislative majorities to arbitrate disputes over congressional access to national security information. The arbitrations should be binding and shielded from judicial review. Executive privilege based on a generalized interest in the confidentiality of presidential communications to ensure candid advice from subordinates should be explicitly rejected. Without the proposed legislation, assertions by Democrat leaders to insist on greater oversight and accountability of President Bush's tight-lipped administration will prove toothless.

The informing and checking functions of Congress are more important than its legislative responsibilities. The former enlighten public opinion and the president's maladministration and lawlessness are deterred and exposed. Think of the Fulbright hearings on the Vietnam War, the Watergate hearings of the Ervin Committee, and the Church Committee's hearings on the massive intelligence wrongdoing by the FBI, CIA and NSA.

During the first six years of the Bush administration, oversight hibernated under a Republican-controlled Congress. Republican committee chairmen regularly refused to hold hearings, for example, to examine the CIA's secret prisons and interrogations abroad or to question President Bush's preposterous expectations of a unified, secular, democratic Iraq. And the hearings that were held were edifying. Administration witnesses routinely asserted executive privilege to deny Congress access to critical information. Attorney General Alberto Gonzales, for example, refused to share with the Senate Judiciary Committee the legal advice President Bush had received to justify the NSA's warrantless domestic surveillance program in contravention of the Foreign Intelligence Surveillance Act (FISA), or the ongoing post-September 11 secret spying programs of President Bush that have not yet leaked to the

media. During Gen. Michael Hayden's confirmation hearing for the post of CIA director, he ludicrously maintained to Sen. Diane Feinstein, California Democrat, that to disclose whether the NSA had ever sought a FISA warrant for a pen register would reveal intelligence sources and methods. Congress has not been alerted to the number of Americans who have been targeted without warrants by the NSA, the percentage of such intercepted communications that have proven useful, or what is done with interceptions that have political but not foreign intelligence value.

At present, the legal landscape tilts decisively in favor of presidential secrecy. Supreme Court and inferior court rulings recognize a qualified constitutional privilege to withhold from Congress either state secrets or confidential advice received from presidential subordinates. If a privilege claim is challenged by Congress in a judicial proceeding, the court balances the importance of the information to oversight or legislation against the danger to national security or executive branch internal candor that might be occasioned by disclosure. But time is of the essence in politics. It takes years to litigate congressional challenges to executive privilege. In the meantime, the information sought typically becomes stale or politically irrelevant. That explains the conspicuous dearth of such lawsuits. As a practical matter, the president's assertion of executive privilege is absolute. Congress theoretically could retaliate by slashing appropriations or placing in abeyance the confirmation of presidential appointees. These weapons, however, are ordinarily unusable because they are radically disproportionate to the congressional grievance over access to a particular piece of information.

Article I, section 8, clause 18 of the Constitution is the key to cutting the Gordian knot to the executive privilege problem. It empowers Congress to enact appropriate laws for the exercise of all presidential prerogatives, including the authority to withhold information

from the legislative branch. Congress should thus pass a bill to establish five-member House and Senate legislative-executive committees to arbitrate executive privilege claims pivoting on national security within 48 hours, unless a majority agreed to an extension. (The statute should categorically reject a generalized interest in confidential advice to the president as a justification for concealing information. No executive official worth keeping would stoop to insincere presidential communications because fearful of public disclosure). The House legislative-executive committee would consist of three members appointed by the speaker, one member appointed by the minority leader, and one executive branch official appointed by the president. The Senate legislative-executive committee would be correspondingly appointed. The disputed information would remain confidential unless the House or Senate committee ordered disclosure. Member votes to sustain or reject executive privilege would be public to insure accountability. Committee decisions would be binding on both Congress and the president with no judicial review. The rulings would enjoy the same constitutional status as a decree by the Supreme Court.

The 110th Congress may issue hundreds of subpoenas to the Bush administration. But if it fails to enact a workable enforcement mechanism, the subpoenas will prove no more than flashy ornaments on the political stage.

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